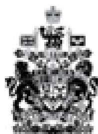

[TRANSLATION]

Citation: *CB v Canada Employment Insurance Commission*, 2022 SST 482

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	C. B.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (439766) dated November 23, 2021 (issued by Service Canada)

Tribunal member:	Josée Langlois
Type of hearing:	Teleconference
Hearing date:	April 22, 2022
Hearing participant:	Appellant
Decision date:	April 29, 2022
File number:	GE-22-735

Decision

[1] The appeal is allowed.

[2] The Appellant has shown that she was available for work within the meaning of the *Employment Insurance Act* (Act) from August 16, 2021.

Overview

[3] The Appellant applied for Employment Insurance (EI) regular benefits on July 29, 2021. The Commission established a benefit period from July 18, 2021. The Appellant then started culinary training (diploma of vocational studies), which was offered from August 16, 2021, to August 30, 2022, Monday to Friday from 8 a.m. to 4 p.m.

[4] On November 23, 2021, the Canada Employment Insurance Commission (Commission) decided that the Appellant wasn't disentitled from receiving EI regular benefits from August 16, 2021, because she was taking training on her own initiative and wasn't available for work.

[5] The Appellant has to be available for work to get EI regular benefits. Availability is an ongoing requirement. This means that the Appellant has to be searching for a job.

[6] The Appellant says that she is available for work and that she is actively looking for work. She says that she can work long hours in the evening on weekdays and weekends. She says that the she also asked for a schedule change to attend evening classes.

[7] I have to decide whether the Appellant is available for work within the meaning of the Act from August 16, 2021, and whether she can receive EI benefits as of that time. The Appellant has to prove her availability on a balance of probabilities. This means that she has to show that it is more likely than not that she is available for work.

Issue

[8] Was the Appellant available for work from August 16, 2021?

Analysis

Reasonable and customary efforts to find a job

[9] The law sets out criteria for me to consider when deciding whether the Appellant's efforts were reasonable and customary.[1] I have to look at whether her efforts are sustained and whether they are directed toward finding a suitable job. In other words, the Appellant has to have kept trying to find a suitable job.

[10] I also have to consider the Appellant's efforts to find a job. The *Employment Insurance Regulations* (Regulations) list nine job-search activities I have to consider, including the following:[2]

- assessing employment opportunities
- preparing a résumé or cover letter
- registering for job-search tools or with online job banks or employment agencies
- contacting employers who may be hiring
- applying for jobs

[11] The Commission says that the Appellant admitted that she had made no effort to find a job before October 2021. It says that the Appellant changed her version of the facts when the Commission made its initial decision. The Commission argues that the Appellant contradicts herself because, even if she said she had searched for a job in food service from October 2021, she also said that there weren't enough restaurants in her area.

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[1] See section 9.001 of the *Employment Insurance Regulations* (Regulations) and section 50(8) of the *Employment Insurance Act* (Act).
[2] See section 9.001 of the Regulations.

[12] At the hearing, the Appellant said that she had made efforts to find a job in food service and customer service and that she had applied for jobs in every possible business in her community, X. She said that she had also applied for jobs in X, the community where she attends classes. She said that she could have worked before or after her classes.

[13] In this regard, the Appellant applied for jobs in different places from August 16, 2021. She was hired by X in September 2021. But, like she told the Commission, from October 2021, she had made efforts to find a job because her employer offered her only two shifts.

[14] She then applied to work at Metro, IGA, and Maxi because she learned that it was possible to work at night. She also applied at Tim Hortons, X, and X.

[15] She also applied for jobs at one of these restaurants in X: Pizza Hut, A&W, and McDonald's.

[16] She kept up her efforts in the winter of 2021. She hoped to get a job at McDonald's, since she had recently attended a virtual Zoom interview.

[17] The Appellant says that she also regularly checks job openings on Emploi-Québec's [Quebec employment services] website.

[18] I find that the Appellant has made sufficient and reasonable efforts to find a job from August 16, 2021. Also, she found a job at X, where she has worked since September 2021. But, since the employer doesn't offer enough hours per week, the Appellant has kept up her efforts so she can add on another job or so she can find a full-time job because she has to work to earn a living.

[19] Even if I agree that the Appellant's statements seem contradictory, she said at the hearing that she didn't really understand the goal of the Commission's calls, and she answered its questions without really knowing what it was looking for. When she requested a reconsideration, she asked to change her statement transparently.

