Citation: *AZ v Canada Employment Insurance Commission*, 2022 SST 579

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Claimant:	A. Z.
Representative:	V. Z.
Commission:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (451365) dated January 26, 2022 (issued by Service Canada)

Tribunal member:	Audrey Mitchell
Type of hearing:	Teleconference
Hearing date:	March 29, 2022
Hearing participants:	Claimant Claimant's representative
Decision date:	April 20, 2022
File number:	GE-22-570

Decision

[1] The appeal is dismissed with modification. The Tribunal disagrees with the Claimant.

[2] The Claimant hasn't shown that he was available for work while in school. This means that he can't receive Employment Insurance (EI) benefits.

Overview

[3] The Canada Employment Insurance Commission (Commission) decided that the Claimant was disentitled from receiving EI regular benefits from March 29, 2021 to June 22, 2021, 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 Claimant has proven that he was available for work. The Claimant 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 Claimant wasn't available because he was in school full-time.

[6] The Claimant disagrees and says that because he was willing and available to work full-time any time of day and any day of the week.

Issue

[7] Was the Claimant 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 Claimant 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 Claimant 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 full-time.

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

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 Claimant disputes that he was a full-time student

[15] The Claimant now says that he was only a part-time student because he was only taking a few courses in his last year of high school.

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[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.

[16] The Commission disagrees and says the Claimant told them that his high school studies were considered full-time by his educational institution.

[17] I find that the Claimant was a full-time student.

[18] In the period in question, the Claimant was finishing Grade 12 at his high school. He and his representative confirmed that he had taken many courses in Grade 9 through Grade 11. This meant that he had a reduced course load in Grade 12. The Claimant said that he had at least two or three spares per semester in the 2020/2021 school year. He had three courses in the fall and two in the spring semester of that school year.

[19] According to the Commission's file, the Claimant said that he attended classes for nine hours a week and had an additional 10 hours of self-guided activities. When asked about this at the hearing, he testified that he wasn't sure about the additional part. He said that he remembered saying that he studied a total of nine to 10 hours including homework.

[20] In a separate conversation with the Commission, the Claimant said that he attended 22.5 hours of training per week from September 11, 2020 to June 22, 2021.

[21] I find it more likely than not that the Claimant was a full-time student. He was completing his last year in high school in a traditional school year. This was not in a continuing education program, for example. He had a mix of spares and courses required to get his diploma. This is consistent with the Claimant's statement to the Commission that his school considered him to be full-time student.

[22] I find that the Claimant likely spent around 20 hours per attending classes and studying. He testified that when speaking to the Commission, sometimes the agent didn't specify what time period they were talking about. The Commission's notes show that the Claimant also gave them information about his university studies. He said that he spent 14 hours per week attending classroom training and 19 hours a week on his studies.

[23] The number of hours per week spent on studies the Claimant gave the Commission for Grade 12 versus his first year of university is different, namely 19 versus 33, respectively. But the two times he spoke to the Commission about time spent on his studies in Grade 12 is more consistent, namely 22.5 and 19 hours a week. For this reason, I find it likely that the Claimant knew the period the Commission was asking him about and he gave them accurate information.

[24] So, based on the above, I find that the Claimant was a full-time student.

– **The Claimant was a full-time student**

[25] The Claimant is a full-time student. But the presumption that full-time students aren't available for work can be rebutted (that is, shown to not apply). If the presumption were rebutted, it would not apply.

[26] There are two ways the Claimant can rebut the presumption. He can show that he has a history of working full-time while also in school.[6] Or, he can show that there are exceptional circumstances in his case.[7]

[27] The Claimant says he could have switched to online education or put his education on hold.

[28] The Commission says the Claimant's primary focus was on school and he was committed to completing high school. They also say that he has only a minimal history of working while in school.

[29] I find that the Claimant hasn't rebutted the presumption of non-availability while in school.

