



Citation: *NM v Canada Employment Insurance Commission*, 2021 SST 975

Social Security Tribunal of Canada General Division – Employment Insurance Section

Decision

Appellant: N. M.
Representative: G. A.
Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission
reconsideration decision (431596) dated September 15,
2021 (issued by Service Canada)

Tribunal member: Teresa M. Day
Type of hearing: Teleconference
Hearing date: October 19, 2021
Hearing participants: Appellant
Appellant's representative
Decision date: November 12, 2021
File number: GE-21-1848

Decision

[1] The appeal is dismissed.

[2] The Claimant (who is the Appellant in this appeal) has not proven that he was available for work while attending his full-time university course between January 3, 2021 and April 10, 2021. This means that the disentitlement imposed on his claim for regular employment insurance (EI) benefits cannot be changed.

Overview

[3] The Claimant applied for EI benefits on July 3, 2021. On July 26, 2021¹, the Respondent (the Commission) granted his antedate request, which allowed his claim to be backdated so it could start as of January 3, 2021.

[4] The Commission subsequently learned² that the Claimant was a full-time student at York University³ and working part-time. The Commission decided that the Claimant was not entitled to receive EI benefits while attending his course because he wasn't available for work. On August 6, 2021, they imposed a retroactive disentitlement on his claim from January 3, 2021 to April 10, 2021.

[5] A claimant must be available for work in order to receive regular EI benefits⁴. Availability is an ongoing requirement. This means that a claimant has to be searching for a full-time job for every day of their benefit period, and cannot impose personal conditions that could unduly restrict their ability to return to work.

[6] I must decide if the Claimant has proven that he was available for work between January 3, 2021 and April 10, 2021 (the period of the disentitlement) – while he was attending his university course. The Claimant must prove this on a balance of

¹ This process is described by the Claimant in his Notice of Appeal at GD2-11 to GD2-12.

² The Claimant provided this information when completing his claimant reports by telephone on July 27, 2021 (see GD3-12).

³ The Claimant advised he is taking a Bachelor of Commerce degree.

⁴ Subsection 18(1) of the *Employment Insurance Act*.

probabilities. This means he has to show it was more likely than not that he was available for work while he was a full-time student during this period.

[7] The Commission says that the Claimant wasn't available for 2 reasons: because he was focused on his university course and not willing to return to work as soon as suitable employment was offered to him, and because his course limited his chances of immediately returning to the labour market.

[8] The Claimant disagrees. He says that he was available to work outside of the time he spent on his studies, and that he was actively seeking suitable employment during this period.

[9] For the reasons set out below, I find that the Claimant has not proven his availability during the period of the disentitlement.

Issue

[10] Was the Claimant available for work between January 3, 2021 and April 10, 2021 – while he was attending his university course?

Analysis

[11] The case law around subsection 18(1) of the *Employment Insurance Act* (EI Act) sets out three factors for me to consider when deciding whether the Claimant was capable of and available for work but unable to find a suitable job. The Claimant has to prove the following three things⁵:

- a) He wanted to go back to work as soon as a suitable job was available.
- b) He was making efforts to find a suitable job.

⁵ These three factors appear in *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96. This decision paraphrases those three factors for plain language.

- c) He did not set personal conditions that might unduly (in other words, overly) limit his chances of going back to work.

[12] When I consider each of these factors, I have to look at the Claimant's attitude and conduct.

[13] I will set out the Claimant's evidence in full prior to my analysis of the individual factors. This will save me from having to repeat it under each of the Issues below.

The Claimant's evidence

[14] When completing his claimant reports, the Claimant told the Commission that he is a full-time student in the Bachelor of Commerce degree program at York University, and that he spends 8 hours/day, Monday to Friday, on his studies – either virtually or physically (GD3-12).

[15] When he was first interviewed by the Commission, the Claimant said that, during the school terms (September to April), he was concentrating on his studies and not looking for a full-time job (GD3-13).

[16] At the hearing, the Claimant and his representative (who is also his mother) vigorously denied making these statements⁶, and questioned the accuracy of the Commission's records of the conversations. They preferred that I rely on the information provided in the Claimant's Request for Reconsideration.

a) The Request for Reconsideration

[17] In his Request for Reconsideration, the Claimant stated that:

- He graduated from high school in June 2020.
- He started his first year at York University in September 2020.

⁶ In fact, these concerns were raised prior to the hearing in additional appeal documents submitted by the Claimant's mother (GD5).

