[TRANSLATION]

Citation: *AE v Canada Employment Insurance Commission*, 2022 SST 477

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	A. E.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (449543) dated January 26, 2022 (issued by Service Canada)

Tribunal member:	Normand Morin
Type of hearing:	Teleconference
Hearing date:	April 14, 2022
Hearing participant:	Appellant
Decision date:	May 6, 2022
File number:	GE-22-617

Decision

[1] The appeal is allowed. I find that the Appellant has proven her availability for work for the period from January 4, 2021, to April 30, 2021, during which she was taking training.[1] This means that she is entitled to receive Employment Insurance (EI) regular benefits for the period in question. Because of this, the Appellant should not have to pay back the amount of money that the Canada Employment Insurance Commission (Commission) is asking her to repay and that it mentions in the January 26, 2022, reconsideration decision and in a notice of debt that was sent to her.[2]

Overview

[2] In September 2017, after arriving in Canada and getting a study permit, the Appellant began full-time training at HEC Montréal, an academic institution. The training was for a Bachelor of Business Administration (BBA) degree. She did her fall 2020 term from August 29, 2020, to December 22, 2020, and her winter 2021 term from January 7, 2021, to April 30, 2021.[3] In the fall of 2021, she continued her training at that university through a master's program.

[3] From August 18, 2018, to December 20, 2020, inclusive, the Appellant worked as a clerk for X (X or the employer). She stopped working for that employer because of a shortage of work.[4]

[4] On January 14, 2021, the Appellant made an initial claim for EI benefits (regular benefits). A benefit period was established effective December 20, 2020.

[5] On November 30, 2021, the Commission told her that it was not able to pay her EI benefits as of January 4, 2021, because she was taking a training course on her own initiative and had not shown that she was available for work. The Commission also told her that it could not pay her EI benefits as of December 20, 2020, because her study

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[1] See section 18(1)(a) of the *Employment Insurance Act* (Act), section 153.161 of Part VIII.5 of the Act, and sections 9.001 and 9.002(1) of *the Employment Insurance Regulations* (Regulations).
[2] See GD3-34, GD3-35, GD3-46, and GD3-47.
[3] See GD3-13 to GD3-26.
[4] See GD6-2, GD6-3, GD7-2, and GD7-3.

permit did not let her work more than 20 hours per week. The Commission told her that she had not shown that she was authorized to work full-time. The Commission told her that it considered her unavailable for work. It also told her that, if she owed money, she would receive a notice of debt.[5]

[6] On January 26, 2022, following a reconsideration request, the Commission informed her that the November 30, 2021, decision about the indefinite disentitlement to benefits imposed on her as of December 20, 2020, was removed. It told her that the decision also dated November 30, 2021, was replaced with a new decision maintaining that her disentitlement was established effective January 4, 2021, but that it ended April 30, 2021. The Commission told her that she would receive a notice of debt and would have to pay back the benefit payments she was not entitled to.[6]

[7] The Appellant says that she was available for work during the relevant period. She says that she has been studying in Canada since August 2017 and works part-time while studying in accordance with the rules of her study permit. The Appellant says that, since August 2018, she has had several periods of employment with X and that it is her usual employer. She says that she stopped working for that employer in December 2020 after the Government of Quebec introduced health restrictions because of the COVID-19 pandemic;[7] those restrictions included business closures. The Appellant says that she looked for a job. She says that she started working for her employer again on February 13, 2021. The Appellant explains that, when she contacted the Commission to inquire about her right to benefits, given her situation as an international student and the fact that she had lost her job due to COVID-19, she was told to apply and that her application would be reviewed. She says that, after applying for benefits, the Commission told her that she was entitled to benefits. The Appellant says that the Commission later explained to her that, if she had been paid benefits, it was a mistake and that she would have to repay them. She explains that she disagrees with having to pay back the amount the Commission is asking her to repay, since this has to do with a

[5] See GD3-32 and GD3-33.
[6] See GD3-46 and GD3-47.
[7] Coronavirus disease 2019.

mistake the Commission made. She is asking that her debt to the Commission be cancelled. On February 21, 2022, the Appellant disputed the Commission's reconsideration decision. That decision is now being appealed to the Tribunal.

