Citation: *EM v Canada Employment Insurance Commission*, 2022 SST 627

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	E. M.
Representative:	R. M.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (445391) dated January 13, 2022 (issued by Service Canada)

Tribunal member:	Angela Ryan Bourgeois
Type of hearing:	Teleconference
Hearing date:	March 23, 2022
Hearing participants:	Appellant Appellant's representative
Decision date:	May 1, 2022
File number:	GE-22-474

Decision

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

[2] The Claimant hasn't shown that he was available for work. This means that he can't receive employment insurance (EI) benefits.

Overview

[3] The Canada Employment Insurance Commission (Commission) decided that the Claimant was disentitled from receiving EI regular benefits as of September 8, 2021, because he wasn't available for work. A claimant has to be available for work to get EI regular benefits. Availability is an ongoing requirement. This means that a claimant has to be searching for a job.

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

[5] The Commission says that the Claimant wasn't available because he was in school.

[6] The Claimant disagrees. The Claimant says that:

- He was only attending school on a part-time basis
- His study and class times don't restrict his availability beyond what would be a normal work week of 35 hours
- Service Canada never told him to expand his job search
- He was looking for and accepted work

Issue

[7] Has the Claimant proven his availability under the law?

Analysis

[8] The Commission decided that the Claimant was disentitled from receiving benefits because he wasn't available for work.

[9] Under the *Employment Insurance Act,* claimants must prove that they are capable of and available for work and are unable to find a suitable job.[1] Case law gives three things a claimant has to prove to show that they are "available" in this sense. I will look at those factors below.

[10] The Federal Court of Appeal has said that claimants who are in school full-time are presumed to be unavailable for work.[2] 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 in school full-time.

[11] I will start by looking at whether I can presume that the Claimant wasn't available for work. Then I will consider whether he meets the availability requirements of the *Employment Insurance Act.*

Presuming full-time students aren't available for work

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

[13] The Claimant agrees that his university considers him to be a full-time student. But the Claimant took only two courses first term and three courses second term. His courses occupy only a small portion of each day. So, I find that for the purposes of the presumption, the Claimant is a part-time student.

[14] This means that the presumption of non-availability doesn't apply to the Claimant.

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[1] See section 18(1)(a) of the *Employment Insurance Act*.
[2] See *Canada (Attorney General) v Cyrenne*, 2010 FCA 349.

[15] I'll now look at whether the Claimant has actually proven his availability for work under the law.

Capable of and available for work

[16] I have to consider whether the Claimant is capable of and available for work but unable to find a suitable job.[3] Case law sets out three factors for me to consider when deciding this. The Claimant has to prove the following three things:[4]

a) He wants to go back to work as soon as a suitable job is available.

b) He has made efforts to find a suitable job.

c) He hasn't set personal conditions that might unduly (in other words, overly) limit his chances of going back to work.

[17] When I consider each of these factors, I have to look at the Claimant's attitude and conduct.[5]

– Wanting to go back to work

[18] The Claimant has shown that he wants to work because he is working about 12 hours a week. But he hasn't shown that he wants to work more hours than he is actually working. My finding is supported by the Claimant's comment to the Commission's agent about his job search efforts. In November 2021, the Claimant said that he hadn't applied for any jobs, but would at the end of the semester.[6] This shows that he didn't have a desire to work more than he was working.

– Making efforts to find a suitable job

[19] The Claimant hasn't made enough effort to find a suitable job.

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[3] See section 18(1)(a) of the *Employment Insurance Act*.
[4] 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.
[5] 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.
[6] See page GD3-20.

[20] The Claimant's efforts to find a new job include:

- Asking friends about jobs and making inquiries at other places, like Sporting Intention and Tim Hortons
- Providing résumés to prospective employers
- Looking for work online every couple of weeks (although he testified he wasn't sure of the exact website(s) he uses)[7]
- Registering with job banks
- Getting emails about jobs once a week
- Looking at job postings at university
- Asking his current employer for more hours

[21] In November 2021, the Claimant told the Commission that he hadn't applied for any positions.[8] In December 2021, he told the Commission that he had applied for four positions.[9] At the hearing, the Claimant provided some details about those applications. He said that he had applied for them in September or October.[10] He explained that he sent résumés to those four employers but there were no actual jobs posted. He dropped off résumés to two other employers in December 2021, but again he wasn't aware of any available positions or job listings. In February 2022, according to the Claimant's testimony, he applied for club house positions at two related golf courses.

[22] I find that the Claimant's job search efforts are not enough to meet the requirements of this second factor. This is why.

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[7] Recording at 38:28 and 39:04
[8] See page GD3-20.
[9] See page GD3-25.
[10] Recording around 51:48.

