



Citation: *CL v Canada Employment Insurance Commission*, 2022 SST 560

Social Security Tribunal of Canada General Division – Employment Insurance Section

Decision

Appellant: C. L.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (440690) dated **December 3, 2021** (issued by Service Canada)

Tribunal member: Teresa M. Day

Type of hearing: Teleconference

Hearing date: March 7, 2022

Hearing participant: Appellant

Decision date: March 10, 2022

File number: GE-22-77

Decision

[1] The appeal is dismissed.

[2] The Claimant (who is the Appellant in this appeal) is disentitled to employment insurance (EI) benefits from September 7, 2021 for failing to prove his availability for work while attending a training course.

Overview

[3] The Claimant worked in annual seasonal employment at X Fisheries (X) between March and September for 5 seasons.

[4] He started a claim for EI benefits as of July 25, 2021, when there was a slow period in the fishing season and he had no income coming in. On September 7, 2021, he started a full-time college course to become a heavy equipment operator. The Respondent (Commission) investigated whether he was available for work while attending his course.

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

[6] The Commission decided that the Claimant could not receive EI benefits because he was taking a training course on his own initiative and did not prove his availability for work¹.

[7] The Claimant asked the Commission to reconsider. He argued that he was in school 5 days a week, but had time to work around his class schedule and was applying

¹ The Appellant testified that he got a few payments of EI benefits over the summer during slow periods at X, but did not receive any EI benefits while he was in school.

for jobs. The Commission was not persuaded and maintained the disentitlement on his claim. The Claimant appealed to the Social Security Tribunal (Tribunal).

[8] I have to decide if the Claimant has proven that he was available for work while attending his training course. He must prove this on a balance of probabilities. This means he has to show it is more likely than not that he was available for work while he was in school.

[9] The Commission says that the Claimant wasn't available for 2 reasons: because he was not actively seeking employment while in school and because his training course limited his chances of immediately returning to the labour market.

[10] The Claimant says he worked when called in by his previous employer and was always available for work, no matter the day or time.

[11] For the reasons set out below, I must agree with the Commission.

Issue

[12] Was the Claimant available for work while he was a full-time student, starting from September 7, 2021?

Analysis

[13] To be considered available for work for purposes of regular EI benefits, the law says the Claimant must show that he is capable of, and available for work and unable to obtain suitable employment².

[14] There is no question that the Claimant was **capable** of work during this time³. Therefore, I will proceed directly to the availability analysis to assess his entitlement to regular EI benefits while he was in school, starting from September 7, 2021.

² Section 18(1)(a) of the *Employment Insurance Act* (EI Act).

³ There is no indication the Claimant was medically unable to work during this period.

[15] The Federal Court of Appeal has said that availability must be determined by analyzing 3 factors:

- a) the desire to return to the labour market as soon as a suitable job is offered;
- b) the expression of that desire through efforts to find a suitable job; and
- c) not setting personal conditions that might unduly limit the chances of returning to the labour market⁴ .

[16] These 3 factors are commonly referred to as the “*Faucher* factors”, after the case in which they were first laid out by the court.

[17] The court has also said that:

- a) availability is determined for **each working day** in a benefit period for which a claimant can prove that, on that day, they were capable of and available for work and unable to obtain suitable employment⁵; and
- b) claimants who are in school full-time are **presumed to be unavailable** for work⁶ (this is commonly referred to as the presumption of non-availability).

[18] To make a decision on this appeal, I have to start by looking at whether I can presume that the Claimant wasn't available for work. Then I must look at whether he was available for work based on the legal test set out in paragraph 14 above.

Issue 1: Has the Claimant rebutted the presumption of non-availability?

[19] No, he has not.

⁴ See *Faucher v. Canada (Employment and Immigration Commission)*, A-56-96.

⁵ See *Canada (Attorney General) v. Cloutier*, 2005 FCA 73.

⁶ See *Canada (Attorney General) v. Cyrenne*, 2010 FCA 349

[20] The presumption that students are not available for work only applies to full-time students. Since the Claimant was a full-time student⁷, the presumption applies to him.

[21] He can rebut the presumption by showing that he has a history of working full-time while also a full-time student⁸, or that there are exceptional circumstances that apply to his case⁹.

[22] The Claimant has not presented evidence of a multi-year history of working full-time while also attending school full-time. He told the Commission that he has been working since he was 13 years old¹⁰, but has not previously worked while attending a training course¹¹. He testified that he graduated from high school in June 2021 and worked at X¹² until his course started in September 2021.

