Citation: *KT v Canada Employment Insurance Commission*, 2022 SST 581

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	K. T.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (435718) dated October 5, 2021 (issued by Service Canada)

Tribunal member:	Lilian Klein
Type of hearing:	Teleconference
Hearing date:	February 1, 2022
Hearing participants:	Appellant
Decision date:	February 21, 2022
File number:	GE-22-50

Decision

[1] I am dismissing the Claimant's appeal. This decision explains why.

[2] The Claimant has not shown that she was available for work from October 5, 2020, to June 30, 2021, while studying full time. This means that she is disentitled from receiving Employment Insurance (EI) regular benefits.

Overview

[3] After receiving EI Emergency Response Benefits (EI-ERB), the Claimant was automatically transitioned to EI regular benefits starting on October 3, 2020. Payment of benefits began.

[4] On August 25, 2021, the Canada Employment Insurance Commission (Commission) decided that the Claimant was disentitled from receiving EI benefits because she was not available for work. A claimant has to be available for work to get regular benefits. The Commission's decision resulted in an overpayment.

[5] I have to decide whether the Claimant has proved that she was available for work. She has to prove this on a balance of probabilities. This means she has to show it is more likely than not that she was available for work.

[6] The Commission says refusing to drop her studies for full-time work means that the Claimant cannot rebut the presumption of non-availability that applies to all full-time students. It says she was not available for work because she was in school from 8am to 2pm Monday to Friday and could only work around that schedule.

[7] The Claimant disagrees. She says she was available for work and tried to find a job. She argues that she was used to working part time while studying full time. She says she never had any trouble before COVID-19 getting shifts that started after school ended.

The issue I must consider

[8] Was the Claimant available for work while studying full-time?

Analysis

[9] The law requires claimants to show that they are available for work.[1] As well, a new temporary section of the *Employment Insurance Act* (EI Act) says claimants who attend a full-time course cannot receive benefits unless they prove that they are capable of and available for work.[2]

[10] The EI Act says all claimants have to prove this. Case law sets out three things they must prove to show that they are "available."[3] I will look at those factors below.

[11] The Federal Court of Appeal says we must first presume that claimants who are taking a full-time course are not available for work.[4] This is called the "presumption of non-availability." It means we can suppose that students are not available for work when the evidence shows that they are in school full time.

[12] There is no case law to guide me on whether the presumption applies given the new temporary section in the EI Act. So, I will still first consider whether the Claimant has rebutted this presumption. I will then look at the law on availability.

Presuming that full-time students are not available for work

[13] The presumption that students are not available for work only applies to full-time students.

[14] The Claimant agrees that she was in school full-time, with classes daily from 8am to 2pm as well as study time on her own. I see no evidence that shows otherwise so I find that she was a full-time student. This means that the presumption applies to her.

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[1] S 18(1)(a) of the *Employment Insurance Act* (EI Act) says that claimants are not entitled to be paid benefits for a working day in their benefit period if they fail to prove that on that day they were capable of and available for work and unable to obtain suitable employment.
[2] In March 2020, the EI Act was amended to add interim orders to mitigate the economic effects of COVID-19 – see s 153.3(1). S153.16 requires full-time students to prove they are capable of and available for work (unless the Commission refers them to the course, which does not apply to the Claimant).
[3] See *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96.
[4] See *Canada (Attorney General) v Cyrenne*, 2010 FCA 349.

[15] The presumption can be rebutted, which means that it would not apply. There are two ways that the Claimant can rebut the presumption. She can show that she has a history of working full-time while also in school.[5] Or, she can show that there are exceptional circumstances in her case.[6]

[16] The Commission says the Claimant cannot rebut the presumption of non-availability because she was not willing to drop her studies to accept full-time work. It argues that there were no exceptional circumstances in her case.

[17] I accept the Claimant's sworn testimony that she has a history of working part time while studying full time. This is because I find her a credible witness. She testified in an open and direct way about her past employment and her statements were consistent with her previous reports to the Commission.

[18] I rely on a decision of the Tribunal's Appeal Division to make the following finding: the part-time nature of the Claimant's previous job and her ability to maintain at least that level of employment while studying full time is an exceptional circumstance. I find that this allows her to rebut the presumption of non-availability.[7]

[19] Although the Claimant has rebutted the presumption, this only means that I do not automatically consider her to be unavailable. I will now look at the law that applies in her case to decide whether she was available for work.

[20] The Commission says claimants must make "reasonable and customary" efforts to find work. However, it did not make specific submissions on the Claimant's job search beyond accepting that she made some effort to find part-time work.

[21] For this reason, I make no decision on a disentitlement under section 50 of the EI Act for failing to carry out a reasonable and customary job search. I will only consider the following test for availability in sections 18(1)(a) and 153.161 of the EI Act.

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[5] *Canada (Attorney General) v Rideout*, 2004 FCA 304.
[6] *Canada (Attorney General) v Cyrenne*, 2010 FCA 349.
[7] See *J. D. v Canada Employment Insurance Commission*, 2019 SST 438. I do not have to follow the decisions of the Tribunal's Appeal Decision but their logic often guides me, as in this case.

Capable of and available for work

[22] I have to consider three factors when deciding whether the Claimant was capable of and available for work but unable to find a suitable job.[8] She has to prove that

a) she wanted to get back to work as soon as a suitable job was available;

b) she tried to do this by making efforts to find suitable work; *and*

c) she did not set personal conditions that might have unduly (in other words, unreasonably) limited her chances of finding a job. [9]

[23] I have to consider each of the above three factors to decide the question of availability.[10] To do this, I have to look at the Claimant's attitude and conduct.[11]

The Claimant wanted to get back to work

[24] The Claimant has shown that she wanted to get back to work as soon as she could find a suitable job.