Issues

[8] I have to decide whether the Appellant has proven that she was available for work during the period from January 4, 2021, to April 30, 2021, while taking training.[8] To decide this, I have to answer the following questions:

- Did the Appellant do the following?
    - rebut the presumption that she was not available for work
    - show a desire to return to the labour market as soon as a suitable job was available
    - express that desire through efforts to find a suitable job
    - set personal conditions that might have unduly limited her chances of going back to work

[9] I also have to decide whether the Appellant should pay back the benefits that she received and that the Commission is asking her to repay.[9]

Analysis

Availability for work

[10] The Federal Court of Appeal (Court) has held that a person who is in school full-time is presumed to be unavailable for work.[10] This is called "presumption of

[8] See section 18(1)(a) of the Act, section 153.161 of Part VIII.5 of the Act, and sections 9.001 and 9.002(1) of the Regulations.
[9] See sections 43, 44, and 52 of the Act and section 153.161 of Part VIII.5 of the Act.
[10] See the Federal Court of Appeal (Court) decision in *Cyrenne*, 2010 FCA 349.

non-availability.” It means we can suppose that this person is not available for work when the evidence shows that they are taking training full-time.

[11] But this presumption can be rebutted if certain conditions are met. The Court tells us that principles related to returning-to-studies cases can help rebut the presumption of non-availability.[11] These principles include:

- the attendance requirements of the course
- the claimant’s willingness to give up their studies to accept employment
- whether the claimant has a history of being employed at irregular hours
- the existence of “exceptional circumstances” that would enable the claimant to work while taking their course[12]

[12] Although this presumption of non-availability can be rebutted, the student still has to show that they are actually available for work.

[13] Two sections of the *Employment Insurance Act* (Act) indicate that claimants have to show that they are available for work.[13] Both sections deal with availability, but they involve two different disentitlements.

[14] First, a claimant is not entitled to receive benefits for a working day in a benefit period for which the claimant fails to prove that, on that day, the claimant was capable of and available for work and unable to find a suitable job.[14]

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[11] The Court established or reiterated these principles in the following decisions: *Lamonde*, 2006 FCA 44; *Cyrenne*, 2010 FCA 349; *Wang*, 2008 FCA 112; *Gagnon*, 2005 FCA 321; *Rideout*, 2004 FCA 304; *Boland*, 2004 FCA 251; *Loder*, 2004 FCA 18; *Primard*, 2003 FCA 349; and *Landry*, A-719-91.
[12] The Court established or reiterated these principles in the following decisions: *Lamonde*, 2006 FCA 44; *Cyrenne*, 2010 FCA 349; *Wang*, 2008 FCA 112; *Gagnon*, 2005 FCA 321; *Rideout*, 2004 FCA 304; *Boland*, 2004 FCA 251; *Loder*, 2004 FCA 18; *Primard*, 2003 FCA 349; and *Landry*, A-719-91.
[13] See sections 18(1)(a) and 50(8) of the Act.
[14] See section 18(1)(a) of the Act.

[15] Second, to prove availability for work, the Commission may require the claimant to prove that they are making reasonable and customary efforts to find a suitable job.[15]

[16] In its arguments, the Commission indicated that it required the Appellant to prove that her job search efforts were reasonable and customary, as section 50(8) of the Act states.[16]

[17] To determine whether a claimant is available for work, I have to consider the specific criteria set out in the Act for determining whether their efforts to find a suitable job are reasonable and customary.[17] According to these criteria, the efforts must be 1) sustained, 2) directed toward finding a suitable job, and 3) compatible with nine specific activities that can be used to help claimants get a suitable job.[18] These activities include assessing employment opportunities, registering for job search tools or with online job banks or employment agencies, contacting prospective employers, and submitting job applications.[19]

[18] The criteria for determining what constitutes a suitable job are the following: 1) the claimant's health and physical capabilities allow them to commute to the place of work and to perform the work, 2) the hours of work are not incompatible with the claimant's family obligations or religious beliefs, and 3) the nature of the work is not contrary to the claimant's moral convictions or religious beliefs.[20]

[19] The notion of "availability" is not defined in the Act. Court decisions have set out criteria for determining a person's availability for work and whether they are entitled to EI benefits.[21] These three criteria are:

- wanting to return to the labour market as soon as a suitable job is available

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[15] See section 50(8) of the Act.
[16] See GD4-5.
[17] See section 9.001 of the Regulations.
[18] See section 9.001 of the Regulations.
[19] See section 9.001 of the Regulations.
[20] See section 9.002(1) of the Regulations.
[21] The Court established or reiterated this principle in the following decisions: *Faucher*, A-56-96; *Bois*, 2001 FCA 175; and *Wang*, 2008 FCA 112.