[30] At the hearing, the Claimant said that he did not have a history of working full-time while in school. His representative referred to work he had done at a trampoline park. The Claimant said that he had accepted every shift they offered.

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[6] See *Canada (Attorney General) v Rideout*, 2004 FCA 304.
[7] See *Canada (Attorney General) v Cyrenne*, 2010 FCA 349.

[31] The Commission's file has a record of employment from the trampoline park where the Claimant worked. In the two months he worked there, from September 23, 2020 to November 22, 2020, the Claimant worked 82 hours. The Claimant worked 64 hours for another employer from March 7, 2021 to March 27, 2021. Based on this evidence and the Claimant's testimony, I don't find that his work history is enough to rebut the presumption of non-availability.

[32] The Commission's notes show that the Claimant said that he would not drop his courses to accept a full-time job. However, in his notice of appeal, he said that he was ready to switch to online education or put his education on hold if a potential employer wanted him to work during school hours.

[33] At the hearing, the Claimant testified that he was prepared and looking for jobs that he could do at any time. He added that his main goal was to obtain employment, and to drop his courses and continue high school later on.

[34] I find the Claimant's statements above are self-serving. I do so because I don't find the statements are consistent with his actions.

[35] The Claimant had worked hard to get his high school diploma and to have a lighter Grade 12 course load. He said he did so to be able to save for college in his Grade 12 year. He applied to a number of universities and was accepted in March 2021 to the university where he is now studying. He testified that he decided a couple months later that he would attend the university in the fall. So, I give little weight to the Claimant's testimony that he would have dropped his classes to accept a full-time job. I find his actions show that his priority was to finish Grade 12.

[36] The Claimant told the Commission that his classes were held during normal working hours. He testified that his courses were recorded and one was in-person, usually in the mornings. The Claimant said that he could attend classes online or he could join during the scheduled classes, and he did both.

[37] I have already found that the Claimant's priority was to finish Grade 12. From his testimony, he attended both online and in-person classes. I find that this would likely

have limited his availability to work any day at any time. So, even though the Claimant may have had some flexibility being able to watch recorded classes, I am not persuaded that this is enough to show an exceptional circumstance that would rebut the presumption of non-availability.

[38] The Claimant hasn't rebutted the presumption that he is unavailable for work.

– The presumption isn't rebutted

[39] The Federal Court of Appeal hasn't yet told us how the presumption and the sections of the law dealing with availability relate to each other. Because this is unclear, I am going to continue on to decide the sections of the law dealing with availability, even though I have already found that the Claimant is presumed to be unavailable.

Reasonable and customary efforts to find a job

[40] 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.[8]

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

[42] I also have to consider the Claimant's efforts to find a job. The Regulations list nine job-search activities I have to consider. Some examples of those are the following:[10]

- assessing employment opportunities
- preparing a résumé or cover letter
- applying for jobs

[8] See section 50(8) of the Act.
[9] See section 9.001 of the Regulations.
[10] See section 9.001 of the Regulations.

[43] The Commission says that the Claimant didn't do enough to try to find a job.

[44] The Commission states that they disentitled the Claimant under section 50 of the Act along with sections 9.001 of the Regulations for failing to prove his availability for work. In their submissions, they say that showing availability requires a claimant to make reasonable and customary efforts to find suitable employment.

[45] The Commission's notes do not reflect that they asked the Claimant to prove his availability by sending them a detailed job search record.

[46] I find a decision of the Appeal Division on disentitlements under section 50 of the Act persuasive. The decision says the Commission can ask a claimant to prove that they have made reasonable and customary efforts to find a job. They can disentitle a claimant for failing to comply with this request. But they have to ask the claimant to provide this proof and tell the claimant what kind of proof will satisfy their requirements.[11]

[47] I do not find that the Commission asked the Claimant to give them his job search record to prove his availability. For this reason, I do not find that he is disentitled under this part of the law.

