



Citation: *ML v Canada Employment Insurance Commission*, 2022 SST 683

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

Decision

Claimant: M. L.

Commission: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission
reconsideration decision (457104) dated February 20, 2022
(issued by Service Canada)

Tribunal member: Audrey Mitchell

Type of hearing: Teleconference

Hearing date: May 26, 2022

Hearing participant: Claimant

Decision date: May 30, 2022

File number: GE-22-1094

Decision

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

[2] The Claimant hasn't shown that he is 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 Claimant is disentitled from receiving EI regular benefits as of October 12, 2020, 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 is 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 is available for work.

[5] The Commission says that the Claimant isn't available because he was in school full-time.

[6] The Claimant disagrees and says that he had been working while in school, and only stopped because of the COVID-19 lockdowns, so he should be entitled to EI benefits.

Issues

[7] Is the Claimant available for work while in school?

[8] If not, does he have to repay the overpayment

Analysis

[9] Two different sections of the law require claimants to show that they are available for work;¹ the Commission disentitled the Claimant from being paid benefits under both of these sections. So, he has to meet the criteria of both sections to get benefits.

[10] 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.² The *Employment Insurance Regulations* (Regulations) give criteria that help explain what “reasonable and customary efforts” mean.³ I will look at those criteria below.

[11] 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.⁴ Case law gives three things a claimant has to prove to show that they are “available” in this sense.⁵ I will look at those factors below.

[12] The Commission decided that the Claimant was disentitled from receiving benefits because he isn’t available for work based on these two sections of the law.

[13] In addition, the Federal Court of Appeal has said that claimants who are in school full-time are presumed to be unavailable for work.⁶ This is called “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.

¹ Subsection 50(8) of the *Employment Insurance Act* (EIA) provides that, for the purpose of proving that a claimant is available for work and unable to obtain suitable employment, the Commission may require the claimant to prove that he or she is making reasonable and customary efforts to obtain suitable employment. Paragraph 18(1)(a) of the EIA provides that a claimant is not entitled to be paid benefits for a working day in a benefit period for which he or she fails to prove that on that day he or she was capable of and available for work and unable to obtain suitable employment.

² See section 50(8) of the *Employment Insurance Act* (Act).

³ See section 9.001 of the *Employment Insurance Regulations* (Regulations).

⁴ See section 18(1)(a) of the Act.

⁵ See *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96.

⁶ See *Canada (Attorney General) v Cyrenne*, 2010 FCA 349.

[14] I will start by looking at whether I can presume that the Claimant wasn't available for work. Then, I will look at whether he was available based on the two sections of the law on availability.

Presumption full-time students aren't available for work

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

– The Claimant doesn't dispute that he is a full-time student

[16] The Claimant agrees that he is a full-time student, and I see no evidence that shows otherwise. So, I accept that the Claimant is in school full-time.

[17] The presumption applies to the Claimant.

– The Claimant is a full-time student

[18] The Claimant is a full-time student. But the presumption that full-time students aren't available for work can be rebutted (that is, shown to not apply). If the presumption were rebutted, it would not apply.

[19] There are two ways the Claimant can rebut the presumption. He can show that he has a history of working full-time while also in school.⁷ Or, he can show that there are exceptional circumstances in his case.⁸

[20] The Claimant says he had been working while in school and only sopped because of COVID-19 lockdowns.

[21] The Commission says the Claimant told them he was only available for work that didn't conflict with his studies.

[22] I find that the Claimant hasn't rebutted the presumption of non-availability.

⁷ See *Canada (Attorney General) v Rideout*, 2004 FCA 304.

⁸ See *Canada (Attorney General) v Cyrenne*, 2010 FCA 349.

[23] The Claimant testified that he's a full-time student studying business management/human resources since 2019. While in school, he had worked part-time, but lost his job due to the COVID-19 pandemic. He testified that he did not have a history of full-time work while in school. The Claimant applied for EI benefits after having received the Canada Emergency Response Benefit.

[24] The Claimant testified that in the 2020/2021 and 2021/2022 school years, he attended online classes. He said that he had to attend the classes at the time they were scheduled with the exception of one class. He confirmed that the schedule of classes detailed in the Commission's file for both school years is accurate.