[20] It is true that the transcripts of the conversations don’t clearly show whether the Appellant was asked about her efforts to find a job. So, while her statements seem to differ and it seems that she was trying to give answers that would entitle her to benefits, the fact is that she adjusted her answers because she wanted to take on her responsibilities.

[21] The Appellant has shown that she has made efforts to find a job from August 16, 2021. She even found a job from September 2021, which shows that she made efforts to find a job before October 2021.

[22] Despite the fact that job opportunities were more limited in X than in Montreal, for example, the Appellant has shown her availability for work as soon as a job is available. She has actively looked for a job in sectors like food service and customer service.

[23] While the transcripts of the conversations between the Appellant and the Commission agent show that the Appellant wasn’t available for or interested in a job of over 25 hours a week and that she was limiting the types of jobs she was looking for, I give preference to what the Appellant said at the hearing. She said that she had to earn a living, that she would have accepted as many hours as possible from an employer, and that she would have even dropped a class to be able to accept a job. On this point, the Appellant asked for her course schedule to be changed.

[24] The Appellant kept trying to find a job from August 16, 2021. I find that she has shown that she was available for work within the meaning of section 50(8) of the Act and under sections 9.001 and 9.002 of the Regulations.

Capable of and available for work

[25] Case law sets out three factors for me to consider when deciding whether a claimant is capable of and available for work but unable to find a suitable job. The Appellant has to prove the following three things:[3]

[3] 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.

- She wanted to go back to work as soon as a suitable job was available.
- She has made efforts to find a suitable job.
- She hasn't set personal conditions that might unduly (in other words, overly) limit her chances of going back to work.

[26] When I consider each of these factors, I have to look at the Appellant's attitude and conduct.[4]

– **Wanting to go back to work**

The Commission says that the Appellant didn't show a desire to go back to work because she was focusing on her training, which she was taking full-time.

As I mentioned in the previous section, the Appellant made multiple efforts to find a job. She said that she was actively trying to find a job because she had to earn a living and that she had asked to attend her classes on a different schedule so she could work.

[27] I understand from the Appellant's explanations that she was studying full-time but that she was available for work and was actively searching for a job.

[28] The Appellant showed a desire to go back to work from August 16, 2021.

Making efforts to find a suitable job

[29] To be able to get EI benefits, the Appellant is responsible for actively looking for a suitable job.[5]

[30] The Commission says that the Appellant undermined her credibility when she modified her version of the facts. It argues that the file shows that she made no effort to find a job.

[31] At the hearing, the Appellant said she was available for work.

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[4] Two decisions set out this requirement. Those decisions are *Attorney General of Canada v Whiffen*, A-1472-92; and *Carpentier v The Attorney General of Canada*, A-474-97.
[5] This principle is explained in the following decisions: *Cornelissen-O'Neill*, A-652-93; and *De Lamirande*, 2004 FCA 311.

As I mentioned in the previous section, she applied to jobs with multiple employers. For example, she applied with the following employers: Metro, IGA, Maxi, Tim Hortons, X, X, Pizza Hut, A&W, McDonald's, and restaurant X.

[32] She checked job openings on Emploi-Québec's website.

[33] The Appellant has to be available for work to be able to get EI regular benefits. Availability is an ongoing requirement. This means that she has to be searching for a job.

[34] I find that the Appellant made efforts to find a suitable job from August 16, 2021.

[35] The Appellant kept up her efforts to find a job despite having been hired at X to work weekends, on Friday and Saturday.

[36] I find that the Appellant made efforts to find a suitable job from August 16, 2021.

Unduly limiting chances of going back to work

[37] The Commission says that the Appellant hasn't rebutted the presumption of non-availability while taking training full-time because she limited her availability to only work part-time.

[38] The Appellant said that she was studying full-time for a diploma of vocational studies in culinary arts from August 16, 2021, to August 30, 2022. These classes were offered from Monday to Friday from 8 a.m. to 4 p.m.

[39] I presume that the classes the Appellant is taking make her unavailable for work within the meaning of the Act.

[40] This presumption of non-availability can be rebutted based on four principles relating specifically to return-to-studies cases.[6]

[6] *Landry*, A-719-91; *Lamonde*, 2006 FCA 44; *Gagnon*, 2005 FCA 321 (CanLII); *Floyd*, A-168-93.

