Citation: *SS v Canada Employment Insurance Commission*, 2022 SST 590

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	S. S.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (452776) dated January 27, 2022 (issued by Service Canada)

Tribunal member:	Leanne Bourassa
Type of hearing:	Videoconference
Hearing date:	March 9, 2022
Hearing participants:	Appellant
Decision date:	March 24, 2022
File number:	GE-22-409

Decision

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

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

Overview

[3] Claimants have to be available for work in order to get regular EI benefits. Availability is an ongoing requirement; claimant have to be searching for a job.

[4] The Canada Employment Insurance Commission (Commission) decided that the Claimant was disentitled from receiving EI regular benefits as of December 14, 2020 because she was on a training course of her own initiative and hadn't proven her availability for work.

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

[6] The Commission says that the Claimant wasn't available because she was in school full-time. She had also reported to them that she was only trying to find a job that would fit around her school schedule.

[7] The Claimant says that she had worked in the past while attending school and would have worked around her classes, which were mostly online. She disagreed with the decision being made retroactively and argues that she was not given warning of the disentitlement.

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 has referenced both of these sections.[1]

[10] The Federal Court of Appeal has also said that claimants who are in school full-time are presumed to be unavailable for work.[2] This is called "presumption of non-availability."

[11] The Commission also says that under new measures put in place because of the COVID-19 pandemic, they have a right to verify that a claimant who received benefits while on non-referred training is entitled to those benefits. This section of the law allows them to require proof that a claimant was capable and available for work on a working day in their benefit period.[3]

[12] As I read these provisions, I see that the presumption of non-availability has been displaced. A full-time student is not presumed to be unavailable, but simply has to prove their availability like any other claimant.

[13] So, from my reading of the law, I find that a claimant who is in a full-time training program that they have not been referred to, can only be paid benefits for a working day in their benefit period for which they have shown that they were capable of and available for work.[4] The Commission is allowed, at any time after benefits are paid to the claimant, to require proof that they were capable of and available for work.[5] If the Claimant is unable to provide that proof, the Act says they are not entitled to benefits.

[14] I would mention that since we are not dealing with a presumption of non-availability, the Claimant does not need to rebut this presumption. So she does not need

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[1] These are paragraphs 18(1)(a) and subsection 50(8) of the Employment Insurance Act (Act).
[2] See *Canada (Attorney General) v Cyrenne*, 2010 FCA 349.
[3] See section 153.161 of the Act.
[4] This is set out in subsection 153.161(1) of the Act.
[5] This is set out in subsection 153.161(1) of the Act.

to demonstrate that she has a history of work while in full-time studies, she only needs to show that she was available during the time in question.[6]

– **The Claimant was not disentitled under section 50(8) of the Act**

[15] The Commission argued that the Claimant was disentitled under section 50(8) of the Act.

[16] This section of the Act says that a claimant has to prove that they are making "reasonable and customary efforts" to find a suitable job.[7] The *Employment Insurance Regulations* (Regulations) give criteria that help explain what "reasonable and customary efforts" mean.[8]

[17] In looking through the evidence, I did not see any requests from the Commission to the Claimant to prove her reasonable and customary efforts, or any claims from the Commission that if they did, her proof was insufficient. The Claimant testified that she was never asked to provide proof of a job search.

[18] I also find that the Commission did not make any detailed submissions on how the Claimant failed to prove to them that she was making reasonable and customary efforts; the Commission only summarized what the legislation says in regard to that section of the Act[9] and what it says about reasonable and customary efforts.

[19] Based on the lack of evidence the Commission asked the Claimant to prove her reasonable and customary efforts to find suitable employment under that section of the Act, the Commission did not disentitle the Claimant under subsection 50(8) of the Act. Therefore, it is not something I need to consider.

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[6] I mention this because the Claimant brought to my attention CUB 22820 which I find not to be applicable in this case. In that case, the Claimant was found to have rebutted a presumption of non-availability because he had a history of work. In the present case, since we are not dealing with the presumption but general proof of availability, the case is not relevant.
[7] See section 50(8) of the Act.
[8] See section 9.001 of the *Employment Insurance Regulations* (Regulations).
[9] See section 50(8) of the Act.

– **The Claimant was disentitled under paragraph 18(1)(a)**

[20] 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.[10]

[21] The Commission says that they were acting under section 153.161(2) of the Act to verify the Claimant's availability for work. This section of the law involves the application of paragraph 18(1)(a) of the Act, requiring that a claimant prove that they were capable of and available for work but unable to obtain suitable employment.

[22] I find that the Commission's disentitlement was based on paragraph 18(1)(a) of the Act as they were determining if the Claimant was available for work.

[23] Case law gives three things a claimant has to prove to show that they are "available" in this sense.[11] I will look at those factors below.

Capable of and available for work

[24] To show she is capable and available for work, the Claimant has to prove the following three things:[12]

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

b) She made efforts to find a suitable job.

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

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

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[10] See section 18(1)(a) of the Act. I note that the Claimant refers to section 14(a) of the Act, but this appears to be the similar provision in a previous version of the Act.
[11] See *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96.
[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.
[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.