- expressing that desire through efforts to find a suitable job
- not setting personal conditions that might unduly limit the chances of returning to the labour market[22]

[20] Whether a person who is taking a full-time course is available for work is a question of fact that must be determined in light of the specific circumstances of each case but based on the criteria set out by the Court. The claimant's attitude and conduct must be considered.[23]

[21] In this case, the Appellant has met the above criteria to prove that she was available for work during the period from January 4, 2021, to April 30, 2021. In addition to rebutting the presumption of non-availability, she has shown that her efforts to find a job during that period were reasonable and customary.

Issue 1: Did the Appellant rebut the presumption that she was not availability [*sic*] for work?

[22] Among the principles related to returning-to-studies cases that can prove a claimant's availability for work while taking training, I note that the Appellant has a history of being employed at irregular hours while taking full-time training. I find that this is an exceptional circumstance that allows the Appellant to rebut the presumption that she was unavailable for work.

[23] The evidence on file and the Appellant's testimony indicate that, since August 2018, she had several periods of employment while studying full-time.[24]

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[22] The Court established or reiterated this principle in the following decisions: *Faucher*, A-56-96; *Bois*, 2001 FCA 175; and *Wang*, 2008 FCA 112.
[23] See the Court's decisions in *Carpentier*, A-474-97; *Whiffen*, A-1472-92; and *Rondeau*, A-133-76.
[24] See the Record of Employment the employer X (X) issued on April 12, 2022, indicating that the Appellant worked during the following periods: August 18, 20218 [*sic*], to December 20, 2020, and February 15, 2021, to March 27, 2022—GD6-2 to GD6-5 and GD7-1 to GD7-4.

[24] The Appellant explains that the job she had from August 2018 onward, while in school full-time, was a part-time job.[25] She states that she was available to work full-time during the school breaks.[26]

[25] The Appellant explains that, after she arrived in Canada, the study permit she was issued let her work up to 20 hours per week during her academic terms.[27] She says that she could however work more than 20 hours per week if the job was on her university's campus. Also, she says that she was allowed to work more than 20 hours per week outside her academic terms and during her academic breaks.[28] The Appellant points out that she provided the Commission with all the information about the rules she had to follow to work during her studies and sent the Commission a copy of her study permit.[29]

[26] I find the Appellant's testimony that she can work following the rules of her work permit while taking full-time training to be persuasive. Her testimony is also supported by compelling evidence that she was able to do this.[30]

[27] The Appellant does not dispute that she was in school full-time during the period she was disentitled from receiving benefits, that is, from January 4, 2021, to April 30, 2021.

[28] I find that the Appellant has a work-study history showing that she is able to balance part-time work with her full-time studies while following the rules of her study permit.

[29] A decision by the Tribunal's Appeal Division (Appeal Division) indicates that the law does not require that a claimant have a history of full-time employment while

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[25] See GD2-5 and GD3-28.
[26] See GD3-29, GD3-30, GD3-39, and GD3-40.
[27] See GD3-15.
[28] See GD2-5, GD2-9, GD3-15, GD3-28 to GD3-31, GD3-36, GD3-37, and GD3-39 to GD3-43.
[29] See GD2-5, GD2-9, GD3-15, GD3-28 to GD3-31, GD3-36, GD3-37, and GD3-39 to GD3-43.
[30] See the Record of Employment the employer X (X) issued on April 12, 2022, indicating that the Appellant worked during the following periods: August 18, 20218 [sic], to December 20, 2020, and February 15, 2021, to March 27, 2022—GD6-2 to GD6-5 and GD7-1 to GD7-4.

attending school to rebut the presumption that, as a full-time student, they are unavailable for work under the Act.[31]

[30] That decision was about a claimant (student) with a history of full-time study and part-time employment indicating that she was working approximately 14 to 18 hours per week and looking for a part-time job of 16 to 20 hours weekly.[32]

[31] In that decision, the Appeal Division found that the nature of the claimant's previous employment—part-time employment—and the fact she had shown her ability to maintain part-time employment over the long term, while simultaneously attending full-time studies, were an exceptional circumstance sufficient to rebut the presumption of the claimant's non-availability.[33]

