Citation: *EH v Canada Employment Insurance Commission*, 2022 SST 901

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Claimant:	E. H.
Commission:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (457377) dated February 26, 2022 (issued by Service Canada)

Tribunal member:	Audrey Mitchell
Type of hearing:	Videoconference
Hearing date:	June 14, 2022
Hearing participant:	Claimant
Decision date:	June 27, 2022
File number:	GE-22-1087

Decision

[1] The appeal is dismissed with modification. 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 May 2, 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 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 told the Commission he was available on the phone and in his bi-weekly reports

Issue

[7] Is the Claimant 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 Claimant 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] The Commission says it disentitled the Claimant under section 50 of the Act along with sections 9.001 of the Regulations for failing to prove his availability for work. But its file notes do not reflect that it asked the Claimant to prove his availability by sending his job search record. So, I do not find that he is disentitled under this section of the law.

[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.[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.

[12] In addition, the Federal Court of Appeal has said that claimants who are in school full-time are presumed to be unavailable for work.[5] 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.

[13] 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 second part of the law on availability.

Presuming full-time students aren't available for work

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

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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.

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

[15] 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.

[16] The presumption applies to the Claimant.

– The Claimant is a full-time student

[17] 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.

[18] 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.[6] Or, he can show that there are exceptional circumstances in his case.[7]

[19] The Claimant says he was actually working regular hours when the Commission says he wasn't available. He says that he was otherwise looking fro work.

[20] The Commission says the Claimant hasn't shown that he was available for work during normal working hours.

[21] I find that the Claimant hasn't rebutted the presumption that he's not available while in school.

[22] The Claimant testified that he was in his last year of high school when he first applied for EI benefits. He said he was taking only two courses in May and June 2021 so he was able to work.

[23] When asked about full-time work while in school, the Claimant said that he had worked full-time from March 2021 to May 2021. He testified that he had classes four hours a week, and his teacher recorded them, so he could attend on his own time.

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[6] See *Canada (Attorney General) v Rideout*, 2004 FCA 304.
[7] See *Canada (Attorney General) v Cyrenne*, 2010 FCA 349.

[24] The Claimant's employer issued a record of employment showing that the Claimant worked 224 hours from March 29, 2021 to May 4, 2021. I accept the Claimant's testimony may have worked full-time hours for up to four weeks. But I find from the details on the ROE that he likely worked as a part-time worker.

[25] The Claimant's ROE shows that his employer paid him bi-weekly and the final pay period ended on May 14, 2021. The Claimant earned $18 per hour. That means that he worked 34.5 hours in pay period four, from March 29, to April 2021, 78.75 hours in pay period three, 85.25 hours in pay period two, and 25.5 hours in pay period one, from May 1 to May 14, 2021.

[26] The ROE shows the Claimant worked 25.5 hours between May 1 and May 4, 2021 (pay period one), which is Saturday to Tuesday. Given the number of hours worked, I find it likely he worked some hours on the weekend. But he worked 34.5 hours between March 29 to April 2, 2021 (pay period four), which is Monday to Friday.

[27] Based on the above, I am not satisfied that the Claimant has shown that he has a history of full-time work while in school. I don't find that working a few weeks of near full-time hours is enough of a history to show this.

[28] I also don't find that the Claimant's light course load in May and June 2021 while in high school is an exceptional circumstance based on which he has rebutted the presumption of non-availability.

[29] When I asked the Claimant if he attended his high school classes at the time they were being taught, he said yes. He said that they were mostly in the morning. But the Claimant later testified that he had about four hours of week of school which he could do on his own time. I give more weight to the first statement, because this is what the Claimant said he did. He may have had some flexibility with his classes, but he says he attended classes mostly in the morning as they were taught.

[30] In a post-hearing document, the Claimant gave more information about his classes in May and June 2021. He said that his classes were in the morning, on alternate days. The Claimant said that he could work more than 30 hours a week if that

included weekends. This supports a finding that the Claimant's light course load and flexibility as a result isn't an exceptional circumstance based on which he can rebut the presumption that he was not available for work.

[31] The Claimant testified that he was available to work full-time while in high school. But, he said in his training questionnaire that if he found a job that conflicted with school, he would finish school. I find from this that the Claimant's priority was to finish high school.