Capable of and available for work

[48] I also have to consider whether the Claimant was capable of and available for work but unable to find a suitable job.[12] Case law sets out three factors for me to consider when deciding this. The Claimant has to prove the following three things:[13]

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.

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[11] *L. D. v. Canada Employment Insurance Commission*, 2020 SST 688
[12] See section 18(1)(a) of the Act.
[13] 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 didn't set personal conditions that might have unduly (in other words, overly) limited his chances of going back to work.

[49] When I consider each of these factors, I have to look at the Claimant's attitude and conduct.[14]

– **Wanting to go back to work**

[50] The Claimant has shown that he wanted to go back to work as soon as a suitable job was available.

[51] The Claimant applied for EI benefits after his lay-off from a part-time job. He said that he had taken more courses than usual in Grade 9 to Grade 11 so that he could have time to work to save for college. He is now in university.

[52] The Claimant sent the Tribunal a record of his job search efforts. I find that this supports his statement that he wanted to work to save for college. I am satisfied that the Claimant wanted to work.

– **Making efforts to find a suitable job**

[53] The Claimant has made enough effort to find a suitable job.

[54] 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.[15]

[55] I asked the Claimant what he did to find a job. He said that he assessed job opportunities, worked on his résumé especially after not getting job offers after his first 10 applications, contacted friends about jobs, connected with a teacher from his career education course, and submitted job applications.

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[14] 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.
[15] 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.

[56] The Claimant sent a list of 60 jobs that he applied for from March 29, 2021 to June 22, 2021. He said that he had dropped off an additional 55 résumés at restaurants and cafés.

[57] The Claimant did not say in his job search record what positions he applied for or if the jobs he applied to were part-time or full-time. However, I find the evidence he has submitted is enough to meet the requirements of this second factor. I find that he was making sustained efforts to find work. I also find that the number of jobs he applied to is sufficient for the period of his job search.

– **Unduly limiting chances of going back to work**

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

[59] I have already found that the Claimant was a full-time student who has not rebutted the presumption of non-availability. When speaking to the Commission about completing high school, the Claimant said that he had not been able to work full-time. It wasn't until after the Commission's initial decision denying him benefits that he said that he was willing and available to work at a full-time job.

[60] Even though I find that the Claimant wanted to work and had made enough effort to find a job, I find that his being in school was a personal condition that limited his availability. Again, the Claimant first said that he wouldn't drop his courses to accept a full-time job. I gave little weight to what he said later, namely that he would drop classes to accept work. So I find that being in school may have unduly limited the Claimant's chances of going back to work.

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

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

[62] The Claimant's representative submitted that the Commission approved the Claimant's benefits, then denied him, and finally partially approved him even though he provided them the same information.

[63] The Commission's file includes some of the Claimant's bi-weekly reports. He declared in reports covering four weeks March and April 2021 that he was in school. He did the same in reports covering four weeks in August and September 2021. The Commission's decision to deny the Claimant benefits resulted in an overpayment.

[64] The Commission refers to a particular section in the law. They say that this part of the law allows them to verify availability at any time after they pay a claimant benefits.[16]

[65] The section of the law the Commission cites is a pandemic-related temporary measure. It says how to apply the normal availability provision for claimants who are in school. I understand the Claimant's feeling that the Commission approved him, then denied him. However, I find that the law allows the Commission to verify the Claimant's availability by asking him to prove that he was available for work in the period that they had paid him benefits. This is what they did.

Conclusion

[66] The Claimant hasn't shown that he was available for work within the meaning of the law. Because of this, I find that the Claimant can't receive EI benefits.

[67] This means that the appeal is dismissed with modification. For clarity, I don't find that the Claimant is disentitled under subsection section 50 of the Act. However, he is disentitled under paragraph 18(1)(a) of the Act.

Audrey Mitchell
Member, General Division – Employment Insurance Section

[16] See section 153.161 of the Act.