[32] Another decision by the Appeal Division indicates that a claimant (student) was able to rebut the presumption that he was not available for work by showing his history of part-time employment and full-time study.[34]

[33] In that decision, the Appeal Division found that the student had given persuasive testimony showing his consistent efforts to pick up as many shifts as possible during the school breaks, in addition to being able to work close to full-time hours.[35]

[34] Although I am not bound by the Tribunal's decisions, I consider its findings persuasive in showing that a person can rebut the presumption that they are not available for work while taking training full-time, if the person can show that they have experience simultaneously studying full-time and working part-time (work-study history). As a result, I adopt the same approach in this case.

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[31] See the Appeal Division decision in *JD v Canada Employment Insurance Commission*, 2019 SST 438.
[32] See the Appeal Division decision in *JD v Canada Employment Insurance Commission*, 2019 SST 438.
[33] See the Appeal Division decision in *JD v Canada Employment Insurance Commission*, 2019 SST 438.
[34] See the decision of the Tribunal's Appeal Division in *YA v Canada Employment Insurance Commission*, 2020 SST 238.
[35] See the decision of the Tribunal's Appeal Division in *YA v Canada Employment Insurance Commission*, 2020 SST 238.

[35] The Commission says that the Appellant has not successfully rebutted the presumption of non-availability for the following reasons: She limited herself to working for only one employer; studying full-time in Canada on a study permit did not allow her to work more than 20 hours per week off campus, under paragraph 186(v) of the *Immigration and Refugee Protection Regulations*; she demonstrated that she started looking for off-campus summer employment by May 2, 2021.[36]

[36] I do not accept the Commission's arguments about the presumption of non-availability.

[37] I find that the Appellant has shown she has a significant work-study history that helps her rebut this presumption, even if even if [*sic*] she had to follow specific rules about the number of hours of work she could carry out because of her study permit.

[38] I find that the Appellant has shown that she worked for more than two years while studying full-time.

[39] I find that the Commission's argument that the Appellant limited herself to working for only one employer does not mean that she must be presumed to not have been available for work for that reason.

[40] I also find that the fact that the Appellant followed the rules of her study permit does not prevent her from rebutting the presumption of non-availability.

[41] I find that the Appellant has rebutted the presumption, since she has a work-study history showing that she is able to balance part-time work with her full-time studies, while following the rules of her study permit.

[42] In my view, this is an exceptional circumstance sufficient to allow the Appellant to rebut the presumption that she was unavailable.

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[36] See GD4-5.

[43] Although the Appellant has rebutted the presumption that she was unavailable for work, I now have to decide whether she is actually available for work under the Act.

Issue 2: Did the Appellant show a desire to return to the labour market as soon as a suitable job was available?

[44] I find that the Appellant showed her desire to return to the labour market as soon as a suitable job was available during the period from January 4, 2021, to April 30, 2021. I find that, even though the Appellant was in training during that period, her intention was also to stay in the labour market.

[45] The Appellant argues that she was available for work during the period in question in accordance with the rules of her work permit.[37] She says that she was available to work for her usual employer every day of the week, without exception, during the period in question. She says that she could carry out her shifts with that employer during the week and on weekends, as required. She says that the store's opening hours are as follows: Monday to Wednesday, 10:00 a.m. to 6:00 p.m.; Thursday and Friday, 10:00 a.m. to 9:00 p.m.; and Saturday and Sunday, 10:00 a.m. to 5:00 p.m.

[46] The Appellant explains that the reason she stopped working in late December 2020 was that her employer had to shut down because of the COVID-19 pandemic, just as other businesses had to.[38]

[47] The Appellant explains that she had to go back to work with her employer on January 11, 2021, but that, in the end, she returned on February 13, 2021.[39]

[48] I find that, during the relevant period, and after being laid off on December 20, 2020, the Appellant did not stop showing her desire to find work.

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[37] See GD2-5, GD2-9, GD3-28 to GD3-31, GD3-36, GD3-37 and GD3-39 to GD3-43.
[38] See GD3-16 to GD3-21, GD3-36, and GD3-37.
[39] See GD3-21.

[49] I note that the evidence on file also shows that the Appellant's employment ended because of a shortage of work and that she returned to work for that employer mid-February 2021.[40]

[50] I have no reason to doubt that the Appellant wanted to work and stay in the labour market during the period from January 4, 2021, to April 30, 2021.

