[TRANSLATION]

Citation: *JL v Canada Employment Insurance Commission*, 2022 SST 1111

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	J. L.
Representative:	Gabrielle Marquis-Beaudoin
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (447842) dated January 17, 2022 (issued by Service Canada)

Tribunal member:	Josée Langlois
Type of hearing:	Videoconference
Hearing date:	May 20, 2022
Hearing participants:	Appellant Appellant's representative
Decision date:	May 24, 2022
File number:	GE-22-414

Decision

[1] The appeal is allowed.

[2] The Appellant has shown that she was available for work within the meaning of the *Employment Insurance Act* (Act) from September 28, 2020, to July 12, 2021.

Overview

[3] The Appellant stopped working in one of her jobs because of the health measures imposed by the government during the COVID-19 pandemic. She is also a full-time student.

[4] On January 17, 2022, the Canada Employment Insurance Commission (Commission) decided that the Appellant was disentitled to Employment Insurance (EI) regular benefits from September 28, 2020, to July 12, 2021, because she was taking training on her own initiative and wasn't available for work.

[5] This decision means that the Appellant was overpaid $13,416 in benefits and now has to pay them back.

[6] The Appellant has to be available for work to get EI regular benefits. Availability is an ongoing requirement. This means that the Appellant has to be searching for a job.

[7] The Appellant says that, if she hadn't stopped working at X because of the pandemic health measures, she would have continued working the same amount while also studying. She says that she continued working at X but that her hours were reduced because of the health measures, like a curfew. She also argues that she was actively looking for a job and was available for work while studying.

[8] I have to decide whether the Appellant was available for work within the meaning of the Act from September 28, 2020, to July 12, 2021, and whether she can get EI benefits for that period. The Appellant has to prove her availability on a balance of probabilities. This means that she has to show that it is more likely than not that she was available for work.

Issue

[9] Was the Appellant available for work from September 28, 2020, to July 12, 2021?

Analysis

Reasonable and customary efforts to find a job

[10] The law sets out criteria for me to consider when deciding whether the Appellant's efforts were reasonable and customary.[1] I have to look at whether her efforts were sustained and whether they were directed toward finding a suitable job. In other words, the Appellant has to have kept trying to find a suitable job.

[11] I also have to consider the Appellant's efforts to find a job. The *Employment Insurance Regulations* (Regulations) list nine job search activities I have to consider. Some examples of those activities are the following:[2]

- assessing employment opportunities
- 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

[12] The Commission says that the Appellant made little effort to find a job throughout her benefit period and didn't show that she wanted to work full-time.

[13] At the hearing, the Appellant argued that the Commission agent who transcribed their conversations made her explanations sound bad. She is disappointed because the

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[1] See section 9.001 of the *Employment Insurance Regulations* (Regulations) and section 50(8) of the *Employment Insurance Act* (Act).
[2] See section 9.001 of the Regulations.

Commission was aware of her situation; she says she was honest and transparent when she made her claim.

[14] She explains that she went to her employer X twice, but contrary to what the Commission implies, it wasn't to shop. She says that she didn't want to [translation] "take it easy" and that she was available for work.

[15] She says that she was available to work at the X location and, since the employer had told her there would be more hours available at the X location, she told the employer that this option suited her. Having been promised the first available job at the X location, she was hoping that this option would become a reality. But the employer never called her back, even though she had visited a location twice. And, without further explanation, she received a Record of Employment.

[16] So, from September 18, 2021, until the 2021 holiday season, the Appellant worked, but her hours were reduced. She was laid off from X when the government imposed other measures. The layoff was supposed to be temporary but turned out to be permanent.

[17] Even though she expected to go back to her job as soon as possible, the Appellant still assessed employment opportunities.

[18] At the hearing, she explained that she was a student but that she worked to support herself. Despite the fact that many stores were closed because of the COVID-19 pandemic, she assessed employment opportunities. She registered with a few job sites, including Indeed. She updated her résumé and applied for jobs with some employers. She got a job at a drugstore, X, that she started in early July 2021.