- He was not accepted into his preferred program, so he decided to take some elective courses that would allow him to work full-time hours while in school. These courses would be “less difficult compared to core courses” (GD3-19).
- He found that the electives were “easy” and “did not require much effort”⁷.
- Due to the Covid-19 pandemic, his courses were all on-line, and most were pre-recorded. This saved him commuting time and prep time, and allowed him to view lectures on his own time.
- Except for one 3-hour tutorial per week that he was required to attend⁸, most of his courses did not require him to be physically present during class time. This flexibility allowed him to work at his own pace and plan his work schedule.
- His average daily studying time, including lectures and tutorials, was “roughly” 3-4 hours per day.
- In September 2020, he was hired for a part-time retail position at a local mall.
- He was required to commit to a minimum of 3 shifts per week, of 5 hours /shift (for a total of 15 hours). But he was willing to work than that, and he let the employer know this.
- When he registered for his courses in August 2020, he “ensured” that his courses were held over a 2-day period, which would allow him time to work 3 days/week and 2 days on weekends (GD3-20).
- His weekday availability actually increased to 5 days/week once he realized how flexible his on-line courses were. So he told the employer he was available to work all hours from Monday to Sunday⁹.

⁷ See GD3-19 to GD3-20 for additional details on this.

⁸ The Claimant’s mother advised that this tutorial took place in the evening, outside of regular working hours (see GD6-1).

⁹ The X store he worked at was in the X mall, which generally operated from 11am to 8pm weekdays, and 10am to 9 pm on weekends (GD3-19).

- But he continued to average only 15 hours per week because things were slow at the store.
- He estimates that he devoted 20 hours/week to his studies (GD3-20).
- His hours increased slightly in the late November and December 2020¹⁰, but then Ontario went into lockdown and his shifts were cancelled.
- He was laid off from December 26, 2021 until he was recalled to work in mid-February 2021.
- During this lay-off, he updated his resume and continued to look for work online, every day. But he was not successful because most places in Ontario were closed, and people were told to stay home and only go out for essential items. This meant job prospects were very limited during the lockdown.
- He registered at online job search sites, and was receiving daily e-mails of job positions, but most postings were looking for skills he did not have.
- Despite his best efforts, he was not successful in getting work.
- “I was therefore forced to wait till the lockdown got lifted and got called back to work.” (GD3-20)
- When he returned to his part-time job in mid-February, 2020, he again told his manager that he wanted more hours. He also told his co-workers that he was available to fill in if they had to miss a shift, and he went on to the “work group chat site” to try to pick-up extra shifts from co-workers. He also looked for work from other retail stores in the mall by asking other outlet employees if their store was hiring, and by visiting various stores after his shift to see what was available.

¹⁰ Up to 25 hours in certain weeks (GD3-20).

- Sometimes he was able to pick up an extra shift at his store¹¹. But mostly he was unable to get any additional hours because hours were very scarce and the Covid-19 social distancing restrictions were still in place.
- There were times when he was scheduled for a 5 hour shift, but was sent home after only 2 hours “due to slow traffic in the store”.
- This continued to be the case for his hours from February to April 2021.
- The fact that he had “low hours during school” was not due to being unavailable or because he was not actively looking for work. It was because of the lack of employment opportunities due to the Covid-19 restrictions.

[18] The Claimant attached information about his courses, a copy of his resume, and a screen shot of job listings received by e-mail¹².

[19] He subsequently submitted a log of his job search activities between July 18, 2021 to September 2, 2021 (GD3-32 and GD3-36), as well as further screen shots of job listings received in his e-mail.

b) The Notice of Appeal

[20] In his Notice of Appeal, the Appellant stated that:

- His job search efforts from January to April 2021 were not documented on a daily basis because he didn't apply for EI benefits until July 2021 and, therefore, was not aware of the requirement to keep track of his job search activities at that time (GD2-11).

¹¹ See GD3-21 for an example.

¹² The screen shot with the list of emails that fall during the period of the disentitlement starts at GD3-25 (January 5, 2021) and continues to GD3-26 (March 9, 2021). as of December 11, 2020 and continues to March 12, 2021.