[51] I find that, even though the Appellant chose to take training full-time, this situation did not affect her desire to return to the labour market as soon as a suitable job was available during the relevant period.

Issue 3: Did the Appellant express that desire through efforts to find a suitable job?

[52] I find that the Appellant expressed her desire to go back to work through efforts to find a suitable job during the period from January 4, 2021, to April 30, 2021.

[53] The Appellant explains that she did not look for work when she stopped working in late December 2020 until January 2021, since she hoped to return to work for her usual employer.

[54] In her statement to the Commission on January 22, 2021, the Appellant indicated that she had not made efforts to find a job since the start of her course or training program or since becoming unemployed.[41] She said that she was to go back to work on January 11, 2021, and that stopping work for two weeks was not an issue for her. The Appellant explained that the store closure had been extended. She said that she did not want to take up a new job because, technically, she was still employed by her employer. She also explained that she was going to go back to her usual job as soon as businesses reopened.[42]

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[40] See the Record of Employment the employer X (X) issued on April 12, 2022—GD6-2 to GD6-5 and GD7-1 to GD7-4.
[41] See GD3-16 and GD3-21.
[42] See GD3-16 and GD3-21.

[55] The Appellant explains that, after her employer told her in late December that it would have to shut down in light of the government's decision, she was in contact with her employer a few times to find out when she would be able to return to work. She says that she was following the government's announcements and that she knew that, as soon as the government allowed businesses to open again, she would be able to return to work. She points out that the decision for her to return to work was not made by her employer, but by the government.

[56] In its statement to the Commission on January 24, 2022, the employer X explained that its business was closed from December 25, 2020, to February 2021, because of COVID-19. It said that, if this had not been the case, the Appellant would have been available for work. It indicated that she was available to work 20 hours per week, while she had courses, and full-time after her courses ended but that it divided up the hours between the employers.[43]

[57] The Appellant says that she made efforts to find another job given that the COVID-19 situation had persisted. In her February 2, 2021, statement to the Commission, she said that she had made efforts to that end.[44]

[58] In her statement to the Commission on January 18, 2022, the Appellant explained that she had told her usual employer that she was available full-time. Also, she said that lockdown measures (ex. closing businesses) had meant that she had not worked for a month and that she had looked for another job at the same time.[45]

[59] The Appellant states that, from January 2021 until the end of April 2021, she made the following job search efforts:

a) registering on the site *Guichet-Emplois* (a job hunting platform), following what a Commission agent suggested for finding a suitable job

[43] See GD3-44 and GD3-45.
[44] See GD3-22 and GD3-27.
[45] See GD3-39 and GD3-40.

b) updating her résumé and asking a friend, a human resources (HR) specialist, to review it; writing a cover letter based on her résumé

c) searching on the site LinkedIn; preparing her applications for jobs she applied for in May 2021 (ex., L'Oréal, Chanel)[46]

d) using her personal network

e) finding out about job opportunities on the HEC university campus (ex., cafeteria clerk and shop clerk); working in these types of jobs was not possible because they were in limbo since the university was closed and courses were not being held in person

[60] The Appellant says that she started working for her usual employer again February 13, 2021. She explains that, after returning to that job and finding that her working hours had been significantly reduced since there was not as much clientele due to COVID-19, she looked for work somewhere else with networking.

[61] In this case, I find that the Appellant made "reasonable and customary efforts" in the "search for suitable employment"—that is, sustained efforts directed toward finding a suitable job and compatible with nine specific activities that can be used to help claimants get a suitable job.[47]

[62] In assessing the Appellant's availability for work and her efforts to find a suitable job, I am taking into account the fact that she worked part-time for more than two years while in school full-time. I find that her part-time employment was her usual employment.

[46] See GD3-39 to GD3-43.
[47] See section 9.001 of the Regulations.

[63] I find the Appellant's testimony that she has been working since August 2018 while studying full-time to be credible. Her statement is also supported by compelling evidence about this.[48]

[64] I find that the Appellant has shown that she worked most of the time during the period from January 4, 2021, to April 30, 2021.

[65] Although section 9.002(1) of the *Employment Insurance Regulations* (Regulations) describes the criteria for determining what constitutes suitable employment,[49] it does not otherwise or more clearly define the expression "suitable employment."

