Citation: *MM v Canada Employment Insurance Commission*, 2022 SST 789

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	M. M.
Representative:	T. M.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (451076) dated January 27, 2022 (issued by Service Canada)

Tribunal member:	Angela Ryan Bourgeois
Type of hearing:	Teleconference
Hearing date:	April 26, 2022 and June 16, 2022
Hearing participants:	Appellant Appellant's representative
Decision date:	June 20, 2022
File number:	GE-22-653

Decision

[1] The appeal is allowed in part. The Appellant (Claimant) has shown that he was available for work as of December 8, 2021, but not as of September 6, 2021. This means that the Claimant is disentitled from receiving EI regular benefits because of availability from September 6, 2021, to December 7, 2021.

Overview

[2] 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.

[3] The Claimant is 20 years old. He attends university part-time. He has two health conditions, post-concussion syndrome, and primary ciliary dyskinesia, a structural lung condition. Post-concussion syndrome affects his short-term memory and processing. His lung condition makes him susceptible to lung infections.[1]

[4] The Claimant applied for EI benefits in August 2021. At that time, he was living away from home. He planned to attend university part-time, online, and play hockey. After a few weeks, he had to stop playing hockey because of post-concussion syndrome. He returned to X where his parent's live. [2]

[5] The Canada Employment Insurance Commission (Commission) decided that the Claimant was disentitled from receiving EI regular benefits as of September 6, 2021, because he wasn't available for work.

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

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[1] See medical evidence in GD2.
[2] Between leaving hockey and returning to X, he spent about a week in Fredericton, New Brunswick.

[7] The Commission says that the Claimant wasn't available because he was taking a training course on his own initiative.

[8] The Claimant disagrees. He says he was looking for suitable work but couldn't find any.

Issue

[9] Was the Claimant available for work as of September 6, 2021?

Analysis

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

[11] 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.[3] The *Employment Insurance Regulations* (Regulations) give criteria that help explain what "reasonable and customary efforts" mean.[4] I will look at those criteria below.

[12] 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.[5] Case law gives three things a claimant has to prove to show that they are "available" in this sense.[6] I will look at those factors below.

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

[14] In addition, the Federal Court of Appeal has said that claimants who are in school full-time are presumed to be unavailable for work.[7] This is called the "presumption of

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[3] See section 50(8) of the *Employment Insurance Act* (Act).
[4] See section 9.001 of the *Employment Insurance Regulations* (Regulations).
[5] See section 18(1)(a) of the Act.
[6] See *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96.
[7] See *Canada (Attorney General) v Cyrenne*, 2010 FCA 349.

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.

[15] 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.

Presuming full-time students aren't available for work

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

[17] The Claimant wasn't a full-time student, so the presumption doesn't apply. The Claimant took one course (class) first term, and two second term. So he wasn't a full-time student.

[18] This means that the Claimant isn't presumed to be unavailable for work. I will now look at the two sections of the law to decide whether the Claimant was available within the meaning of those two sections.

Reasonable and customary efforts to find a job

[19] The first section of law that I am going to consider says that claimants have to prove that their efforts to find a job were reasonable and customary.[8]

[20] The law sets out criteria for me to consider when deciding whether the Claimant's efforts were reasonable and customary.[9] I have to look at whether he made sustained efforts to find a suitable job.

[21] 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:[10]

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[8] See section 50(8) of the Act.
[9] See section 9.001 of the Regulations.
[10] See section 9.001 of the Regulations.

- assessing employment opportunities
- preparing a résumé
- registering with online job banks

[22] The Commission says that the Claimant didn't do enough to try to find a job. The Commission relies on what the Claimant put in his application for benefits form in August 2021.

[23] At that time, the Claimant was moving to X, Nova Scotia. He was anticipating playing hockey, attending university, and working (or volunteering) part-time. Because he had just moved, he wasn't actively looking for work. This is what he said in his application form.

[24] I agree with the Commission that the Claimant wasn't making reasonable and customary efforts to find suitable work then. During his few weeks in X, he was settling in, and sorting out how and if he could continue to play hockey with post-concussion syndrome. He asked around about work, talking to his coach and teammates. But he was only looking for part-time work he could do around his hockey schedule. This wasn't enough to be "reasonable and customary" efforts within the meaning of the law.