- His availability status has never changed since he was first hired in September 2020. He has always “actively looked for more hours to gain full time employment” (GD2-12).
- The Commission accepted his availability as of September 12, 2021 – even though there is no difference in his job search efforts or school hours. The only change is that he was not aware of the need to document his daily job search efforts between January – April 2021¹³.

c) The Hearing:

[21] At the hearing, the Appellant testified that:

a) Regarding his job search efforts:

- After he was laid off on December 26, 2020, he went through the daily e-mails he received from the on-line job banks he registered for and updated his resume.
- Ontario was in lockdown between December 26, 2020 and February 15, 2021. “No jobs were open because we were told to stay home”.
- After lockdown was lifted on February 15, 2021, he networked by participating in the “employee group chat” and by walking around the mall to see if anyone was hiring.
- He also continued to follow the e-mails from the electronic job boards and did the things he listed in his Request for Reconsideration (see para 17 above), including trying to get more hours from his own manager.
- But he did not apply for any jobs between January and April 2021.

¹³ After becoming aware of this requirement, he created a spreadsheet to keep track of his job searches on a daily basis.

- This is because there were no jobs to apply for.
- The Covid-19 rates in Peel Region (where the Claimant resides) were very high. “The malls were empty” – people were staying home because of Covid.
- His “skill set was for retail”, “so he didn’t apply to be a hair dresser” or anything like that.
- Ontario went back into lockdown on April 8, 2021 and continued like that until June.
- There were no job openings between December 2020 and June 2021 due to the Covid-19 pandemic.
- Just because he didn’t apply for any jobs during the period of the disentanglement does not mean he wasn’t looking for work.
- The jobs he applied to “later” were based on the networking he was doing then.

b) Regarding his studies:

- Between September 2020 and April 2021, he was taking 27 credits over 2 academic terms.
- This means he was a full-time student, but the courses he was taking were “lighter courses” and “not core load”.
- There would have been no need for him to abandon his studies to accept full-time employment because his course work was done in the evenings and he studied at night.
- “A lot of professionals work full-time and do this course online.”

- The jobs that he applied for after September 5, 2021 were all full-time employment opportunities¹⁴.

d) Post-hearing Documents:

[22] The Claimant provided e-mails showing that he applied to a full-time position at Amazon on September 16, 2020 (GD9-5), and that he applied for a sales associate position and a cashier position at Champs Sports on September 13 and 14, 2020.

Issue 1: Wanting to go back to work

[23] The Claimant must show that – between January 3, 2021 and April 10, 2021, he wanted to go back to work as soon as a suitable job was available¹⁵.

[24] He submits that the fact he returned to work when he was recalled on February 16, 2021 (immediately after lockdown ended), shows he had a desire to return to the labour market as soon as a suitable job was offered (GD6-1).

[25] But it's not quite as simple as that.

[26] The law says that a claimant who attends a full-time training course is generally not considered to be available for work unless they can demonstrate that their **main intention** is to immediately accept suitable employment **and** that the course does not constitute an obstacle to seeking and accepting suitable employment¹⁶. To satisfy the **first** part of this statement, a claimant must show that their course is of **secondary** importance to accepting suitable employment.

[27] I asked the Claimant if he would have been willing to abandon his studies to accept full-time employment.

¹⁴ Starting in September 2021, the Appellant has been taking a lighter course load than during the period of the disentitlement (see GD2-14).

¹⁵ Suitable employment is generally considered to mean full-time employment that takes place within regular working hours.

¹⁶ *Canada (Attorney General) v Gagnon*, 2005 FCA 321, *Canada (Attorney General) v Loder*, 2004 FCA 18; *Canada (Attorney General) v Rideout*, 2004 FCA 304; *Canada (Attorney General) v Primard* (2003), 2003 FCA 349 (CanLII), 317 N.R. 359 (F.C.A.); *Canada (Attorney General) v Bois*, 2001 FCA 175

[28] He did not answer the question. Instead, he said there was no need for him to abandon his studies because his course work and studying were done at night.

[29] From this response, I conclude that employment was ***not*** the Claimant's primary goal during the period of the disentitlement. He asserts there was no potential for the requirements of his full-time studies to conflict with his ability to work (even up to the equivalent of full-time hours). But the inference in his response is that his priority was always to continue with his university program. This is completely understandable given that the Claimant had just graduated from high school and was only in the first year of his post-secondary program. It also indicates he was putting continuing with his university course ahead of immediately accepting full-time employment.

[30] I find that, between January 3, 2021 and April 10, 2021, the Claimant was, first and foremost, a full-time university student. He had some extra time on his hands because his courses were online due to the Covid-19 pandemic, but this doesn't make him different from any other full-time student at that time. He had a part-time job that he tried to leverage into the equivalent of full-time hours, but he had no history of full-time employment while in school. It is not enough for the Claimant to simply believe he would have been able to juggle school and full-time employment.