[19] The Appellant's efforts were reasonable and customary and directed toward getting a job as soon as available.

[20] The Appellant kept trying to find a job between September 28, 2020, and July 12, 2021. I find that she has shown that she was available for work within the meaning of section 50(8) of the Act and under sections 9.001 and 9.002 of the Regulations.

Capable of and available for work

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

- She wanted to go back to work as soon as a suitable job was available.
- She made efforts to find a suitable job.
- She didn't set personal conditions that might have unduly (in other words, overly) limited her chances of going back to work.

[22] When I consider each of these factors, I have to look at the Appellant's attitude and conduct.[4]

– Wanting to go back to work

[23] The Commission says that the Appellant didn't show a desire to go back to work; she was focusing on her training, which she was taking full-time.

[24] At the hearing, the Appellant mentioned wanting to go back to work and said this was evidenced by the fact that she had contacted her employer at X a few times and that she had looked for another job despite the challenges of the pandemic measures.

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[3] 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.
[4] Two decisions set out this requirement. Those decisions are *Attorney General of Canada v Whiffen*, A-1472-92; and *Carpentier v The Attorney General of Canada*, A-474-97.

[25] I understand from the Appellant's explanations that she was studying full-time but that she was available to work, as much as before she was laid off because of the COVID-19 pandemic, and was looking for work with that in mind.

[26] The Appellant showed a desire to go back to work from September 28, 2020, to July 12, 2021.

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

[27] To be able to get EI benefits, the Appellant is responsible for actively looking for a suitable job.[5]

[28] The Commission says that the Appellant hasn't proven her lack of effort [*sic*] to find a job and that she was instead prioritizing her training.

[29] As she mentioned at the hearing, the Appellant was transparent with the Commission and reported being a student.

[30] At the hearing, she said that she had made efforts to keep her job with her employer X, but she also made other efforts to find a suitable job.

[31] The Appellant agreed to work at X's X location because the employer was likely to call her back earlier and to offer her more hours.

[32] At the same time, she also approached other employers, like X and X. As she told the Commission, in the spring of 2021, she completed an internship in a daycare. After the internship, she offered her services to replace permanent employees.

[33] The Appellant has to be available for work to be able to get EI regular benefits. Availability is an ongoing requirement. This means that she has to be searching for a job.

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[5] This principle is explained in the following decisions: *Cornelissen-O'Neill*, A-652-93; and *De Lamirande*, 2004 FCA 311.

[34] I find that the Appellant made efforts to find a suitable job and to keep her job at X by showing that she was available to work at a location that was a little farther from home. Despite the challenges of COVID-19 and the periodic closure of most stores and restaurants, she still made efforts, focusing on immediate employment opportunities to get a job quickly.

[35] The Appellant wanted to keep her job at her employer X and, at some point during that time, she worked a bit more hours at X. She was willing to work as many hours as the employer could give her. In the end, she found a job at X.

[36] Given the Appellant's statements at the hearing, I give preference to her testimony, which has convinced me of her willingness to work, and I find that it is more likely than not that she made efforts to find a suitable job between September 28, 2020, and July 12, 2021.

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

[37] The Commission argues that the Appellant has failed to rebut the presumption of non-availability because she is taking training full-time. The Commission also says that the Appellant wasn't available for work during that period.

[38] The Appellant said that she was taking courses full-time in early childhood education at X College.

[39] I presume that the courses the Appellant is taking make her unavailable for work within the meaning of the Act.

[40] This presumption of non-availability can be rebutted based on four principles related specifically to return-to-school cases.[6]

[6] *Landry*, A-719-91; *Lamonde*, 2006 FCA 44; *Gagnon*, 2005 FCA 321 (CanLII); *Floyd*, A-168-93.

[41] These principles are:[7]

- the attendance requirements of the course
- the claimant's willingness to give up their studies to accept employment
- whether the claimant has a history of being employed at irregular hours
- the existence of "**exceptional circumstances**" that would enable the claimant to work while taking courses

[42] When she applied for benefits, the Appellant indicated that she would accept a full-time job if offered one. She reported spending between 15 and 24 hours per week on her studies.