[66] I point out that, in addition to those criteria,[50] the Act also sets out characteristics describing what constitutes employment that is "not suitable."[51] I find that the criteria set out in the Regulations[52] and these characteristics[53] have to be considered together to be able to determine what constitutes suitable employment based on a claimant's circumstances.

[67] These characteristics indicate, for example, that employment is not suitable employment if it is not in the claimant's usual occupation.[54] Section 6(4)(c) of the Act also says that this employment in a different occupation, or that is not suitable, includes conditions less favourable or lower earnings than those that a claimant could reasonably expect to obtain, taking into account the conditions and earnings the claimant would have had if they had remained in their previous employment.

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[48] See the Record of Employment the employer X (X) issued on April 12, 2022, indicating that the Appellant worked during the following periods: August 18, 20218 [*sic*], to December 20, 2020, and February 15, 2021, to March 27, 2022—GD6-2 to GD6-5 and GD7-1 to GD7-4.
[49] The criteria are the following: 1) the claimant's health and physical capabilities allow them to commute to the place of work and to perform the work, 2) the hours of work are not incompatible with the claimant's family obligations or religious beliefs, and 3) the nature of the work is not contrary to the claimant's moral convictions or religious beliefs.
[50] See section 9.002(1) of the Regulations.
[51] See sections 6(4) and 6(5) of the Act.
[52] See section 9.002(1) of the Regulations.
[53] See sections 6(4) and 6(5) of the Act.
[54] See section 6(4)(c) of the Act.

Section 6(5) of the Act broadens the types of jobs that can be suitable, since the provisions of section 6(4)(c) of the Act no longer apply after a reasonable period.

[68] Based on the characteristics set out in the Act to describe what constitutes employment that is not suitable,[55] I am of the view that suitable employment includes employment that is in the claimant's usual occupation (ex., same nature, earnings, and working conditions).[56]

[69] With this in mind, I find that the fact that the Appellant has worked part-time for more than two years while studying full-time amounts to employment in her usual occupation, since it has been her usual employment. This is the same type of job she has had since she started her training.

[70] The Court also tells us that the notion of suitable employment is defined in part with reference to the personal circumstances of the claimant.[57]

[71] So, in assessing the Appellant's availability for work, I am taking into account the specific characteristics of her case, namely that she worked part-time as a clerk while studying full-time.

[72] I note that the Act does not specifically require a claimant to be available for full-time work. In addition, the Appellant's usual employment is part-time employment. I find that it is suitable employment in her case.

[73] I also find that the Appellant's personal circumstances were affected by the particular job market conditions in many sectors of the economy due to the COVID-19 pandemic. Because of the pandemic, the Government of Quebec has introduced health restrictions at different times since March 2020, including during the Appellant's training period. These restrictions included business closures. They also included reduced

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[55] See sections 6(4) and 6(5) of the Act.
[56] In English, sections 6(4)(b) and 6(4)(c) of the Act use the expression "claimant's usual occupation," which can also be translated as "*occupation habituelle d'un prestataire*."
[57] The Court established this principle in *Whiffen*, A-1472-92.

operating hours for businesses and specific customer capacity limits based on the space occupied by these businesses.

[74] In determining that the Appellant has proven her availability for work, and in addition to the fact that she worked part-time, I am also taking into account that, when she stopped working in late December 2020, she went through a period of uncertainty as to when she would be going back to her job with her usual employer. This period of uncertainty was caused by the situation created by the COVID-19 pandemic and by the government's closing businesses for an unspecified period.

[75] In my view, it is necessary to consider the unusual and unpredictable situation the Appellant faced when she had to stop working in late December 2020.

[76] I find that the situation created by the pandemic forced the Appellant to stop working in her usual employment, but that this situation lasted for only a few weeks in her case.

[77] Given this situation, I am of the view that she was entitled to a period of time to assess how she would be able to go back to her job with her employer before making other efforts to work.

[78] As a result, I find that the Appellant needed a "reasonable interval" before accepting employment that was not in her usual occupation, as the Act states.[58]

[79] With this in mind, I accept the Appellant's explanation from her January 22, 2021, statement to the Commission that she had not made efforts to find a job since the start of her course or training program or since becoming unemployed, as she expected to go back to work on January 11, 2021, that stopping work for two weeks was not an issue for her, and that she did not want to take up a new job because she was still employed by X.[59]

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[58] See sections 6(4) and 6(5) of the Act.
[59] See GD3-16 and GD3-21.