[31] Moreover, EI benefits are not meant to subsidize self-improvement or the acquisition of new skills¹⁷, nor are they intended to provide student aid¹⁸.

[32] The courts have said that a claimant who is not willing to abandon their course if and when full-time employment is found is ***not*** available for work¹⁹.

[33] I therefore find that the Claimant has ***not*** satisfied the first *Faucher* factor required to prove availability pursuant to subsection 18(1) of the EI Act.

¹⁷ CUBs 18973, 18828, 18827, 18582, 24103, 23225, 20385, 23821

¹⁸ CUBs 19090, 018139, 22760, 77736

¹⁹ *Floyd A-168-93*. See also the recent decision of the Social Security Tribunal's Appeal Division in AD-21-107 (*issued June 24, 2021*).

Issue 2: Making efforts to find suitable employment

[34] The second *Faucher* factor considers a claimant's efforts to ***find*** suitable employment.

[35] The Claimant submits that he expressed his desire to return to work through his efforts to find a suitable job. He says the fact that he didn't apply for any jobs between January 3, 2021 and April 10, 2021 doesn't mean he was not looking for work. He was looking for work, but could not find a suitable job because the Covid-19 lockdowns limited his job prospects (GD6-1).

[36] The period of the disentitlement runs from January 3, 2021 to April 10, 2021.

[37] From January 3, 2021 until he was returned to work on February 16, 2021, the Claimant was laid off during a provincial Covid-19 lockdown. For this period, I give significant weight to the Claimant's statement that, he registered at online job search sites and reviewed the daily e-mail alerts with job postings, but found that most were for positions requiring skills he did not have, so he was forced to wait until lockdown was over and he was recalled to work by his original employer (GD3-20).

[38] I acknowledge the Claimant's desire to return to work for his usual employer. However, it is not sufficient to merely wait to be recalled to work after a lay-off²⁰. The Claimant must be looking for employment to be entitled to regular EI benefits, even if there is a possibility of recall or the period of unemployment is unknown or relatively short-term. And no matter how little chance of success the Claimant may think a fulsome job search had, only those who are actively seeking work can receive regular EI benefits. The Claimant was only making passive efforts to review e-mail alerts from electronic job boards. I agree with the Commission that this is not sufficient to prove he was making reasonable efforts to find suitable employment during this period.

²⁰ *Canada Employment Insurance Commission v GS*, 2020 SST 1076; *D. B. v Canada Employment Insurance Commission*, 2019 SST 1277; *Canada (Attorney General) v Cornelissen-O'Neill*, A-652-93; *Faucher v Canada (Employment and Immigration Commission)*, A-56-96; *Canada (Attorney General) v Cloutier*, 2005 FCA 73; *DeLamirande v Canada (Attorney General)*, 2004 FCA 311; CUB 76450; CUB 69221; CUB 64656; CUB 52936; CUB 35563

[39] As for the Claimant's job search after he was recalled to work on February 16, 2021 up to April 10, 2021, I find that the efforts described in his Request for Reconsideration are not sufficient to prove an active, on-going²¹ and wide-ranging job search directed towards full-time employment.

[40] A stated intention or desire to find full-time employment must be proven by an active job search. After February 16, 2021, the Claimant continued to monitor the electronic job boards, and he made additional efforts to network, walk around the mall to enquire about openings, and ask his manager to increase his hours. However, I agree with the Commission that the Claimant's failure to submit even one (1) application for a job made it very unlikely he would find employment. This is especially the case given that he was not getting many hours from his existing part-time job and would have needed another part-time job to get to the equivalent of full-time hours. There is also a lack of evidence that the Claimant was actively assessing or pursuing employment opportunities beyond the one shopping mall where he was employed. I therefore find that the Claimant was not making reasonable efforts to find suitable employment during this period.

[41] I acknowledge the Claimant's statements that he was not aware of the need to document his job search efforts until after he applied for EI benefits. But since he didn't even know that he was eligible for EI benefits until July 4, 2021 (when a co-worker told him), I have some doubt as to whether – between January 3, 2021 and April 10, 2021, he was aware that he needed to be actively looking for work for every day this period in order to receive EI benefits.

[42] For all of these reasons, I find that the Claimant has not satisfied the second *Faucher* factor required to prove availability pursuant to subsection 18(1) of the EI Act.