[32] The Claimant started a college course on September 8, 2021 that ended on May 31, 2022. He testified that he attended classes in person on Tuesdays and Wednesdays, and online on Thursdays and Fridays. The hours were from 9:00 a.m. to 1:00 p.m. The Claimant said that he worked on Saturdays and Mondays at the same job he left in May 2021. Otherwise, he said he could work after school.

[33] I accept as fact that the Claimant's testimony about his availability for work from September 2021. In a second training questionnaire, the Claimant said he would finish school if he found full-time work that conflicted with school. So again, I find that his priority was school. I don't see an exceptional circumstance based on which the Claimant has rebutted the presumption of non-availability.

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

– The presumption isn't rebutted

[35] 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.

Capable of and available for work

[36] I also have to consider whether the Claimant is capable of and available for work but unable to find a suitable job.[8] Case law sets out three factors for me to consider when deciding this. The Claimant has to prove the following three things:[9]

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.

[37] When I consider each of these factors, I have to look at the Claimant's attitude and conduct.[10]

– **Wanting to go back to work**

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

[39] The Claimant lost his seasonal job on May 4, 2021. He said that the job involved customers changing winter and summer tires. The Claimant said that he was available and had looked for work. He started looking for another job shortly after his lay-off.

[40] The Claimant returned to his seasonal job and worked there from October 2021 to December 2021. He said that he followed up with employment agencies after he was laid off again. He also said he applied for jobs in 2022 until he found a full-time job.

[41] I find that even though the Claimant was in school, he made efforts to find work, even if part-time. I find that his actions and attitude are those of someone who wants to

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[8] See section 18(1)(a) of the Act.
[9] 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.
[10] 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.

work. I find that his success in doing so supports a finding that he wants to go back to work as soon as a suitable job is available.

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

[42] The Claimant has made enough effort to find a job in May and June 2021, and after December 2021 to find a suitable job. But he hasn't done so from July to September 2021.

[43] The Claimant's efforts to find a new job included registering with an employment agency, handing out his résumé, completing online job questionnaires and applying for jobs. I asked the Claimant if he had kept a list of his job-search efforts as instructed in his application for benefits. He said that he did not.

[44] I gave the Claimant time after the hearing to send details of his job search efforts. The list he sent shows that after his lay-off on May 4, 2021, he applied for four jobs in May 2021 and five jobs in June 2021. He said that he didn't apply for any jobs in July and August. The Claimant was re-called to work at his seasonal job, where he worked from October 16, 2021 to December 12, 2021.

[45] As noted above, the Claimant said that he followed up with employment agencies and applied for jobs in 2022 until he got a full-time job.

[46] I'm satisfied that for the periods May and June 2021, and after December 2021, the Claimant made enough effort to find a suitable job. I find that the activities he undertook, including applying for jobs, are of the type listed in the law to find work. However, I don't find this is the case for July to December, when he didn't apply for jobs and/or was working part-time at his seasonal job.

[47] Even if the Claimant was following up with the employment agency and looking for work in other ways in July, August and September, I don't find it reasonable that he wouldn't have found any jobs to apply for.

[48] Although the Claimant was working part-time hours at his seasonal job from October to December, the ROE shows that the most he worked in a two-week period is

31.25 hours. The Claimant did not present evidence of applying for any jobs in this period either. I don't find that the Claimant's efforts are enough from July through December 2021. However, I find that the Claimant has made enough efforts to find a suitable job for the periods May and June 2021, and after December 2022.

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

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

[50] The Commission says that the Claimant hasn't shown that he is available for work during normal working hours. The Claimant says that he was working regular hours when they say he wasn't available.

[51] As noted above, the Claimant said that he wouldn't leave school for a full-time job that conflicted with school. I understand this since the Claimant was in high school and then in a college program. However, I find that this means that school was his priority.

[52] I have already found that the Claimant hasn't rebutted the presumption of non-availability. I find so even though he had worked while in school. I find that by giving priority to his studies, the Claimant's attendance at school was a personal condition that might unduly limit his chances of going back to work.

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

[53] 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.

Conclusion

[54] 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.

[55] This means that the appeal is dismissed with modification. For clarity, I don't find that the Claimant is disentitled under subsection section 50 of the Act. However, he is disentitled under paragraph 18(1)(a) of the Act.

Audrey Mitchell
Member, General Division – Employment Insurance Section