



[TRANSLATION]

Citation: *AG v Canada Employment Insurance Commission*, 2021 SST 994

**Social Security Tribunal of Canada  
General Division – Employment Insurance Section**

## Decision

**Appellant:** A. G.  
**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** Canada Employment Insurance Commission  
reconsideration decision (433127) dated  
September 17, 2021 (issued by Service Canada)

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**Tribunal member:** Josée Langlois  
**Type of hearing:** Teleconference  
**Hearing date:** November 26, 2021  
**Hearing participant:** Appellant  
**Decision date:** December 3, 2021  
**File number:** GE-21-1934

## Decision

[1] The appeal is allowed.

[2] The Appellant has shown that she was available for work within the meaning of the *Employment Insurance Act* (Act) from October 5, 2020, to June 18, 2021.

## Overview

[3] The Appellant worked as a dance teacher at X. She stopped working temporarily on October 4, 2020, because of the government's public health measures during the COVID-19 pandemic.

[4] On September 17, 2021, the Canada Employment Insurance Commission (Commission) decided that the Appellant was disentitled from receiving Employment Insurance (EI) regular benefits from October 5, 2020, to June 18, 2021, because she was taking training on her own initiative and wasn't available for work.

[5] This decision resulted in a benefit overpayment of \$14,444 that the Appellant now has to repay.

[6] The Appellant has to be available for work to get EI regular benefits. Availability is an ongoing requirement. This means that the Appellant has to be searching for a job.

[7] The Appellant says she stopped working because of the COVID-19 pandemic, and she adapted at her employer's request. Also, she maintained her relationship with the students in her group at her employer's request, and she applied for another job while waiting for instructions from the government that would allow her to go back to her job.

[8] She says she was disappointed the Commission paid her benefits that she now has to repay, when she was transparent about her student status from the moment she made her claim for benefits.

[9] She says that she relied on the person who helped her when she contacted Service Canada and that she would have liked for them to refer her to the right person if they didn't know the answers to her questions. She says that she has always acted in good faith and that, had she known she wasn't entitled to EI benefits, she could have asked for benefits from another plan.

[10] The Commission says that the Appellant wasn't available for work from October 5, 2020, to June 18, 2021, because she was prioritizing her training and that she didn't show any effort to find a job.

[11] I have to decide whether the Appellant was available for work within the meaning of the Act between October 5, 2020, and June 18, 2021, and whether she can receive EI benefits for that period. The Appellant has to prove her availability 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.

## **Issue**

[12] Was the Appellant available for work from October 5, 2020, to June 18, 2021?

## **Analysis**

### **Reasonable and customary efforts to find a job**

[13] The law sets out criteria for me to consider when deciding whether the Appellant's efforts were reasonable and customary.<sup>1</sup> I have to look at whether her efforts were sustained and whether they were directed toward finding a suitable job. In other words, the Appellant has to have kept trying to find a suitable job.

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<sup>1</sup> See section 9.001 of the *Employment Insurance Regulations* (Regulations) and section 50(8) of the *Employment Insurance Act* (Act).

[14] I also have to consider the Appellant's efforts to find a job. The *Employment Insurance Regulations* (Regulations) list nine job-search activities I have to consider, including the following:<sup>2</sup>

- assessing employment opportunities
- preparing a résumé or cover letter
- registering for job-search tools or with online job banks or employment agencies
- contacting employers who may be hiring
- applying for jobs

[15] The Commission says that the Appellant focused on her studies and that she was passively waiting for her employer to call her back. For this reason, it finds that the Appellant hasn't shown that she made reasonable and customary efforts to find a job.

[16] On January 22, 2021, the Appellant told the Commission she had made efforts to find a job. She said that she had stopped working because of the COVID-19 pandemic but that, even though she wasn't paid for all of the hours she put toward her job, she had maintained a relationship with the students enrolled in her dance class.

[17] At the time, she didn't know when she could go back to the job she worked for 7 hours a week. However, she says she showed that she was available to work other jobs for the same employer.