[25] But I find he was making reasonable and customary efforts to find work by the end of September 2021, when he left X (and hockey).

[26] The evidence about the exact date the Claimant left X is unclear. Given that the Claimant only meets the availability requirements under the other section of law on December 8, 2021, he is disentitled until then, despite when he left X.[11] But for the purposes of my decision, I find that on a balance of probabilities, the Claimant started making reasonable and customary efforts on September 27, 2021. This was the

[11] The disentitlement under section 18(1)(a) of the Act ends only on December 7, 2021.

Monday of the last week of September. He had started making reasonable and customary efforts to find work by then because he had started working for Door Dash.[12]

[27] Other efforts include the following:

- Updated his résumé
- Registered for Indeed (an online job bank)
- Registered with LinkedIn
- Looked for jobs on his university website
- Assessed the types of jobs he could do with his health conditions
- Contacted Nova Scotia Works (specifically, his aunt, who works there)
- Kept regularly in touch with a previous employer
- Applied for work
- Attended the one interview he obtained

[28] These efforts were reasonable and customary. The efforts were sustained because he started them upon leaving X and continued with them until the date of the hearing.

[29] The efforts were directed at finding suitable work. Suitable work for the Claimant is work that he can do with his health conditions. Post-concussion syndrome affects his short-term memory and processing. His lung condition makes him susceptible to lung infections. So he couldn't work in close contact with others during the period in question

[12] Despite what the Claimant told the Commission, I accept that he was working for Door Dash at the end of September 2021, because he did this work in Fredericton, New Brunswick, before returning home to X. He moved back to X in early October 2021.

because of the risk of contracting COVID-19.[13] The Claimant was looking for work that fell within these parameters.

[30] Now I will look at the other section of the law about availability.

Capable of and available for work

[31] I also have to consider whether the Claimant was capable of and available for work but unable to find a suitable job.[14] Case law sets out three factors for me to consider when deciding this. The Claimant has to prove the following three things:[15]

a) He wanted to go back to work as soon as a suitable job was available.

b) He made efforts to find a suitable job.

c) He didn't set personal conditions that might have unduly limited his chances of going back to work.

[32] When I consider each of these factors, I have to look at the Claimant's attitude and conduct.[16]

– Wanting to go back to work

[33] The Claimant has shown that he had a desire to return to work as soon was a suitable job is offered. He did this by starting to work at Door Dash as soon as he left X, by contacting a former employer (X), and applying for and accepting suitable work with X.

– Making efforts to find a suitable job

[34] The Claimant has made enough effort to find a suitable job.

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[13] This was before the Claimant was eligible for a COVID-19 booster.
[14] See section 18(1)(a) of the Act.
[15] 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.
[16] 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.

[35] The Claimant has updated his résumé, looked for work online, downloaded and registered with the Indeed app, kept in touch with a job search agency (Nova Scotia Works), kept in regular touch with his former employer, and applied for suitable jobs. He went to different employer locations to see if the work environment would be suitable with his health conditions.

[36] Those efforts are enough to meet the requirements of this second factor. His efforts show that he has been actively looking for work and unable to find suitable employment. He has shown that since returning home to X he has been making genuine, not token, efforts to find suitable work.

[37] I give little consideration to the Claimant's comments to the Commission's officers about what he was doing to find a job. I prefer the documentary evidence he provided, and his testimony, which he gave after due consideration and preparation. Having heard the Claimant, and accepting what his mother says about his symptoms from post-concussion syndrome, I accept that the Claimant has difficulty recalling details, especially when he did what. For example, he struggled to provide information about his first term course(s) only four months after finishing the course. There is no doubt that the Claimant attended a course, but he simply couldn't recall the details. This shows that his on-the-spot recall is likely to be unreliable, which was the case when he spoke to the Commission's officers.