[25] The Commission says the Claimant had to show that she was prepared to drop her studies to accept full-time work. However, the EI Act does not say claimants must work full time when they usually work part time. For this reason, I find that wanting to finish her course while working part-time still shows that she wanted to get back to work.

The Claimant tried to find a suitable job

[26] The evidence shows that the Claimant made efforts to find a suitable job.[12]

[27] The Commission acknowledged that the Claimant applied for three jobs in October 2020, two in December 2020, one in January 2021 and three in March 2021.

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[8] See section 18(1)(a) of the Act.
[9] 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.
[10] *Faucher*, see above.
[11] Two decisions from case law set out this requirement: *Canada (Attorney General) v Whiffen*, A-1472-92; and *Carpentier v Canada (Attorney General)*, A-474-97.
[12] I consulted the list of job-search activities in s 9.001 of the *Employment Insurance Regulations* in deciding this second factor. This list is used to decide disentitlements under s 50 of the EI Act, which I am not considering. I am not bound by this list when making a decision under s 18(1)(a) of the EI Act so I use it in this appeal for guidance only.

[28] The Claimant says she made efforts to find work, mostly in the retail sector where she worked before the pandemic began. These efforts included registering on online job search sites, editing her resume and cover letter for each job application and networking with friends and family. She says she also looked for jobs she could do from home, such as government work on the census, but she did not have the qualifications to get that job.

[29] After the hearing, the Claimant submitted additional proof of jobs that she was able to find in her email records. This added a few more job applications to her original list.

[30] The Claimant says there were few jobs to apply to because of COVID-19 workplace shutdowns. She submitted information on this issue to support her argument.

[31] I agree that the labour market was very challenging during the period under review. This means that claimants had to be willing to apply for suitable vacancies without putting personal conditions on their availability.

The Claimant set personal conditions that might have unduly limited her chances of finding a job

[32] The Claimant set conditions that might have unreasonably limited her chances of returning to the labour market in suitable employment.

[33] The Commission says the Claimant had to be willing to accept full-time work to meet her obligations under the law. It says she set a personal condition by only being willing to accept part-time work.

[34] The Commission says the Claimant set another personal condition by only being willing to accept work outside her daily school schedule.

[35] The Claimant says she should not have to be available for full-time work when she had previously worked part time. She says her school schedule did not unduly limit her chances of finding work. This is because shifts for part-timers in the retail sector were usually after school hours since full-time workers wanted the day shifts.

[36] I do not agree with the Commission that the Claimant—who had a history of working part time—had to prove that she was available for full-time work. The EI Act does not require her to change her level of availability.

[37] However, I agree with the Commission that only being available after school ended each working day was a personal condition that would have limited the Claimant's chances of finding work in an already difficult job market.

[38] I acknowledge the Claimant's argument that she never had any difficulty in the past finding after-school shifts. However, pandemic restrictions changed the hours of many retail stores. This means that limiting herself to evening or weekend shifts would, more likely than not, have further restricted her access to a limited supply of jobs. Case law says you cannot show you are available for work when you are only available outside your school hours.[13]

[39] I accept the Claimant's testimony that she set no conditions on the type of job or amount of pay she would accept. She says she is used to earnings just above minimum wage. However, she did set conditions on where she would work.

[40] The Claimant says she had to work near her house. She says commutes of 20 minutes by car would take her more than an hour by public transit. She could not use the family car for her work commute since her parents needed it to get to their medical appointments. She did not want them to leave the house unnecessarily during COVID-19 to give her rides. She says that is why her first job was in walking distance.

[41] Although the Claimant could not get to work by car, she says she did not want to take the bus or subway (TTC) either. She says this was because she was scared of catching COVID-19 and bringing it home to her parents who both have health problems.

[42] The Claimant lives in Toronto but—without a car and being unwilling to use the TTC—she says she could only work in Vaughan ON, where she has relatives who could give her rides. Her job search list reflects this preference.

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[13] *Duquet v Canada (Attorney General),* 2008 FCA 313.

[43] I acknowledge the Claimant's COVID-19 concerns, but I see no evidence that Ontarians were told to avoid using—with proper precautions—the TTC. There is no evidence that her parents' doctor had advised household members to avoid using it either.

[44] This is why I find that the Claimant's restrictions on where she could accept work were her own personal conditions.

[45] These personal conditions would have unduly limited her chances of returning to work.

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

[46] Based on my findings on the above three factors, I find that the Claimant has not shown that she was capable of and available for work but unable to find a suitable job.

[47] The Claimant says she was always truthful and consistent in her responses to the Commission and it should not have paid her benefits if she was not entitled to them.

[48] I sympathize with the Claimant's situation but I cannot change the law.[14] The Commission may retroactively impose a disentitlement if, on review, it finds that a claimant did not prove availability for work. Benefits already paid must then be repaid.[15]

Conclusion

[49] Since the Claimant has not shown that she was capable of and available for work from October 5, 2020, to June 30, 2021, she is disentitled from receiving EI regular benefits during that period.

[50] This means that I am dismissing the Claimant's appeal.

Lilian Klein

Member, General Division – Employment Insurance Section

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[14] *Canada (Attorney General) v Knee*, 2011, FCA 301.
[15] S 44 of the EI Act.