[23] His job search is casual. It does not show that he is actively looking for work and unable to find work. It is not enough to look for work online every couple of weeks and ask about work when you go someplace. Further, the Claimant has only applied for two actual positions since September 2021. Given that he is looking for unskilled positions, I find it unlikely that there were only two such suitable positions available between September 2021, and March 2022.

[24] The Claimant argues that he was never told to expand his job search. He relies on a CUB to support his position that this is a requirement. But the requirement under the law to be available for work isn't dependent upon the Commission telling the Claimant about his obligation to look for work, or to expand his job search. I consider this more below.

[25] I know the Claimant returned to work for his former employer when recalled in September 2021. But accepting this position doesn't prove that he was looking for more work. The Claimant simply hasn't shown that he was looking for more work (or hours) than he is getting at his current job.

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

[26] The Claimant has set personal conditions that might unduly limit his chances of going back to work.

[27] At the hearing, the Claimant testified that:

- First term, he took two courses. His first course held class in person every Monday, Wednesday and Friday morning for one hour. His second course had online classes. There was no mandatory attendance but he had to watch the recorded classes at some point.

- Second term, he took three courses. His classes are online for one hour, Monday to Friday. There is mandatory attendance on Monday, Wednesday and Friday. He has a two-hour lab from 7 p.m. to 9 p.m. in person.

- He has a 40-minute commute to class (when he has to attend in person)
- He is looking for a job in customer service and retail work.
- He is looking for work he can do from around 11 a.m. to 5 or 6 p.m.
- Since September 2021, he's been working on and off for his former employer, about 12 hours a week, usually on Tuesday and Thursday, from 12 p.m. to 5 p.m.

[28] The Claimant says he could work full-time hours. But whether he has the time to work full-time hours isn't the only consideration when deciding if claimants have set conditions that unduly limit their chances of finding a job.

[29] The Federal Court has stated that trying to find work around a school schedule doesn't meet the availability requirements under the law.[11] I must follow the direction of the Federal Court.

[30] The Claimant is looking for work that he can do around his course hours. His testimony about this was clear. This is a condition that unduly limits his chances of finding work. And following the Federal Court, I find that he doesn't meet the availability requirements under the law.

[31] I considered that the Claimant told the Commission and the Tribunal that he would leave his course if he'd found full-time work.[12] I don't find his statements about this credible for the following reasons.

[32] When he completed his training questionnaire on September 25, 2021, the Claimant had to answer a question about his willingness to leave his course if he found full-time work. This is the question:

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[11] See *Horton v Canada (Attorney General),* 2020 FC 743.
[12] For example, see page GD3-25.

> If you found full-time work but the job conflicted with your course/program, what would you do?
>
> - I would drop the course/program to accept the job
> - I would finish my course/program
> - I would accept the job as long as I could delay the start date to allow me to finish the course/program
> - I would change my course schedule to accept the job.

[33] The Claimant selected the third option – that he would accept the job if he could delay the start date to finish his course.

[34] Despite what the Claimant later said, I find the answer on his application form reflects his true intention.

[35] First, I find it unlikely that he didn't understand the question, as he said at the hearing. I know it is his first time applying for EI benefits. But the Claimant is in his second year of university. So it is reasonable to expect that he could understand the question as it is written in clear, plain language, using short sentences.

[36] Secondly, the application form answer is in line with the Claimant's spontaneous statement at the hearing that he was looking for work he could do after 11 a.m. He didn't hesitate to say that he was looking for work around his school schedule. So it is unlikely that he'd leave his course to accept work.

– **Was the Commission obligated to give the Claimant a chance to expand his job search?**

[37] No. There is no obligation on the Commission to pay the Claimant EI benefits while he expands his job search to meet the availability requirements under the law.

[38] The Claimant didn't provide me with the CUB he relied on to support his assertion that the Commission had to give him a chance to improve his job search

efforts before imposing a disentitlement. However, I believe he is referring to CUB 72689.

[39] I will not follow that CUB decision. First, CUB decisions are not binding upon me. Secondly, I know of no binding legal authority that would require the Commission to give notice of an impending disentitlement for availability. Thirdly, the circumstances in the CUB decision are not the same as in this file. The claimant in that case had secured employment and was in a situation akin to a claimant awaiting a recall to existing employment. The Claimant is not in such a situation.

– **The Claimant has not proven his availability under the law.**

[40] Based on my findings on the three factors, I find that the Claimant hasn't shown that he is capable of and available for work but unable to find a suitable job. The Commission's disentitlement from receiving EI benefits as of September 8, 2021, remains.

Conclusion

[41] The Claimant hasn't shown that he was available for work within the meaning of the law as of September 8, 2021. Because of this, I find that the Claimant can't receive EI benefits.

[42] The appeal is dismissed.

Angela Ryan Bourgeois
Member, General Division – Employment Insurance Section