– **Job market information**

[38] The Commission provided a list of jobs available in the Claimant's area. We reviewed the job listing at the hearing. After hearing the Claimant and his mother, I am satisfied that he carefully considered all jobs in his area for suitability. Available positions were not dismissed without due consideration. I am satisfied that the Claimant couldn't find suitable employment.

[39] The Claimant is young (20 years old). Because of his age, he has limited work experience, and hasn't completed his formal education yet. Symptoms from his post-concussion syndrome affect his ability to respond quickly. This limits the type of work that would be suitable for him. For example, a call centre position would not be suitable

because of the fast pace. His lung condition also affects the type of work that is suitable, at least until he is able to obtain a COVID-19 booster.[17] This means that jobs in the fast food industry or in other close quarters are not suitable employment for the Claimant.

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

[40] The Claimant had two personal conditions that might have unduly limited his chances of getting back to work. But those personal conditions ended on December 7, 2021.

[41] First, when in X, he could only work around his hockey schedule. Secondly, first term his course schedule consisted of a class that he was obligated to attend at a set time during daytime hours.

[42] The courts are clear that limiting your work availability around a school schedule doesn't meet the availability requirements under the Act.[18] I find that arranging a work schedule around a hockey schedule would be similarly restricting. For these reasons, I find that these restrictions could have unduly limited his chances of finding work.

[43] However, both of these restrictions ended. The hockey restriction ended around the end of September.[19] The Claimant finished his only course with classroom obligations on December 7, 2021, when he wrote the examination in that course.

[44] The evidence about the Claimant's first term courses isn't clear. At the hearing, the Claimant said he took an English course first term. He had to attend the online course at a set time, three times a week, during regular working hours. He wasn't sure if it was recorded. But documentary evidence he later provided suggested that he dropped the one course he started first term (Anthropology).[20] The Claimant's later testimony on June 16, 2022, confirmed that he maintained at least one class each term.

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[17] The Claimant had to have a pneumonia shot and wait a period of time before he could have the COVID-19 booster.
[18] See, for example, Federal Court decision of *Horton v Canada (Attorney General),* 2020 FC 743.
[19] The evidence isn't clear about the exact date the Claimant's hockey obligations ended, but it was around the end of September 2021. Because his course obligations continued after that, the exact date he left X/hockey doesn't affect the outcome of the decision.
[20] See page GD7-3,

[45] So given the evidence before me, I find that the Claimant took an English course first term. He attended the English course at a set time, three times a week, during regular working hours. So, following the Federal Court, I find that his course schedule was a limitation on his availability that could have unduly limited his chances of returning to work. This ended on December 7, 2021, when he finished that course.

[46] The evidence is clear about second term. The Claimant's classes were not live.[21] So the schedule was not an undue restriction on his availability. He would not have had to arrange a work schedule around his class schedule. Further, he was taking only two courses.

[47] I considered the amount of time the Claimant spent on his course work. And I thought about whether, given his post-concussion syndrome symptoms, his part-time work with X was the most work he could do.

[48] And I am satisfied that as of December 8, 2021, the Claimant's studies and work were not personal conditions that would have unduly limited his availability.[22] He could do his second-term school work at any time of day. And the Claimant explained that he prefers having different activities to juggle. His mother noted that being busy has a positive impact on the Claimant's mental health. Further, the Claimant is looking for more hours from X. This shows that he isn't working at his maximum capacity, despite his post-concussion syndrome symptoms.

[49] So I find that as of December 8, 2021, the Claimant had no personal conditions that unduly limited his chances of getting back to work.

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

[50] Based on my findings on the three factors, I find that the Claimant has shown that he was capable of and available for work but unable to find a suitable job as of December 8, 2021.

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[21] He provided documents from the university showing that the courses were not live. See page GD7-3 and GD7-4.
[22] To be clear, his part-time work only started in Spring 2022.

Conclusion

[51] The Claimant has shown that he was available for work within the meaning of the law as of December 8, 2021. Although he was making reasonable and customary efforts to find work before then, the restrictions on his availability until December 7, 2021, means he wasn't available under the law until December 8, 2021.

[52] The appeal is allowed in part. The Claimant's disentitlement for availability ends on December 7, 2021.

Angela Ryan Bourgeois
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