[41] These principles are:[7]

- the attendance requirements of the course
- the claimant's willingness to give up their studies to accept employment
- whether the claimant has a history of being employed at irregular hours
- the existence of "exceptional circumstances" that would enable the claimant to work while taking their course

[42] On November 23, 2021, the Appellant said she was searching for a job.

[43] At the hearing, the Appellant said that, despite taking training full-time, she was available to work more than 25 hours a week because she had to earn a living. Contrary to what the Commission says, she says that she is looking to work as many hours as possible and that she asked for her course schedule to be changed.

[44] The Appellant says that, before starting this training, she was in high school and working at Amir 40 hours a week. After graduating high school, she intended to register for training in civil engineering at a college, but she didn't meet the prerequisites. She kept working at X before having to stop because of the pandemic. She says her employer never called her back.

[45] So, the Appellant decided to get culinary training and, since she lives in an apartment with her partner, she had to work to earn a living.

[46] She argues that she has been available for work since August 16, 2021.

[47] Lastly, she says that she asked for her course schedule to be changed to start her classes at 1 p.m. instead of 8 a.m. so that she could work following a different schedule.

[48] As the Commission stated: A claimant who is taking a training course without having been referred by a designated authority must prove that they are capable of and

[7] This principle is explained in the following decision: *Gagnon*, 2005 FCA 321 (CanLII).

available for work and unable to find a suitable job. The claimant must meet the availability requirements the same as any other claimant who wants regular benefits.[8]

[49] In this case, I am of the view that the Appellant has rebutted the presumption of non-availability while in school. She has shown a history of full-time work while dedicating herself to her high school studies. She has also shown to be actively making efforts to find a job without intending to limit her work schedule.

[50] I find that the existence of "**exceptional circumstances**" enables the Appellant to work while taking training.

[51] The insurable hours of employment a claimant accumulates when working full-time aren't the only history that may be considered in establishing a benefit period. And, **employment history isn't the only basis on which the presumption of availability may be rebutted**.[9] The presumption of non-availability can be rebutted through proof of exceptional circumstances.[10]

[52] So, exceptional circumstances can be associated with a history of part-time employment.

[53] The Appellant has been taking classes full-time from August 16, 2021, but she has successfully rebutted the presumption that a person who is taking a full-time training course on their own initiative isn't available for work.[11]

[54] The Appellant says she has previously worked part-time while studying full-time. She says that, even if she had been a part-time employee, she sometimes worked 40 hours per week, and, in fact, had been working full-time for weeks when she stopped

[8] Section 153.161(1) of the Act.
[9] See the decision of the Tribunal's Appeal Division in *JD v Canada Employment Insurance Commission*, 2019 SST 438; and *Attorney General of Canada v Rideout*, 2004 FCA 304.
[10] *Attorney General of Canada v Wang*, 2008 FCA 112; and *Landry*, A-719-91.
[11] This principle is explained in the following decisions: *Landry*, A-719-91; *Lamonde*, 2006 FCA 44, *Gagnon*, 2005 FCA 321 (CanLII); and *Paxton*, 2002 FCA 360 (CanLII).

working. The Appellant has combined her work and study schedules for the past few years, and she has no choice but to do so because she has to earn a living.

[55] I find that no personal conditions unduly limited the Appellant's chances of finding a suitable job from August 16, 2021. She has shown that she was available for work while studying full-time.

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

[56] I have to apply the criteria for determining whether the Appellant was available for work within the meaning of the Act and whether she can receive benefits from August 16, 2021.

[57] To be entitled to receive benefits, the Appellant has to be available for work each working day of her benefit period, and she has to show that she made efforts to find a job each working day of her benefit period.

[58] The exceptional circumstances related to the COVID-19 pandemic support the finding that the Appellant was available for work while taking training. She has also shown to have made efforts to find job.

[59] I find that the Appellant has shown that she was available for work from August 16, 2021, within the meaning of section 50(8) of the Act and under sections 9.001 and 9.002 of the Regulations.

[60] Based on my findings on the three factors, I find that the Appellant has shown that she was capable of and available for work.

Conclusion

[61] The appeal is allowed.

Josée Langlois
Member, General Division – Employment Insurance Section