[18] She applied for two jobs. One was providing customer service at the boutique and the other was a full-time job at the summer day camp. When she told her employer she was interested in working at the boutique, it seemed convinced it could offer her a few hours. The Appellant started working at the boutique in early May 2021.

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<sup>2</sup> See section 9.001 of the Regulations.

[19] Also, in March 2021, the employer told the Appellant that she was hired for the day camp job she had applied to. This was a full-time job set to start in June 2021.

[20] The Appellant says that she is a student but that she always works a few hours a week to earn a living and that she had enough hours of insurable employment to establish a benefit period.

[21] Despite the fact that many businesses were closed because of the COVID-19 pandemic, the Appellant has shown her employer her availability to accept another job as soon as one was available. The Appellant has experience working as a dance teacher. But she applied for a customer service job at the boutique to make up for the fact that she could not teach in the short-term. She says that she was waiting for instructions from the government to go back to her job but that she spent a few hours toward that job during the year.

[22] The Appellant's efforts were reasonable and customary, and directed toward accepting a job as soon as one was available.

[23] The Appellant kept trying to find a job between October 5, 2020, and June 18, 2021. I find that she has shown that she was available for work within the meaning of section 50(8) of the Act and under sections 9.001 and 9.002 of the Regulations.

### **Capable of and available for work**

[24] Case law sets out three factors for me to consider when deciding whether a claimant is capable of and available for work but unable to find a suitable job. The Appellant has to prove the following three things:<sup>3</sup>

- She wanted to go back to work as soon as a suitable job was available.
- She has made efforts to find a suitable job.

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<sup>3</sup> 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.

- She didn'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 Appellant's attitude and conduct.<sup>4</sup>

– **Wanting to go back to work**

[26] The Commission says that the Appellant didn't show a desire to go back to work because she was focusing on her training, which she was taking full-time.

[27] At the hearing, the Appellant said that she worked as a teacher at the dance school seven hours a week. Even though she stopped working because of the COVID-19 pandemic, she still organized virtual sessions with her students, at her employer's request. She did this partly on a volunteer basis so she could keep her job and honour her contract with her employer.

[28] She says she created online videos for her students and held some online dance sessions. She says she duly reported all hours she was paid for to the Commission.

[29] She says that dance groups are organized in September every year for classes and that when she agrees to teaching a specific group, she makes a commitment with the employer to be available to teach for the duration of the course—from September to May.

[30] Even though the Appellant told the Commission she made no effort to find a job, she did, in fact, show she was available to work for the employer and applied for other jobs with the same employer.

[31] I accept the Appellant's explanation that she was studying full-time, but that she was available to work part-time, and that she was looking for a job with that in mind.

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<sup>4</sup> Two decisions set out this requirement. Those decisions are *Canada (Attorney General) v Whiffen*, A-1472-92; and *Carpentier v Canada (Attorney General)*, A-474-97.

[32] The Appellant showed a desire to go back to work from October 5, 2020, to June 18, 2021.

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

[33] To be able to get EI benefits, the Appellant is responsible for actively looking for a suitable job.<sup>5</sup>

[34] The Commission says that the Appellant hasn't shown she made any efforts to find a job and that she was prioritizing her training instead.

[35] As she said at the hearing, the Appellant was transparent with the Commission and reported that she was studying while giving details about her courses from the moment she made her claim for benefits.

[36] At the hearing, she said she made efforts to find another job with her employer to keep her job, but also to be able to work while waiting to start teaching dance again.

[37] The Appellant applied for a job at the boutique to make up for the seven hours she could not completely work because of classes being put on hold at the employer. She also applied to work full-time at the 2021 summer camp. The employer was confident it could guarantee her a few hours, and she did get hired to work at the boutique in May 2021. In March 2021, she was also told she had been hired to work at the summer camp during the summer of 2021. This was a full-time job, which started in June 2021.

[38] At the same time, the Appellant continued meeting virtually with her students so she could go back to teaching dance as soon as possible.