²¹ The Claimant must be searching for work for **every day of his benefit period**. There is no evidence he was looking for work for every day between January 3, 2021 to April 10, 2021.

Issue 3: Unduly limiting chances of going back to work

[43] The Claimant submits that his university course did not limit his chances of returning to the labour market between January 3, 2021 and April 10, 2021. His schooling was on-line and he was able to study on his own time (with the exception of one 3-hour tutorial, which took place in the evening, outside of regular working hours). As such, he says there were no restrictions that limited his availability for work (GD6-1).

[44] As set out under Issue 1 above, a claimant who attends a full-time training course is generally not considered to be available for work unless they can demonstrate that their **main intention** is to immediately accept suitable employment **and** that the course does not constitute an obstacle to seeking and **accepting** suitable employment²². To satisfy the **second** part of this statement, availability must be demonstrated during regular working hours for every working day. It cannot be restricted to irregular hours, such as evenings, nights, weekends and/or school holidays, in order to accommodate a course schedule that significantly limits availability²³.

[45] Under Issue 1 above, I found that employment was not the Claimant's primary concern during the period of the disentitlement.

[46] Under Issue 2 above, I found that the Claimant's job search efforts were not sufficient to support his stated desire to return to work.

[47] I also find that the Claimant's university course was an obstacle to accepting suitable employment.

[48] I am still unclear as to the basis for the Commission accepting the Claimant's availability as of September 2021 even though he has returned to his studies²⁴. But I must make my own findings for the period of the disentitlement.

²² See footnote 15 above.

²³ *Bertrand (1982)*, 1982 Carswell Nat 466 (CA). See also the recent decision of the Social Security Tribunal's Appeal Division in AD-21-107 (issued June 24, 2021).

²⁴ In GD7, I asked the Commission to explain this given that the Claimant said his course requirements were the same (he estimated 20 hours per week during the period of the disentitlement, and said he now

[49] The Claimant's evidence is that his course work and studying took place entirely at night, which meant it was possible for him to work weekdays and weekends without restriction, even up to full-time hours.

[50] But just because something is theoretically possible doesn't mean it is feasible.

[51] The Claimant also said he was spending 20 hours per week on his studies. This is not an insignificant amount of time, and I cannot ignore the implications of this commitment. A full-time job of 40 hours per week, on top of full-time university studies (even at 20 hours per week), is not realistic for most students. Having the theoretical potential to work full-time during regular business hours while also attending a full-time university course does not automatically translate into practice. This is why the law says that the presumption of unavailability when going to school may be rebutted by proof of **exceptional circumstances**, such as a multi-year history of full-time employment while studying²⁵. There is no evidence that such circumstances existed for the Claimant²⁶.

[52] For these reasons, I must conclude that the Claimant's university course was an obstacle to him accepting full-time employment, and that he has failed to rebut the presumption of non-availability while attending his university course between January 3, 2021 and April 10, 2021.

[53] I therefore find that the Claimant has not satisfied the third *Faucher* factor required to prove availability pursuant to s. 18 of the EI Act.

spends 19 hours per week on his studies). They responded in GD8, but did not provide any information as to why they were satisfied that, as of September 2021, the Claimant's university course was no longer an undue restriction on his ability to return to the labour force.

²⁵ *Rideout* 2004 FCA 304, *Boland* 2004 FCA 251, *Loder* 2004 FCA 18, *Primard* 2003 FCA 349 and *Landry A-719-91*.

²⁶ A work pattern of part-time employment during the school term and full-time employment during the summer break is typical of any student and, accordingly, is not an exception: *Jean v. Canada, A-787-88*.

So, was the Claimant capable of and available for work?

[54] The Claimant must satisfy all 3 of the *Faucher* factors to prove availability pursuant to section 18 of the EI Act. Based on my findings, he has not satisfied any of them.

[55] I therefore find that the Claimant has not shown that he was capable of and available for work but unable to find a suitable job.

Conclusion

[56] The Claimant has not proven that he was available for work within the meaning of the law²⁷ while he was enrolled in a full-time university program between January 3, 2021 and April 10, 2021. As a result, I find that the Claimant was not entitled to receive EI benefits during this period.

[57] This means that the disentitlement imposed on his claim from January 3, 2021 to April 10, 2021 must remain.

[58] The appeal is dismissed.

Teresa M. Day
Member, General Division – Employment Insurance Section

²⁷ Subsection 18(1) of the EI Act.