[25] Because the Claimant does not have a history of full-time work while in school, I don't find that he can rebut the presumption of non-availability in this way.

[26] The Claimant completed two training questionnaires. In both, he said that he wouldn't leave school to accept a full-time job that conflicts with his school schedule. The Commission's notes say that the Claimant said he would finish his program and that his focus was on school. I asked the Claimant about the Commission's notes. He again confirmed that the notes are accurate.

[27] I agree with the Commission's submission and find that the Claimant's priority is his studies. He testified that when he was working, he did so around his classes. In spite of this, I don't find that he has shown any exceptional circumstances based on which he can rebut the presumption of non-availability.

[28] The Claimant hasn't rebutted the presumption that he is unavailable for work.

– **The presumption isn't rebutted**

[29] The Federal Court of Appeal hasn't yet told us how the presumption and the sections of the law dealing with availability relate to each other. Because this is unclear, I am going to continue on to decide the sections of the law dealing with availability, even though I have already found that the Claimant is presumed to be unavailable.

Reasonable and customary efforts to find a job

[30] 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 are reasonable and customary.⁹

[31] The law sets out criteria for me to consider when deciding whether the Claimant's efforts are reasonable and customary.¹⁰ I have to look at whether his efforts are sustained and whether they are directed toward finding a suitable job. In other words, the Claimant has to have kept trying to find a suitable job.

[32] I also have to consider the Claimant's efforts to find a job. The Regulations list nine job-search activities I have to consider. Some examples of those are the following:¹¹

- assessing employment opportunities
- contacting employers who may be hiring
- applying for jobs

[33] The Commission says that the Claimant is not doing enough to try to find a job.

[34] The Claimant disagrees. He says that the efforts he is making are enough to prove that he is available for work.

[35] I find that the Claimant hasn't shown that he is making reasonable and customary efforts to find a job. I do so for reasons that follow.

[36] I asked the Claimant when he started to look for work. He said that he started looking around May 2021, after which he got a job at a golf clubhouse. He explained that after October 10, 2020 when the pandemic-related lockdown happened, there weren't any jobs available in the kitchen industry.

[37] The Commission asked the Claimant to provide a job search record of the places he had applied to for work and potential employers he had spoken to since October

⁹ Subsection 50(8) of the *Employment Insurance Act*.

¹⁰ Section 9.001 of the *Employment Insurance Regulations*.

¹¹ See section 9.001 of the *Regulations*.

2020. The Claimant told the Commission that he did not look for jobs online, but looked in person for kitchen jobs. He sent a list of companies that he called or visited in person to ask about job opportunities. The list doesn't give details other than the company name and number, except for three that include contact names as well.

[38] I asked the Claimant when he had visited or called the companies on the list. He said that he had done so in November/December 2020, asking if they had any kitchen positions available. He said that he had also looked for work in January/February 2021 to see if anything was available for the spring.

[39] I asked the Claimant about his previous response where he said he had started to look for work in May 2021. The Claimant said that he just happened to be out in May 2021 and saw a job fair, and that's how he got the job at the golf clubhouse.

[40] I don't find that the Claimant's response reasonably explains why he didn't say he started looking for work in December 2020. The Claimant testified that he didn't have a detailed job search record because he misplaced it leaving him without evidence. In response to the Commission's questions, the Claimant said that he started looking for work in March 2021.

[41] I give more weight to the Claimant's testimony where he said he started to look for work in May 2021. I do so because this is more consistent with what he told the Commission, namely that he didn't look for work until 2021.

[42] Even though the Claimant did get a job in June 2021, he said in his training questionnaire that it's a seasonal job. He said that he had worked until December 2021. I asked him if he had looked for work after that. The Claimant said that he was "partially looking", just in case the golf clubhouse employer called him back. He added that around January to February 2022, he was focussing on his education.

[43] The Claimant testified that his job search efforts included using two job search websites, and calling and visiting potential employers. He also sent the Commission confirmation of four job applications.

