Citation: *RD v Canada Employment Insurance Commission*, 2022 SST 472

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	R. D.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (437251) dated November 18, 2021 (issued by Service Canada)

Tribunal member:	Mark Leonard
Type of hearing:	Teleconference
Hearing date:	January 12, 2022
Hearing participants:	Appellant
Decision date:	January 17, 2022
File number:	GE-21-2540

Decision

[1] The appeal is dismissed. The Tribunal disagrees with the Appellant (Claimant).

[2] The Appellant has not shown that he was available for work while in school. This means that he is disentitled from receiving Employment Insurance (EI) benefits.

Overview

[3] The Canada Employment Insurance Commission (Commission) decided that the Appellant was disentitled from receiving EI regular benefits as of September 28, 2020, because he wasn't available for work. A claimant has to be available for work to get EI regular benefits. Availability is an ongoing requirement. This means that a claimant has to be searching for a job.

[4] I have to decide whether the Appellant has proven that he was available for work. The Appellant has to prove this on a balance of probabilities. This means that he has to show that it is more likely than not that he was available for work.

[5] The Commission says that the Appellant wasn't available because he was in school and consistently stated that he would not leave school to accept a job if it conflicted with his studies. It says that he is not capable of accepting full-time employment if offered. It also adds that the Appellant has not proven that he made reasonable and customary steps to find employment due to limit job search.

[6] The Appellant disagrees and says that he has always been available and looking to work. He says that the Commission asked him for information numerous times, which, he provided, and each time he was told he was eligible for benefits.

Issue

[7] Was the Appellant available for work while in school?

Analysis

[8] Two different sections of the law require claimants to show that they are available for work. The Commission decided that the Appellant was disentitled under both of these sections. So, he has to meet the criteria of both sections to get benefits.

[9] First, the *Employment Insurance Act* (Act) says that a claimant has to prove that they are making "reasonable and customary efforts" to find a suitable job.[1] The *Employment Insurance Regulations* (Regulations) give criteria that help explain what "reasonable and customary efforts" mean.[2] I will look at those criteria below.

[10] Second, the Act says that a claimant has to prove that they are "capable of and available for work" but aren't able to find a suitable job.[3] Case law gives three things a claimant has to prove to show that they are "available" in this sense.[4] I will look at those factors below.

[11] The Commission decided that the Appellant was disentitled from receiving benefits because he wasn't available for work based on these two sections of the law.

[12] In addition, the Federal Court of Appeal has said that claimants who are in school full-time are presumed to be unavailable for work.[5] This is called "presumption of non-availability." It means we can suppose that students aren't available for work when the evidence shows that they are in school.

[13] I will start by looking at whether I can presume that the Appellant wasn't available for work. Then, I will look at whether he was available based on the two sections of the law on availability.

---

[1] See section 50(8) of the *Employment Insurance Act* (Act).
[2] See section 9.001 of the *Employment Insurance Regulations* (Regulations).
[3] See section 18(1)(a) of the Act.
[4] See *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96.
[5] See *Canada (Attorney General) v Cyrenne*, 2010 FCA 349.

Presuming full-time students aren't available for work

[14] The presumption that students aren't available for work applies only to full-time students.

The Appellant isn't a full-time student

[15] The Appellant isn't a full-time student. He is finishing High School. He testified that he must attend school 2 out of 7 days as well as some online time. He provided a school schedule that confirms that his cohort participates every other day. I would consider his attendance part-time. The Commission also accepts that that the Appellant is not a full-time student. Therefore, the presumption does not apply to the Appellant.

[16] This only means that the Appellant isn't presumed to be unavailable for work. While the Appellant's schedule offers him the flexibility to work, I still have to look at the two sections of the law that apply in this case and decide whether the Appellant is actually available.

Reasonable and customary efforts to find a job

[17] The first section of the law that I am going to consider says that claimants have to prove that their efforts to find a job were reasonable and customary.[6]

[18] The law sets out criteria for me to consider when deciding whether the Appellant's efforts were reasonable and customary.[7] I have to look at whether his efforts were sustained and whether they were directed toward finding a suitable job. In other words, the Appellant has to have kept trying to find a suitable job.