[39] The Appellant has to be available for work to be able to get EI regular benefits. Availability is an ongoing requirement. This means that she has to be searching for a job.

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<sup>5</sup> This principle is explained in the following decisions: *Cornelissen-O'Neill*, A-652-93; and *De Lamirande*, 2004 FCA 311.

[40] I note that the Appellant made efforts to find a suitable job and to keep her job as a dance teacher. Despite the challenges brought on by the COVID-19 pandemic and of most businesses and restaurants being closed, she still made efforts to get a job quickly by focusing on immediate job opportunities.

[41] Given the Appellant's statements at the hearing, I find that she made efforts to find a suitable job from October 5, 2020, to June 18, 2021.

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

[42] The Commission argues that the Appellant has failed to rebut the presumption of non-availability because she is taking a full-time training course and is restricting her availability, which limits her chances of finding a job. The Commission also says that the Appellant would not accept work at the times she attends her classes.

[43] The Appellant says she attended classes in security and police studies at the Université de Montréal starting September 1, 2020. She was studying part-time during the fall 2020 semester and full-time during the winter 2021 semester. She was also registered for two courses, six hours of courses, during the summer 2021 semester, from May 4, 2021, to June 22, 2021.

[44] I presume that the courses the Appellant is taking make her unavailable for work within the meaning of the Act.

[45] This presumption of non-availability can be rebutted based on four principles relating specifically to return-to-studies cases.<sup>6</sup>

[46] These principles are:<sup>7</sup>

- the attendance requirements of the course
- the claimant's willingness to give up their studies to accept employment

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<sup>6</sup> *Landry*, A-719-91; *Lamonde*, 2006 FCA 44; *Gagnon*, 2005 FCA 321 (CanLII); *Floyd*, A-168-93.

<sup>7</sup> This principle is explained in the following decision: *Gagnon*, 2005 FCA 321 (CanLII).



- 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

[47] On December 12, 2020, the Appellant said she dedicated about 15 hours to her studies from September 1, 2020, to December 16, 2020. The Commission agent’s transcripts indicate the Appellant said that she had to attend her classes following a specific schedule and that she could not change this schedule.

[48] When she applied for benefits, the Appellant reported that if she was offered a full-time job, she would accept it, but she would ask that it begin once her courses were over. However, she indicated that she was looking for a part-time job like she had before she lost her job because of the government’s public health measures during the COVID-19 pandemic.

[49] On January 22, 2021, the Appellant reported she dedicated about 25 hours to her courses for the 2021 winter semester, from January 13, 2021, to April 21, 2021. She then reported that she made efforts to find a job.

[50] At the hearing, the Appellant said that, because of the COVID-19 pandemic, most courses were offered remotely by Zoom.<sup>8</sup> While her schedule is more rigid when she has to attend in-person courses that follow the schedule provided at the beginning of the semester, during the pandemic, professors did things differently. Classes were recorded, and she could watch the recordings whenever was most convenient for her. She didn’t have to restrict her schedule, and her chances of finding a job weren’t limited.

[51] She says that none of her course-related obligations conflicted with her work schedule as a dance teacher and that, if it weren’t for the COVID-19 pandemic, she would have continued working while studying.

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<sup>8</sup> GD3-36.

[52] As the Commission stated: A claimant who is taking a training course without having been referred by a designated authority has to prove that they are capable of and available for work and unable to find a suitable job. The claimant has to meet the availability requirements the same as any other claimant who wants regular benefits.<sup>9</sup>

[53] However, contrary to what the Commission says, the Appellant didn't necessarily have to attend her classes live. As she explained at the hearing, her classes were recorded, and she could watch them whenever was most convenient for her.

[54] So, her schedule wasn't limited because she could take her courses in the evenings and on weekends. Even if she had wanted to quickly go back to her job as a dance teacher and had kept up her involvement with or without compensation, the public health measures didn't let her. She made all of the necessary arrangements to make up the hours she had working for the employer by taking a job at the boutique.