[80] The Commission argues that, after having required the Appellant to prove that her job search efforts were reasonable and customary,[60] the Appellant says that she did not make efforts to find work since the start of her training course or since becoming unemployed because she limited herself to the existing employment relationship with the employer X.[61]

[81] I do not accept the Commission's argument on this point.

[82] I take it that the Commission is referring to a statement the Appellant made January 22, 2021, when she had only just stopped working a few weeks before and was waiting to go back to work with her usual employer.[62] As for the January 18, 2022, statement that the Commission is also referring to, that statement is in relation to the period in question; it summarizes what the January 22, 2021, statement covered nearly a year earlier.[63]

[83] I note that none of those statements indicates that the Appellant had not looked for work throughout her entire disentitlement period. I also note that, in her January 18, 2022, statement, the Appellant also said that she was without work for one month after lockdown and that she was looking for another job [translation] "at the same time."[64]

[84] I find that, in addition to not considering every point from the Appellant's January 18, 2022, statement, the Commission has also not considered the Appellant's February 2, 2021, statement where she said that she had made efforts to find a job.[65] The Commission has also not considered the Appellant's testimony detailing all her job search efforts during the period in question.

[85] Also, I do not accept the Commission's argument that the Appellant has not shown that she made efforts to find work on campus where she could work full-time

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[60] See section 50(8) of the Act.
[61] See GD3-21, GD3-39, GD3-40, and GD4-5.
[62] See GD3-16 and GD3-21.
[63] See GD3-39 and GD3-40.
[64] See GD3-40.
[65] See GD3-22 and GD3-27.

under paragraph 186(f) of the *Immigration and Refugee Protection Regulations*.[66] I find that the Appellant's testimony demonstrated this in setting out how she looked for work.

[86] The Commission also says that the Appellant has not proven that she made efforts to find work between January 4, 2021, and April 30, 2021, despite the fact that she did not work the full 20 hours per week that she was limited to working under section 186(v) of the *Immigration and Refugee Protection Regulations*.[67]

[87] On this point, I find that the Commission has not considered the Appellant's explanation that, when she went back to work on February 13, 2021, her employer had fewer hours to give her because of the COVID-19 situation and the reduced clientele the business saw from that.

[88] I point out that, in its January 24, 2022, statement to the Commission, the employer X explained that the Appellant was available to work 20 hours per week, while she had courses, and full-time after her courses ended, but that it divided up the hours between the employers.[68]

[89] I also note that the April 12, 2022, Record of Employment from that employer indicates an unknown date of recall following the Appellant's job ending on December 20, 2020.[69] This document does not say that the Appellant was not returning to work.[70]

[90] I find that, even though the Appellant did not start looking for a job right after being laid off in late December 2020, she remained available to go back to work for her usual employer and contacted her employer to find our when it would be possible for her to do so. I find that the Appellant made active efforts to continue working for that

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[66] See GD3-15 and GD4-5.
[67] See GD3-15 and GD4-6.
[68] See GD3-44 and GD3-45.
[69] See GD6-2 and GD7-4.
[70] See GD6-2 and GD7-4.

employer. I note that the Appellant started working for that employer again as early as mid-February 2021.

[91] The Court tells us that a claimant who was waiting to be called back to work after being laid off—for a three-month period in that case—should not, especially without being told about it, have been disentitled from receiving benefits because they had not been available for work since the start of their benefit period.[71]

[92] I also note that, in one of its decisions, the Appeal Division also found that, before disentitling a claimant from receiving benefits for not providing the proof of reasonable and customary efforts to find a suitable job that it requires, the Commission must first ask the claimant for the proof, and it must specify what kind of proof will satisfy its requirements.[72]

[93] Several Umpire decisions also indicate that a claimant is entitled to wait for a recall for a reasonable period of time before beginning to seek employment elsewhere, or that they may not have to prove an active job search, at least for a certain period, if they can reasonably expect to be called back to work.[73]

[94] Although I am not bound by Appeal Division or Umpire decisions,[74] I find that these decisions are consistent with the provisions of the Act that say that a claimant is entitled to a reasonable period, depending on the circumstances, before having to actively look for a job.