- I also have to consider the Appellant's efforts to find a job. The Regulations list nine job-search activities I have to consider. Some examples of those are the following:[8] assessing employment opportunities
- registering for job-search tools or with online job banks or employment agencies

[6] See section 50(8) of the Act.
[7] See section 9.001 of the Regulations.
[8] See section 9.001 of the Regulations.

- contacting employers who may be hiring
- applying for jobs

[19] The Commission says that the Appellant didn't do enough to try to find a job. It says that he restricted his job search to jobs that would not require him to leave school.

[20] The Appellant disagrees. He says that he was available and tried to find work but was unable to. He outlined that he had been working at a fast food establishment prior to the Covid-19 pandemic. He was both working and attending high school. He testified that when the pandemic hit he was laid off. He confirmed that he received Canada Emergency Recovery benefits (CERB) until September 2020, when he contacted the Commission about continuing his benefits. He says he was advised to make a claim for EI benefits. The Commission established a claim September 27, 2020.

[21] The Commission contacted the Appellant in November 2020, and it confirmed that the Appellant was in school and that he was not willing to leave school for a job if it conflicted with his school schedule. The Commission issued the Appellant a letter disentitling the Appellant from receiving benefits dated December 22, 2020.

[22] The Commission submitted that while the agent issued a disentitlement letter, she did not complete the process that would stop the Appellant from making claims and receiving benefits.

[23] The Appellant was not clear on what he did about this letter. He said he could not remember many of the details for conversations and his actions during the time he was receiving benefits. He did confirm that he did whatever the agents would ask and that he ended up being continuously approved for benefits.

[24] The Commission's notes of that early contact do not explicitly note that the Appellant was told to maintain records of his employment search. However, the ability to prove a reasonable and customary job search remains a requirement of the Act.

[25] The Appellant says that his efforts were enough to prove that he was available for work.

[26] The Appellant confirmed that is usual method of finding and applying for jobs was through the online job search sites Facebook Marketplace and Indeed. He says that he did not physically attend employer premises to find work; however, he did note that he had visited his local shopping mall one time to seek employment opportunities but that none were available.

[27] The Appellant was unable to provide any evidence of his job search from September 28, 2020, until September 14, 2021. At that time, the Commission again contacted the Appellant seeking proof of his job search. He named 10 jobs to which he claimed he had applied. The Commission noted that the Appellant was unable to demonstrate that he had actually applied for any of the jobs. After the Commission issued a reconsideration decision confirming a disentitlement, the Appellant forwarded screen prints of the jobs he had previously named.

[28] The Commission had asked the Appellant to provide details of his job search from September 8, 2020, to September 7, 2021. He did not provide any additional details beyond the 10 jobs he claimed he applied for in August 2021.

[29] In testimony, the Appellant could not show he had applied for these jobs by way of email confirmations or other means. The Appellant asked by the Commission to provide details of his job search efforts prior to August 2021. He was unable to show any. His testimony regarding efforts throughout the benefit period was vague and he offered that he could not remember specifics about his job search.

[30] I find that the Appellant hasn’t proven that his efforts were sufficient to demonstrate reasonable and customary efforts to find suitable employment.

[31] He knew as early as November 2020 that the Commission had concerns about his availability for work and had told him he was not available because he was in school. It seems to me that a reasonable action would have been to ensure that he documented his efforts to find employment in order to satisfy any future Commission enquiries.

[32] Simply, he needed to show a sustained effort to find suitable employment throughout the benefit period. He has not met the burden of proof that he did so.

[33] I empathize with the Appellant regarding his concern that the Commission continued to allow him to file claims giving him the impression that that he was entitled to benefits.

[34] The failures of the Commission to follow its own procedures to stop his benefits are a serious contributor the Appellant's sizable overpayment. However, regardless of whether the Commission erred in its handling of the Appellant's case, benefits can only be paid to claimants who are eligible. [9]

Capable of and available for work

[35] I also have to consider whether the Appellant was capable of and available for work but unable to find a suitable job.[10] Case law sets out three factors for me to consider when deciding this. The Appellant has to prove the following three things:[11]

a) He wanted to go back to work as soon as a suitable job was available.

b) He has made efforts to find a suitable job.

c) He didn't set personal conditions that might have unduly (in other words, overly) limited his chances of going back to work.