[55] In my view, the Appellant has rebutted the presumption of non-availability while in school. She has shown that she worked part-time while dedicating between 15 and 25 hours a week to her studies. She has shown that she was available for her employer and that she was looking for another job. She took action.

[56] I find that the existence of "**exceptional circumstances**" enables the Appellant to work while taking training.

[57] The insurable hours of employment a claimant accumulates when working full-time aren't the only history that may be considered in establishing a benefit period. And, **employment history isn't the only basis on which the presumption of availability may be rebutted.**<sup>10</sup> The presumption of non-availability can be rebutted through proof of exceptional circumstances.<sup>11</sup>

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<sup>9</sup> Section 153.161(1) of the Act.

<sup>10</sup> See the decision of the Tribunal's Appeal Division in *JD v Canada Employment Insurance Commission*, 2019 SST 438; and *Attorney General of Canada v Rideout*, 2004 FCA 304.

<sup>11</sup> *Attorney General of Canada v Wang*, 2008 FCA 112; and *Landry*, A-719-91.

[58] So, exceptional circumstances can be associated with a history of part-time employment. The Appellant has been studying and working part-time. If it weren't for the COVID-19 pandemic, she would have kept working part-time while taking her training to support herself.

[59] Even though the Appellant wanted to honour her commitment to her employer and she remained available to go back to her job as soon as possible, she made efforts to find a another job with the same employer. She also made efforts to keep her employment relationship to keep her job.

[60] She worked a few hours a week; sometimes she was compensated and sometimes she wasn't. She did so to maintain her relationship with her students to keep her job, which she hoped to go back to as soon as possible. She also applied to two other jobs with the same employer, and she got both of them.

[61] Even though the Commission argues that it wasn't until June 21, 2021, that she went back to her job, the facts show that on June 21, 2021, the Appellant started working full-time at the day camp.

[62] The Appellant is taking training (part-time during the 2020 fall semester, full-time during the winter semester, and part-time during the 2021 summer semester). But, she has successfully rebutted the presumption that a person who is taking a full-time training course on their own initiative isn't available for work.<sup>12</sup>

[63] Exceptional circumstances allow me to find that, if it weren't for the COVID-19 pandemic, the Appellant would have kept working part-time. She said that she had already worked part-time while studying full-time while at CEGEP before starting university. The Appellant has combined her work and study schedules for the past few years. She also reported it to the Commission when she applied for benefits.<sup>13</sup>

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<sup>12</sup> This principle is explained in the following decisions: *Landry*, A-719-91; *Lamonde*, 2006 FCA 44, *Gagnon*, 2005 FCA 321 (CanLII); and *Paxton*, 2002 FCA 360 (CanLII).

<sup>13</sup> GD3-22.

[64] I find that no personal conditions unduly limited the Appellant's chances of finding a suitable job between October 5, 2020, and June 18, 2021. The Appellant was working part-time, and she has shown, through her employment history, that she was available to work part-time while studying full-time.

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

[65] I have to apply the criteria for determining whether the Appellant was available for work within the meaning of the Act and whether she can receive benefits for the period between October 5, 2020, and June 18, 2021.

[66] Exceptional circumstances surrounding the end of her job allow me to find that, the Appellant has shown that, if it weren't for the COVID-19 pandemic, she would have kept working as a dance teacher part-time.

[67] The Appellant made efforts to find another job to make up her hours. She got two jobs she showed interest in with her current employer. To be entitled to receive benefits, the Appellant has to be available for work each working day of her benefit period, and she has to show that she made efforts to find a job each working day of her benefit period.

[68] I find that the Appellant has shown that she was available for work from October 5, 2020, to June 18, 2021, within the meaning of section 50(8) of the Act and under sections 9.001 and 9.002 of the Regulations.

[69] Based on my findings on the three factors, I find that the Appellant has shown that she was capable of and available for work.

## **Conclusion**

[70] The appeal is allowed.

Josée Langlois  
Member, General Division – Employment Insurance Section