[23] Nor has he shown that his situation is exceptional. The fact that the Claimant was taking a specialized training course in order to start a new career as a skilled worker, and would be available for full-time work in his new field upon completion of the course, is not exceptional. I acknowledge the Claimant's legitimate desire to begin a new career, and the fact that he very quickly started full-time employment in his field upon completion of the course¹³. But these factors are not enough to show that his situation was different from that of any other full-time student.

[24] I therefore find that the Claimant has not overcome the presumption that he wasn't available for work while attending school. This means he is disentitled to EI benefits while he was enrolled in his training program, starting from September 7, 2021.

⁷ See Training Course Information sheet at GD3-13 and Training Questionnaire at GD3-16.

⁸ See *Canada (Attorney General) v. Rideout*, 2004 FCA 304.

⁹ See *Canada (Attorney General) v. Cyrenne*, 2010 FCA 349.

¹⁰ See GD3-22.

¹¹ See GD3-14.

¹² The Claimant testified that this was seasonal work he did annually, starting from when the fishing season opened in March and ending in September (or earlier if the fishing quota was reached before that). He said that during the 2021 season, he applied for regular EI benefits on July 25, 2021 because the work had slowed down and he was not getting many hours.

¹³ The course ended on February 21, 2022. At the hearing on March 7, 2022, the Claimant testified that he was already working full-time as a heavy equipment operator.

[25] But even if I am wrong about presuming that the Claimant was unavailable for work while he was a full-time student, he must still be disentitled to EI benefits. This is because, for the reasons set out below, he has not proven he was available for work according to the legal test set out in paragraph 15 above.

Issue 2: Was the Claimant available for work according to the *Faucher* factors?

[26] No, he was not. He has not satisfied all of the *Faucher* factors.

Wanting to go back to work

[27] For purposes of the first *Faucher* factor, the Claimant must prove that he wanted to go back to working full-time as soon as suitable employment was available.

[28] The Claimant testified that:

- He applied for the heavy equipment operator training course in September 2020, during his final year of high school.
- He was accepted into the course “based on graduating from high school”.
- He graduated from high school in June 2021, and worked full-time with X up until he applied for EI benefits on July 25, 2021.
- His seasonal employment with X ended in September 2021.
- He started the training course in September 2021.
- This was his first post-secondary program.
- He was not eligible to be referred to the course¹⁴ because he had to be out of high school for at least two years, or a mature student, before he could qualify.
- He was available to work for X if they called him back to work.

¹⁴ Pursuant to section 25 of the *Employment Insurance Act*.

- He finished the training course and got a full-time job “right away”.
- He did tell the Commission that he would have to quit the course if he didn’t get EI benefits while he was in school¹⁵. But he was able to complete the course without receiving EI benefits because his aunt helped him out with money for school and other expenses.

[29] The Claimant has not shown that he wanted to go back to working full-time as soon as suitable employment was available. He said he was prepared to work for X if they called while he was taking his course. But this does not demonstrate a willingness to return to work as soon as a suitable job became available. The Claimant was well aware there would be little to no work for him with X while he was taking the course because of the seasonal nature of that work¹⁶. He took advantage of the downtime in this seasonal employment to complete the training course¹⁷, which he had applied for while in high school and planned to attend upon completing high school. He relied on financial assistance from family to execute that plan, and then started full-time employment as soon as the course was done. His bald statements that he was willing to quit the course to immediately accept full-time employment are not supported by his conduct or circumstances, or his requests that he be allowed to receive EI benefits to complete his course¹⁸.

[30] I therefore find that the Claimant has not satisfied the first *Faucher* factor.

Making efforts to find a suitable job

[31] For the second *Faucher* factor, the Claimant must prove that he was looking for suitable employment for every day of his benefit period.

¹⁵ See GD3-13 and GD3-22 to GD3-23. As per footnote 1 above, the Appellant got a few payments of EI benefits in the summer of 2021, during slow periods at X. He did not receive any EI benefits after he started the course on September 7, 2021.

¹⁶ The Claimant has repeatedly said that his employment with X was seasonal work and took place between March and September. His training course ran from September 7, 2021 to February 21, 2022.

¹⁷ During his reconsideration interview, he told the Commission he decided to take advantage of the slow season and enrolled in the course (see GD3-26).

¹⁸ See GD3-13, and GD3-22 to GD3-23.

[32] The Claimant testified that:

- He was available for work with X, and did go back to work for them when they “called”.
- He maintained communication with X. He had a flexible arrangement with them that when they had work, they would notify him and he would come back.
- Waiting for X to call him was his main source of work.
- But X is seasonal work. There is work in the spring and summer, between March and September.
- He applied to “roughly” 6 other jobs in addition to waiting for X to call him. He applied to a gas station, a grocery store, and another fishery employer. He also talked to a couple of local fishermen to see if they needed any help, “but no luck there either”.
- In December 2021, “one of the fisheries opened up”, and X called him. He worked for them for a total of 66.75 hours over 4 weeks in December 2021¹⁹. But by January 2022, “the quota was met” and there was no more work.
- There was no other work for him after that.
- While he was taking the course, his classes usually went from 8:30am to 12:30 or 1pm, Mondays to Fridays. Sometimes there were also classes in the afternoons until 3pm, and other times they got out at noon²⁰. There was no homework at all, maybe a half-hour at night. Most of the course was “hands on”, and he never really had to study for the tests.