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

---

[9] See (Granger v. CEIC) 1986 3 F. C. 70
[10] See section 18(1)(a) of the Act.
[11] 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.
[12] Two decisions from case law set out this requirement. Those decisions are *Canada (Attorney General) v Whiffen*, A-1472-92; and *Carpentier v Canada (Attorney General)*, A-474-97.

Wanting to go back to work

[37] The Appellant hasn't shown that he wanted to go back to work as soon as a suitable job was available.

[38] The Appellant testified that in order to find a good job in the future, he needs his high school diploma. He says few employers will hire someone without it. He is highly motivated to obtain his diploma and move on to a better job.

[39] The Appellant testified he had rent, car payments, and other expenses. He says that he needed to find work in order to meet his financial obligations. But needing money is not evidence of wanting to work or a willingness to accept suitable employment as soon as it's available. The Appellant must show that his intention, above all, was to return to the labour market.

[40] In fact, it was evident from his testimony that the Appellant's primary focus is toward obtaining is diploma. Work is a secondary consideration. He was willing to work if it did not interfere with his studies. The Appellant confirmed in testimony that he was not prepared to leave school to accept full-time employment.

[41] It is admirable that the Appellant is pursuing his education but in focussing on it, rather than a returning to the labour market, he has not shown that he would return to work as soon as a suitable job was available.

Making efforts to find a suitable job

[42] The Appellant hasn't made enough effort to find a suitable job.

[43] I have considered the list of job-search activities given above in deciding this second factor. For this factor, that list is for guidance only.[13]

[44] The Appellant efforts to find a new job included reviewing job postings from online employment sites. He says that he applied to numerous jobs and sought

[13] I am not bound by the list of job-search activities in deciding this second factor. Here, I can use the list for guidance only.

employment at the local mall. But over a period of an entire year, his efforts do not amount to much effort to find suitable employment. Again, his efforts appear more focussed on finding employment that would not conflict with his studies.

[45] I explained these reasons above when looking at whether the Appellant has made reasonable and customary efforts to find a job.

[46] Those efforts weren't enough to meet the requirements of this second factor because he simply could not demonstrate that he had conducted a sustained search for suitable employment that would include both full-time and part-time opportunities.

Unduly limiting chances of going back to work

[47] The Appellant did set personal conditions that might have unduly limited his chances of going back to work.

[48] The Appellant says he hasn't done this because he says he applied for many jobs and most recently has accepted full-time employment and will remain in school until he graduates. He says he has always been willing and able to accept full-time work. However, this statement conflicts with his earlier statements to the Commission and responses to Commission questionnaire enquiries.

[49] The Commission says that the Appellant was firm that he would not accept employment that conflicted with his school schedule. The Appellant's testimony confirmed this condition.

[50] I find that the Appellant has set a personal condition that unduly limits his chances of finding suitable employment.

[51] A *"suitable employment*" is not a job that fits the Appellant's circumstances and desires. It can include any full-time Monday to Friday job as well as any part-time job that might require working hours that would conflict with the Appellant's school schedule. In order to continue to be eligible for EI benefits, a claimant must be willing to give up school and return to the labour market as soon as a suitable job is available. He has consistently said he was not prepared to do this.

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

[52] Based on my findings on the three factors, I find that the Appellant hasn't shown that he was capable of and available for work but unable to find a suitable job.

[53] The Appellant testified that he has a sizable overpayment of benefits subject to recovery. He confirmed that he has only recently found employment and is experiencing financial hardship and the overpayment recovery is causing him anxiety.

[54] I am empathetic to the Appellant's plight. The Act does not empower me to address the overpayment amount or write-off any portion. That authority rests solely with the Minister.[14] However, I suggest the Commission examine how its errors and have contributed to the negative impacts on the Appellant when considering any mitigation to the overpayment.

Conclusion

[55] The Appellant hasn't shown that he was available for work within the meaning of the law. Because of this, he cannot receive EI benefits.

[56] This means that the appeal is dismissed.

Mark Leonard
Member, General Division – Employment Insurance Section

[14] See Section 112.1 if the *Employment Insurance Act.*