[44] I'm satisfied that the Claimant did some of the job search activities listed in the Regulations. But I'm not satisfied that his job search efforts are sustained. I understand the Claimant's suggestion that there was no work because of pandemic-related lockdowns. I also understand his focus on school. However, I don't find that with the gaps in his job search efforts up to May 2021, and after December 2021, he has done enough to show that since October 2020 he is making reasonable and customary efforts to find a job.

[45] The Claimant hasn't proven that his efforts to find a job are reasonable and customary.

Capable of and available for work

[46] I also have to consider whether the Claimant has proven that he is capable of and available for work but unable to find a suitable job.¹² The Claimant has to prove three things:

- 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.

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

– Wanting to go back to work

[48] The Claimant has shown that he wants to go back to work as soon as a suitable job is available.

¹² Paragraph 18(1)(a) of the *Employment Insurance Act*.

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.

[49] As noted above, the Claimant testified that he had worked while in school, and that he started his studies in 2019. Since he worked in the food industry, his employer laid him off due to pandemic-related lockdowns.

[50] The Claimant testified that even though he's a student, he still has bills that he has to pay. He added that he doesn't have the option to not work given his living expenses.

[51] I have already found that the Claimant didn't make sustained efforts to find a job. As suggested in the training questionnaire he completed in January 2022, this may be because he was waiting to return to his seasonal job. In spite of this, I accept as fact the Claimant's testimony about needing to work. I find that he wanted to return to work because he had to in order to take care of his living expenses.

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

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

[53] 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.¹⁴

[54] The Claimant's efforts to find a new job included using two job search websites, calling and visiting potential employers, and applying for jobs. As noted above, these activities are consistent with those listed in the law. However, the Claimant submitted confirmation of applying to only four jobs since October 2020. And he testified about a seasonal job he applied for and got in June 2021.

[55] Again, I understand that the Claimant gave priority to his school work. He testified that as a student, he still has bills, so he tried to find a job he could do around school. But, I don't find he has shown that he looked for work with any consistency.

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

¹⁴ 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.

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

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

[58] I have already found that the Claimant hasn't rebutted the presumption of non-availability. I find that in this case, the Claimant's attendance at school was a personal condition that might unduly limit his chances of going back to work. By giving priority to his studies and looking for work only outside his school schedule, I find that the Claimant limited the pool of jobs available to him to work.

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

[59] 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.

Does the Claimant have to repay the overpayment?

[60] Yes, the Claimant has to repay the overpayment.

[61] A claimant who has received benefits to which they are not entitled has to repay the amount paid by the Commission.¹⁵

[62] In his notice of appeal, the Claimant says he doesn't see why he has to pay back an overpayment of \$15,677. He explained that the reason he wasn't working was the pandemic-related lockdown.

[63] The Claimant testified that he had received the Canada Emergency Response Benefit and was then transitioned to EI benefits. He clarified that he applied for EI benefits in October 2020 because he was told to do so if he still needed benefits. The Claimant said that no one told him that if he was going to school, he shouldn't apply for EI benefits.

¹⁵ Paragraph 43(b) of the *Employment Insurance Act*.

[64] The Commission did not address the Claimant's argument about the overpayment in their representations. However, they have included a report in their file that shows bi-weekly overpayment amounts that total \$15,677.

[65] The law says that a claimant has to repay benefits they aren't entitled to. Because he hasn't proven that he is available for work, I find that he has to repay the overpayment.

[66] Since the Claimant applied for benefits because he thought he was entitled to them, he may wish to ask the Commission to consider writing off his debt for reason of undue hardship.¹⁶ This is not something I have the authority to do. The Claimant could also try to arrange a repayment schedule or ask about other debt relief by calling the Debt Management Call Centre at the Canada Revenue Agency at 1-866-864-5823.

Conclusion

[67] The Claimant hasn't shown that he is available for work within the meaning of the law. Because of this, I find that the Claimant can't receive EI benefits. And he has to repay the overpayment.

[68] This means that the appeal is dismissed.

Audrey Mitchell

Member, General Division – Employment Insurance Section

¹⁶ Section 56 of the Employment Insurance Regulations gives the Commission broad powers to write off an overpayment when it would cause undue hardship for a claimant to repay it.