[95] I find that, considering the obstacles the Appellant faced because of COVID-19 and the fact that she usually worked part-time, her availability for work led to concrete

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[71] See the Court's decision in *Carpentier*, A-474-97. In that case, the Court referred the matter back to a different Board of Referees to be decided again.
[72] See the decision of the Tribunal's Appeal Division in *LD v Canada Employment Insurance Commission*, August 10, 2020, 2020 SST 688, AD-20-575 (para 16).
[73] See CUB 21239, CUB 54712, CUB 61516, and CUB 67674.
[74] See the decision of the Tribunal's Appeal Division in *LD v Canada Employment Insurance Commission*, August 10, 2020, 2020 SST 688, AD-20-575; and CUB 21239, CUB 54712, CUB 61516, and CUB 67674.

and sustained efforts to find suitable employment with prospective employers. Her periods of employment show this.

[96] I find that, during the period from January 4, 2021, to April 30, 2021, the Appellant fulfilled her responsibility of actively looking for a suitable job to be able to receive EI benefits.

Issue 4: Did the Appellant set personal conditions that might have unduly limited the chances of returning to the labour market?

[97] I find that the Appellant did not set "personal conditions" that unduly limited her chances of returning to the labour market during the period from January 4, 2021, to April 30, 2021. I find that the Appellant's decision to take training full-time did not hurt her desire and efforts to stay in the labour market.

[98] The Appellant says that she spent 15 to 24 hours per week on her training.[75] She indicates that she was obligated to attend scheduled classes or scheduled sessions (in-person, online, or by telephone).[76] She says that all her course obligations occurred outside of her normal work hours.[77]

[99] The Appellant says that, if she had found full-time work but the job conflicted with her course or program, she would have finished her training.[78]

[100] She also says that she was not approved for the training under an employment or skills development program. She decided on her own to take it.[79]

[101] The Appellant explains that she looked for work in accordance with the conditions or rules set out in her study permit.

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[75] See GD3-23.
[76] See GD3-26.
[77] See GD3-26.
[78] See GD3-26 and GD3-27.
[79] See GD3-23.

[102] I find that, by choosing to take training full-time, the Appellant set personal conditions. But, in my view, they were not conditions that unduly limited her chances of returning to the labour market.

[103] Objectively, despite taking training full-time, the Appellant made sustained efforts to stay in the labour market. In fact, she was able to do so the vast majority of the time during the period from January 4, 2021, to April 30, 2021.

[104] I find that the Appellant did not limit her employment prospects after being laid off in late December 2020 either. She went back to the job she had had since August 2018, which had conditions that allowed her to continue her training. I understand that she also looked for work elsewhere not just with her usual employer.

[105] So, I do not accept the Commission's argument that the Appellant unduly limited her availability for work to only one employer (X) between January 4, 2021, and April 30, 2021.[80]

[106] I am also of the view that the Appellant's study permit conditions for her to be able to work while taking training are not personal conditions. To be able to study and work in Canada, these are conditions the Appellant is subject to. I note that her study permit specifies that she must cease working if she is no longer meeting the eligibility criteria.[81] I find that the Appellant has complied with all the necessary requirements of her study permit as to the number of hours she was allowed to work during her training.

[107] In the circumstances, I accept the Appellant's explanation that she prioritized her training while working under conditions that allowed her to do so.

[108] In my view, the Appellant did not unduly limit her chances of returning to the labour market despite the demands of her training.

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[80] See GD4-6.
[81] See the document entitled "Study Permit/*Permis d'études*"—GD3-15.

[109] I find that, during the period from January 4, 2021, to April 30, 2021, the Appellant did not set personal conditions that unduly limited her chances of going back to work.

Liability to repay benefits paid

[110] Since I have found that the Appellant has proven her availability for work during her training, she should not have to pay back the benefits the Commission is asking her to repay. It is up to the Commission to resolve this matter with the Appellant in accordance with the provisions of the Act.[82]

Conclusion

[111] I find that the Appellant has proven that she was available for work within the meaning of the Act during the period from January 4, 2021, to April 30, 2021. The Appellant can receive EI benefits for that period. She should not have to pay back the benefits the Commission is asking her to repay for that period.

[112] This means that the appeal is allowed.

Normand Morin
Member, General Division – Employment Insurance Section

[82] See also sections 43, 44, and 52 of the Act and section 153.161 of Part VIII.5 of the Act.