Citation: *BG v Canada Employment Insurance Commission*, 2022 SST 487

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant (Claimant):	B. G.
Representative:	Carrie Reynolds
Respondent (Commission):	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (453730) dated February 12, 2022 (issued by Service Canada)

Tribunal member:	Gerry McCarthy
Type of hearing:	Teleconference
Hearing date:	May 5, 2022
Hearing participants:	Appellant Appellant's representative
Decision date:	May 5, 2022
File number:	GE-22-913

Decision

[1] The appeal is allowed.

[2] The Claimant has shown that he was available for work while in school. This means that he isn't disentitled from receiving Employment Insurance (EI) benefits. So, the Claimant may be entitled to benefits.

Overview

[3] The Canada Employment Insurance Commission (Commission) decided that the Claimant was disentitled from receiving EI regular benefits as of September 13, 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 the Claimant wasn't available because he was in school full-time.

[6] The Claimant disagrees and says he was available for work while attending school. The Claimant says he had previously attended school and worked.

Matters I have to consider first

[7] The Claimant's representative wished to provide oral testimony during the hearing as a Witness. The Claimant's representative was the Claimant's mother. Under the circumstances, I allowed the Claimant's representative to be a Witness.

Issue

[8] Was the Claimant available for work while in school?

Analysis

[9] 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.

[10] 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.

[11] 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.

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

[13] 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.

[14] 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.

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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.

Presuming full-time students aren't available for work

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

The Claimant doesn't dispute that he is a full-time student

[16] The Claimant agrees that he is a full-time student, and I see no evidence that shows otherwise. So, I accept that the Claimant was in school full-time.

[17] The presumption applies to the Claimant.

The Claimant is a full-time student

[18] 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.

[19] 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]

[20] The Claimant says he previously worked while attending high school.

[21] The Commission says the Claimant's full-time studies were a substantial restriction on his ability to search for work and accept suitable employment.

[22] I find the Claimant previously worked while attending school. For example, the Claimant testified that since Grade 11 he had worked in retail or in a restaurant. The Claimant further testified that he worked for a contractor while attending high school. Specifically, the Claimant explained that he worked 40-hours every week for "X" when his classes went online in mid-March 2020.

[23] I find the Claimant has rebutted the presumption that he was unavailable for work.

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

The presumption is rebutted

[24] Rebutting the presumption means only that the Claimant isn't presumed to be unavailable. I still have to look at the two sections of the law that apply in this case and decide whether the Claimant is actually available.

Reasonable and customary efforts to find a job

[25] 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]

[26] 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.

[27] 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

[28] The Commission says the Claimant didn't enough to try to find a job. Specifically, the Commission says the Claimant failed to prove he desired to return to the labour market.

[29] The Claimant disagrees. The Claimant says he updated his resume, assessed employment opportunities, and applied to numerous employers including: "Tim Hortons," "Lowes," "Canadian Tire," "X," "Loblaws," X," and "X." The Claimant says his efforts were enough to prove that he was available for work.

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

[30] I find the Claimant made reasonable and customary efforts to find work for the following reasons:

[31] First: The Claimant provided a detailed job-search list with names of employers where he submitted job applications. I realize the Commission argued the Claimant failed to prove he desire to return to the labour market. Nevertheless, I accept the Claimant's testimony that he was searching for work because his statements were consistent, forthright, and supported by a job-search list and Witness testimony.

[32] Second: The Claimant testified that while attending school at X College in 2021-2022 he worked occasionally for "X". Furthermore, the Claimant testified that he regularly assessed employment opportunities through "Indeed," "Zip Recruiter," and "Job Alerts."

[33] The Claimant has proven that his efforts to find a job were reasonable and customary.

Capable of and available for work

[34] I also have to consider whether the Claimant was capable of and available for work but unable to find a suitable job.[11]Case law sets out three factors for me to consider when deciding this. The Claimant has to prove the following three things:[12]

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.

[11] See section 18(1)(a) of the Act.
[12] 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.

[35] When I consider each of these factors, I have to look at the Claimant's attitude and conduct.[13]

Wanting to go back to work

[36] The Claimant has shown that he wanted to go back to work as soon as a suitable job was available, because he testified he submitted job applications to numerous employers (GD3-35 to GD3-36). Furthermore, the Claimant testified he continued to submit job applications to other employers ("Loblaws" and "X") during the Fall and Winter semesters.

Making efforts to find a suitable job

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

[38] 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.[14]

[39] The Claimant's efforts to find a new job included updating his resume, assessing employment opportunities, and submitting job applications to numerous employers. I explained these reasons above when looking at whether the Claimant has made reasonable and customary efforts to find a job.

[40] Those efforts were enough to meet the requirements of this second factor, because the Claimant provided specific names of employers he contacted about potential jobs. Furthermore, the Claimant's testimony about his job-search efforts was supported by Witness Testimony.

Unduly limiting chances of going back to work

[41] The Claimant hasn't set personal conditions that might have unduly limited his chances of going back to work.

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[13] 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.
[14] 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.

[42] The Claimant says he hasn't done this because he was available for work Tuesday, Thursday, Saturday and Sunday (morning, afternoon and evening). The Claimant further explained he could work around his classes, because the lectures were recorded and could be viewed at anytime.

[43] The Commission says the Claimant was required to attend lasses during the day and this prevented him from accepting employment that offered hours on Monday, Wednesday, and Friday.

[44] I find the Claimant hasn't set personal conditions that unduly limited his chances of going back to work for the following reasons:

[45] First: The Claimant was available Tuesday, Thursday, Saturday, and Sunday (all day). I realize the Commission submitted the Claimant's classes on Monday, Wednesday and Friday prevented him from accepting employment on those days. However, I accept the Claimant's testimony that he could make himself available for work on Monday, Wednesday and Fridays because his classes were online and could be viewed at other times.

[46] Second: I accept the Claimant's testimony that his study time was flexible and he could work around his classes. I accept the Claimant's testimony on this matter, because his statements were plausible and supported by Witness Testimony. Furthermore, the Claimant has shown he could attend online classes and work 40-hours every week.

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

[47] Based on my findings on the three factors, I find the Claimant has shown that he was capable of and available for work but unable to find a suitable job.

Conclusion

[48] The Claimant has shown that he was available for work within the meaning of the law. Because of this, I find the Claimant isn't disentitled from receiving benefits. So, the Claimant may be entitled to benefits.

[49] This means that the appeal is allowed.

Gerry McCarthy
Member, General Division – Employment Insurance Section