¹⁹ The Claimant testified that the pay stubs attached to Notice of Appeal (at GD2-3 to GD2-4) correspond to the 4 weeks he worked for X in December 2021. They show he was paid for **9.5** hours the first week, **9.5** hours the second week, **39.5** hours the third week, and **8.25** hours the fourth week.

²⁰ The Claimant confirmed that the class schedule he gave during his reconsideration interview (at GD3-26) was accurate.

- When he wasn't in classes, if he was called to work at X he went, but otherwise he was at home.
- He finished the course in February and got a full-time job as a heavy equipment operator right away.

[33] I acknowledge that the Claimant had an informal understanding with X whereby he could pick up part-time work if it became available in the off season months. This allowed him to work a few hours in December 2021. But the courts have said that maintaining the employment tie and remaining part of the work force part-time while going to school does not necessarily make a person available for work²¹.

[34] The courts have also said that waiting to be recalled to employment is not sufficient to prove availability²². Only claimants who are actively looking for employment can receive regular EI benefits. This is the case even if there is a possibility of recall or the period of unemployment is unknown or relatively short-term. A claimant's job search efforts must be sufficient to prove an active, on-going²³ and wide-ranging job search directed towards finding suitable employment²⁴.

[35] There are also recent decisions from this Tribunal that have held that a claimant cannot look to recall as the best avenue to employment, even when the anticipated period of unemployment is short – where only a minimal job search is made²⁵. In the

²¹ *Canada (Attorney General) v. Gagnon*, 2005 FCA 321, *Canada (Attorney General) v. Loder*, 2004 FCA 18, *Canada (Attorney General) v. Rideout*, 2004 FCA, *Canada (Attorney General) v. Primard* (2003) 2003 FCA 349 (CanLII), 317 N.R. 359 (FCA), *Canada (Attorney General) v. Bois*, 2001 FCA 175.

²² *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*.

²³ The Claimant must be searching for work for **every day of their benefit period**.

²⁴ Suitable employment is generally considered to be full-time employment.

²⁵ *J.S. v. C.E.I.C.*, 2019 SST 994; *T.O. v. C.E.I.C.*, 2019 SST 671, and *C.E.I.C. v. G.S.* 2020 SST 1076.

Claimant's case, his job search efforts were so minimal²⁶ as to show that he was not really in the market for a full-time job.

[36] The *Employment Insurance Act* is designed so that only claimants who are genuinely unemployed and actively looking for work will receive EI benefits. The Appellant was not doing enough to look for work while he was in school.

[37] I therefore find that the Claimant has not satisfied the second *Faucher* factor.

Unduly limiting chances of going back to work

[38] Finally, on the third *Faucher* factor, I find that the Claimant's schooling was a personal condition that unduly limited his chances of returning to the labour market²⁷.

[39] 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 availability²⁸.

[40] Having to attend daily classes at set times in the mornings and afternoons, and the 25-35 hours per week he was spending on his studies²⁹ was an obvious limitation on the Claimant's return to the labour market. It meant that he was not available for work during regular working hours for every working day of his benefit period. It also significantly reduced the jobs he could apply for or accept, because an employer would have to be willing to allow him to work around his school schedule.

[41] This means the Claimant cannot satisfy the third *Faucher* factor³⁰.

²⁶ Neither the efforts described by the Claimant in his testimony, nor applying for "roughly" 6 jobs between September 7, 2021 and February 22, 2022 are evidence of an active, on-going and wide-ranging job search directed towards finding full-time employment.

²⁷ To satisfy the third *Faucher* factor, the Appellant must prove that he did not set personal conditions that overly limited his chances of returning to work for every working day of his benefit period.

²⁸ *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).

²⁹ See GD3-13 and GD3-15.

³⁰ See *Duquet v. Canada (Employment and Immigration Commission)*, 2008 FCA 313

[42] 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. 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 while he was in school, starting from September 7, 2021.

[43] This means he is not entitled to EI benefits while he was taking his training course.

Conclusion

[44] The Claimant has not proven that he was capable of and available for work, but unable to find a suitable job while he was taking his training course, starting from September 7, 2021. This means he is disentitled to EI benefits because he has not proven his availability for work during the training course.

[45] The appeal is dismissed.

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