Citation: *JF v Canada Employment Insurance Commission*, 2022 SST 654

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	J. F.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (448615) dated January 20, 2022 (issued by Service Canada)

Tribunal member:	Mark Leonard
Type of hearing:	Videoconference
Hearing date:	April 5, 2022
Hearing participants:	Appellant
Decision date:	April 12, 2022
File number:	GE-22-564

Decision

[1] The appeal is dismissed.

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

Overview

[3] The Canada Employment Insurance Commission (Commission) decided that the Appellant was disentitled from receiving EI regular benefits from April 26, 2021, to January 14, 2022, 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 Appellant has proven that he was available for work. The Appellant 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 that the Appellant wasn't available because he was in school full-time. It added that the Appellant did not make efforts to find employment and had conditions that limited his availability for work.

[6] The Appellant disagrees and says that his courses were in the evening and he was available to work during the day. He says that he has both worked and attended school in the past. He advised that he did not think he needed to seek other employment because he had a job he would return to whenever his previous employer recalled him. He seeks to have his benefits reinstated.

Issue

[7] Was the Appellant available for work while in school?

Analysis

[8] Two different sections of the law require claimants to show that they are available for work. The Commission decided that the Appellant was disentitled under both of these sections. So, he has to meet the criteria of both sections to get benefits.

[9] 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.

[10] 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.

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

[12] In addition, the Federal Court of Appeal has said that claimants who are taking training full-time are presumed to be unavailable for work.[5] This is called the "presumption of non-availability." It means we can suppose that students aren't available for work when the evidence shows that they are taking training full-time.

[13] The Act was recently changed and new provisions apply to the Appellant. As I read the new provisions, the presumption of unavailability has been displaced.[6] A full-

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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.
[6] See Section 153,161 (1) of the *Employment Insurance Act*.

time student is not presumed to be unavailable, but rather, must prove their availability just like any other claimant.

Reasonable and customary efforts to find a job (Section 50(8))

[14] 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.[7] This section requires claimants to prove they are making efforts to find a job in order to be eligible for benefits.

[15] The law sets out criteria for me to consider when deciding whether the Appellant's efforts were reasonable and customary.[8] I have to look at whether his efforts were sustained and whether they were directed towards finding a suitable job. In other words, the Appellant has to have kept trying to find a suitable job.

[16] I also have to consider the Appellant's efforts to find a job. The Regulations list nine job-search activities I have to consider. Some examples of those are the following:[9]

- 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

[17] The Commission says that the Appellant didn't do enough to try to find a job. They say that the Appellant admitted that he did not look for any other suitable employment after he was laid off in April 2021. The Appellant was separated from his employment and established an initial claim effective April 25, 2021.

[18] After completion of the Commission's course and training program questionnaire, the Commission questioned the Appellant regarding his schooling and his efforts to find

[7] See section 50(8) of the Act.
[8] See section 9,001 of the Regulations.
[9] See section 9,001 of the Regulations.

employment. The Appellant told the Commission he was not and had not been looking for work.

Awaiting a recall to work

[19] The Appellant relayed to Commission that he already had a job and was awaiting recall. In testimony, the Appellant stated that he thought it was unfair to his Employer to find new employment when they were expecting he would return immediately when recalled. So, he did not try to find other employment.

[20] The Employer did provide the Appellant a letter stating its intent to recall the Appellant but did not provide any assurances of an imminent recall. In fact, he would not be called back to work with his Employer until September 10, 2021. This is a period of nearly six months.

[21] The Commission determined that the Appellant had not met the requirements of making reasonable and customary efforts to find another job and disqualified him from receiving benefits.

[22] He confirmed these facts in both submissions and testimony. The Appellant states that he should not have to seek other employment if he already had a job to which he would be returning.

[23] A claimant cannot simply wait to be recalled to work. They must seek employment in order to be entitled to benefits.[10]

Working while in school

[24] The Appellant is enrolled in a program to become a technical teacher. He testified that his courses occurred in the evenings and as such, he was available to work full-time days. I am satisfied from the Appellant's testimony and submissions that he is capable of both working full-time and attending his training. I accept that his schooling is predominately online and learning materials are available in the evening for

[10] See (*De Lamirande v. Canada (A.G.),* 2004 FCA 311)

him to complete his studies. In fact, he has done just that on at least two occasions including before his lay-off in April 2022, and from September 20, 2021, to October 29, 2021.

[25] I find that the participation in the online portion of the course of studies does not impair the Claimant's ability to find and hold full-time employment nor would it impede his ability to make reasonable efforts to find that employment.

Admitted periods of Unavailability

[26] The Appellant identified two periods when he could not accept work. One when his children's daycare was closed due to Covid-19 restrictions and one when he was required to participate in a teaching practicum. He says that the rest of the time he was available for work.

[27] The Appellant explained that he could not accept work when his children's daycare was closed from April 12, 2021, to July 4, 2021, due to Covid-19 restrictions. He says that he had to remain home to look after them. He suggests that he should not be required to seek employment during this period because he could not accept it while caring for his children.