[43] The Appellant also says that, before combining two jobs to support herself, she worked in a chocolate factory for five years while in school, from 2015 to 2019. She then combined two jobs while in school until she was laid off because of the COVID-19 pandemic. So, she has shown a work/school history, working up to 20 hours per week while in high school and when she started her program at CEGEP.

[44] The Appellant also argues that she changed her course schedule to prioritize work. It is normally a three-year program, but she says that she will finish it in four years because she has to work to support herself.

[45] As the Commission says: A claimant who is taking a training course without having been referred by a designated authority has to prove that they are capable of and available for work and unable to find a suitable job. The claimant has to meet the availability requirements the same as any other claimant who wants regular benefits.[8]

[46] However, in my view, the Appellant has rebutted the presumption of non-availability while in school. She has shown that she was working part-time while

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[7] This principle is explained in the following decision: *Gagnon*, 2005 FCA 321 (CanLII).
[8] Section 153.161(1) of the Act.

also spending between 15 and 24 hours per week on her studies. If it hadn't been for the COVID-19 pandemic, it is more likely than not that this situation would have continued.

[47] I find that the existence of "**exceptional circumstances**" enables the Appellant to work while taking training.

[48] The insurable hours of employment a claimant accumulates when working full-time aren't the only history that may be considered in establishing a benefit period. And, **employment history isn't the only basis on which the presumption of availability may be rebutted**.[9] The presumption of non-availability can be rebutted through proof of exceptional circumstances.[10]

[49] Exceptional circumstances can be associated with a history of part-time employment. The Appellant is in school and working part-time and, if it hadn't been for the COVID-19 pandemic, she would have continued working part-time while in training to support herself.

[50] Additionally, the Appellant has shown that she was available for her employer and that she was also looking for another job. To avoid limiting her chances of finding a job, she changed her course schedule and chose to complete her training in four years rather than the usual three.

[51] The Appellant is taking training, but she has successfully rebutted the presumption that a person who is taking a full-time training course on their own initiative isn't available for work.[11]

[52] Exceptional circumstances support a finding that, if it hadn't been for the COVID-19 pandemic, the Appellant would have continued working while studying, and

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[9] See the decision of the Tribunal's Appeal Division in *JD v Canada Employment Insurance Commission*, 2019 SST 438; and *Attorney General of Canada v Rideout*, 2004 FCA 304.
[10] *Attorney General of Canada v Wang*, 2008 FCA 112; and *Landry*, A-719-91.
[11] This principle is explained in the following decisions: *Landry*, A-719-91; *Lamonde*, 2006 FCA 44; *Gagnon*, 2005 FCA 321 (CanLII); and *Paxton*, 2002 FCA 360 (CanLII).

she explained that she had previously worked part-time while in high school full-time, before she started her college training. She has combined her work and school schedules for a number of years.

[53] I find that no personal conditions unduly limited the Appellant's chances of finding a suitable job between September 28, 2020, and July 12, 2021. The Appellant was working part-time, and she has shown, through her work history, that she was available for part-time work while studying full-time.

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

[54] I have to apply the criteria for determining whether the Appellant was available for work within the meaning of the Act and whether she can receive benefits for the period from September 28, 2020, to July 12, 2021.

[55] The exceptional circumstances surrounding the end of her employment at X support a finding that, if it hadn't been for the COVID-19 pandemic, the Appellant would have continued working two jobs to support herself.

[56] I find that the Appellant has shown that she was available for work from September 28, 2020, to July 12, 2021, within the meaning of section 50(8) of the Act and under sections 9.001 and 9.002 of the Regulations.

[57] Based on my findings on the three factors, I find that the Appellant has shown that she was capable of and available for work.

Conclusion

[58] The appeal is allowed.

Josée Langlois

Member, General Division – Employment Insurance Section