– **Wanting to go back to work**

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

[27] The Claimant was working for her father's painting business while she was in school. Unfortunately, due to the pandemic, this business was shut down when provincial lock-downs were put in place. If that had not happened, the Claimant would have continued working.

[28] The Claimant was also looking for jobs while she was in school. She explained that she needed to pay bills and had always worked while she was in school. Her answers on her training questionnaires supports this. I find that she did have a desire to go back to work.

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

[29] Saying that you want to return to work is not the only step in this test. A claimant needs to demonstrate this desire by making efforts to find a suitable job.

[30] I find that the Claimant made efforts to find a suitable job.

[31] The Claimant's efforts to find a new job included going to the companies that were still open despite provincial lock-downs and handing out resumes. She applied to fast food restaurants and other essential businesses, in person because she felt there was more opportunity when she was face to face with a prospective employer. She also handed out resumes through the drive-thru windows in fast food restaurants. Also, the Claimant was signed up for the Job Bank and other online resources and was receiving notices.

[32] The Claimant explained that she was finding there were only jobs available for the spring and summer. She applied anyway. Although travel was restricted in her region, she also tried applying to jobs outside her region. She was applying for full and part time jobs, thinking that she would work it out with her employer if she had to attend

a class on line. She was also waiting for restrictions to be lifted so she could return to work with her father's business.

[33] Those efforts were enough to meet the requirements of this second factor because the Claimant was active in her job search. She persisted despite the government restrictions and sought out which businesses might be hiring despite the lock-down.

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

[34] Despite her efforts to find a job, the Claimant did set personal conditions that might have unduly limited her chances of going back to work.

[35] The Claimant says she didn't do this because she could work around her school schedule and most of the limitations were because of government restrictions.

[36] The Commission says the Claimant was restricting her availability to only work around her course schedule.

[37] I find that the Claimant did set personal conditions that may have limited her chances of returning to work.

[38] I accept that the Claimant was somewhat limited by government restrictions on travel outside of her region. I do not consider that to be a personal condition that she imposed that would have limited her chances at finding a job.

[39] The Claimant testified that she was applying for all sorts of jobs and if she had an offer, she would have worked it out with her employer so that she could attend the online classes that she was required to attend. Her other classes that were recorded or asynchronous, she could do when she was not needed at work.

[40] Unfortunately, I find that this testimony, along with the Claimant's statements on the training questionnaires that she filled out at the time she was receiving benefits, show that she was prioritizing her schooling over full-time work. This means that she was setting a limit that would have limited her job opportunities.

[41] In her training questionnaire filled out on January 22, 2021, the Claimant said that she was obligated to attend scheduled classes and that some of these classes took place during normal work hours. She also clearly stated that she was only available for part-time hours because of her large course load. Finally, she also said that she would only accept a job as long as she could delay the start date to allow her to finish the program. She repeated this when she spoke with the Commission in December 2021.

[42] The Claimant also stated in her notice of appeal that she would have worked between classes to make it possible to work. Because of the consistency of these statements, I have to conclude that the Claimant was only looking for jobs that could be done around her class schedule.

[43] I understand that the Claimant believed that she could find a part-time job and then work with her employer to adjust her schedule to allow her to work and do her full-time classes at the same time. But, remaining committed primarily to her classes and looking only for employment that would allow her to complete her schooling is a personal condition that would limit the jobs that would be available to her.

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

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

Additional questions

[45] The Claimant told the Tribunal that she was honest about being in school so the Commission should not have paid her benefits if she was not entitled to them. The fact that the government was automatically approving benefits was an error that should not concern the applicants. She says if she had been informed that she might have to pay it all back, she would never have accepted the benefits.

[46] I understand her frustration. Unfortunately, the law specifically requires that a Claimant for any sort of regular EI benefits be available for work. Also, the law gives the

Commission the power to review students' availability for work. They can do this, even if EI benefits have already been paid.[14] I can not change that.

[47] The Claimant has brought to my attention decisions of the precursor tribunal to the Tribunal. She explains that these decisions set out that a claimant is entitled to be warned of a disentitlement and given a chance to conform to the Commission's requirements.[15]

[48] There is a significant difference between the cases the Claimant has raised and the current case; in those cases, the claimants were originally entitled to benefits, but something in their circumstances changed during their benefit period that affected their entitlement to benefits.[16] The Umpires found that if the entitlement to benefits were to change, then the claimant should be warned.

[49] In the Claimant's case, her entitlement to benefits was not changing because of a change in her circumstances during her benefit period. Rather, she was found not to be entitled to benefits in the first place. Because of that, I do not find these decisions to be useful in guiding my decision.

Conclusion

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

[51] This means that the appeal is dismissed.

Leanne Bourassa

Member, General Division – Employment Insurance Section

[14] See subsection 153.161(2) of the Employment Insurance Act.
[15] These are CUBs 22834 and 15771
[16] In one case the claimant started school after several months of receiving benefits, in the other, the claimant moved to an area of less employment and lost access to her vehicle for a time.