[28] When asked what he would have done if his Employer had recalled him during this time, he stated that he would have sought support from his father-in-law to look after the children. He also suggested that his spouse had some flexibility in her work schedule that could have helped accommodate him returning to his job.

[29] I suspect that if he could make those arrangements to accept a recall, he could have made them for other employment. This would have allowed him to make the efforts needed to find and evaluated other jobs and then determine their suitability given his circumstances. He did not. Therefore, I conclude that the obligation to stay home with his children cannot be considered a valid reason for not conducting a job search. He had reasonable options that would have allowed him to at least seek employment.

[30] The Appellant did return to his job from September 20, 2021, to October 29, 2021. He testified that he started his teaching practicums in mid November 2021. The practicum lasted from about November 9, 2021, to December 21, 2021, a period of about 6 weeks. He confirmed that he could not accept any employment during this period. He stated that the practicum was unpaid and that was the reason he renewed his EI claim.

[31] After his practicum ended, there is no evidence that the Appellant attempted to start a job search.

[32] I find that the Appellant did not make any reasonable and customary efforts to find suitable employment during the period from April 25, 2021, to January 14, 2022. He was content to await a recall by his employer even though there was no guarantee when that would be.

Capable of and available for work (Section 18(1))

[33] I also have to consider whether the Appellant 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 Appellant 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.

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

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[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.
[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

[35] The Appellant hasn't shown that he wanted to go back to work as soon as a suitable job was available.

[36] The Appellant was clear in his statements that he was only willing to return to his former employer when recalled. In his initial claim for benefits in April 2021, he noted that he would only accept work if he could defer the start until the end of his program. In his renewal application of November 2021, he noted that if there was a conflict between accepting work and completing his program, he would complete the program.

[37] The Appellant said he was available for work, but a willingness to work is not synonymous with availability to work.[14] His goal is to start a new career that will eliminate any future claims f EI benefits. I am satisfied that the Appellant's primary focus (attitude and conduct) was and remains on completion of his program. He said as much in his testimony.

Making efforts to find a suitable job

[38] The Appellant hasn't made any effort to find a suitable job.

[39] 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.[15]

[40] The Appellant made no efforts to find suitable employment when he lost his job or at any time since. He did not register with job banks, make any applications, or evaluate any possible employment options. He was satisfied to await a recall from his employer and to be unavailable during the period of his training practicum. I explained these reasons above when looking at whether the Appellant had made reasonable and customary efforts to find a job.

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[14] See (*Canada (A.G.) v. Leblanc*, 2010 FCA 60)
[15] 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.

[41] Those efforts were not enough to meet the requirements of this second factor because the Act demands that a claimant be actively seeking work. He had no real idea when his employer would recall him. The Appellant had to try to find other employment.

Unduly limiting chances of going back to work

[42] The Appellant did set personal conditions that unduly limited his chances of going back to work.

[43] The Commission says the Appellant restricted his re-employment options to his former employer. To be eligible to receive EI benefits a claimant must be willing to accept other suitable employment. Moreover, he must actively be seeking such employment. He cannot expect to collect benefits while restricting his willingness to work to only one employer.

[44] The Appellant says that he did not seek other employment because he thought it was unfair to his employer that he might find another job and not return. The Appellant must remember that his employer laid him off. The onus then fell upon the Claimant to show he was seeking employment in order to qualify for benefits.

[45] The Appellant confirmed that he accepted a training practicum that lasted six weeks. He stated that the practicum was unpaid. He testified that he reapplied for EI benefits because he was on the practicum and had no earnings that he needed to maintain his household. The Appellant said that he would not quit the practicum or his program to accept a job. He asserted that his schooling would lead to a better job and end the need to claim EI benefits in the future.

[46] The Appellant also elected to not seek employment while his children's daycare was closed. He says that he had no choice but to care for them. However, he also testified that he had options that may have allowed him to work for his former employer. Therefore, the Appellant's decision to remain home with his children was a choice that unduly limited his chances of finding employment because he had options that could have allowed him the flexibility to seek employment.

[47] I find that the Appellant set conditions that unduly limited his chances of finding employment. He restricted the employment he would accept to one single employer and, during his practicum, and while his children's daycare was closed, he was not willing to either seek or accept employment at all.

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

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

[49] The Appellant was clear that he was not willing to give up school to accept work. Further, while he may well have been able to work full-time while attending school, he made no effort to do so beyond a willingness to return to his former employer.

[50] Being "available" for work means more than awaiting a job to present itself. Claimants cannot neglect to seek work while awaiting a recall to a former employer.[16] It requires effort to find other employment. To be eligible to EI benefits, that effort must be sustained, and directed towards finding suitable employment.

Conclusion

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

[52] This means that the appeal is dismissed.

Mark Leonard
Member, General Division – Employment Insurance Section

[16] See (*Khalid,* FC A-337-89)