



Citation: *HM v Canada Employment Insurance Commission*, 2022 SST 935

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

Decision

Appellant (Claimant): H. M.
Respondent (Commission): Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission
reconsideration decision (453454) dated February 3, 2022
(issued by Service Canada)

Tribunal member: Gerry McCarthy
Type of hearing: Teleconference
Hearing date: April 14, 2022
Hearing participant: Appellant
Decision date: April 18, 2022
File number: GE-22-853

Decision

[1] The appeal is allowed.

[2] The Claimant has shown that was available for work while in school. This means that he isn't disentitled from receiving Employment Insurance (EI) benefits. So, the Claimant may be entitled to benefits.

Overview

[3] The Canada Employment Insurance Commission (Commission) decided that the Claimant was disentitled from receiving EI regular benefits from October 13, 2021, to October 14, 2021, and from October 18, 2021, to March 4, 2022, 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 the Claimant wasn't available because he was in school full-time.

[6] The Claimant disagrees and says he was available for work while in school. The Claimant says he applied to a number of jobs while in a 10-week school program. He further says his course obligations ended on December 17, 2021. The Claimant also says he started a new job on January 24, 2022.

Issue

[7] Was 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] 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.

[11] 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.

[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 two sections of the law on availability.

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.

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.

The Claimant doesn't dispute that he was a full-time student from October 13, 2021, to December 17, 2022

[15] The Claimant agrees that he was a full-time student from October 13, 2021, to December 17, 2021. I see no evidence that shows otherwise. So, I accept that the Claimant was in school full-time from October 13, 2021, to December 17, 2021.

[16] The presumption applies to the Claimant from October 13, 2021, to December 17, 2021.

The Claimant disputes that he was a full-time student after December 17, 2021

[17] The Claimant says his course obligations ended on December 17, 2021. The Claimant further testified he started working at a new job on January 24, 2022.

[18] The Commission disagrees and says the Claimant was in a 20-week program and a full-time student until March 4, 2022.

[19] I find the Claimant wasn't a full-time student after December 17, 2021, for the following reasons:

[20] First: I accept as credible the Claimant's statement that his courses ended December 17, 2021, because his statements were detailed and supported by an earlier statement to the Commission in the Appeal Record (GD3-18). I realize the Commission concluded the Claimant was in a 20-week school program until March 4, 2022. Nevertheless, there was some confusion on this matter and the Commission didn't seem to understand the Claimant did finish a 10-week school program on December 17, 2021.

[21] Second: The Claimant started working at a new job on January 24, 2022. Specifically, the Claimant testified that after December 17, 2021, he only received the occasional e-mail from the school program he attended for 10-weeks.

The Claimant wasn't a full-time student after December 17, 2021

[22] The Claimant wasn't a full-time student after December 17, 2021. So, the presumption doesn't apply to the Claimant after December 17, 2021.

[23] This means only that the Claimant isn't presumed to be unavailable for work. I still have to look at the two sections of the law that apply in this case and decide whether the Claimant is actually available after December 17, 2021.

The Claimant was a full-time student from October 13, 2021, to December 17, 2021.

[24] The Claimant was a full-time student from October 13, 2021, to December 17, 2021. 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.

[25] 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

[26] The Claimant says he was once enrolled in a Personal Care Worker (PSW) program (2013-2014) and worked in the afternoons from 4:30pm to midnight.

[27] The Commission says the Claimant was in a full-time course and restricted by the training he was attending.

⁶ See *Canada (Attorney General) v Rideout*, 2004 FCA 304.

⁷ See *Canada (Attorney General) v Cyrenne*, 2010 FCA 349.

[28] I find the Claimant rebutted the presumption he was unavailable from October 13, 2021, to December 17, 2021, because he had previously attended a full-time PSW program while working afternoons from 4:30pm to midnight.

[29] The Claimant has rebutted the presumption that he was unavailable for work from October 13, 2021, to December 17, 2021.

The presumption is rebutted

[30] Rebutting the presumption means only that the Claimant isn't presumed to be unavailable. I still have to look at the two sections of the law that apply in this case and decide whether the Claimant is actually available.

Reasonable and customary efforts to find a job

[31] 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 were reasonable and customary.⁸

[32] 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 his efforts were sustained and whether they were directed toward finding a suitable job. In other words, the Claimant has to have kept trying to find a suitable job.

[33] 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

- assessing employment opportunities
- applying for jobs
- attending interviews

⁸ See section 50(8) of the Act.

⁹ See section 9.001 of the Regulations.

¹⁰ See section 9.001 of the Regulations.

[34] The Commission says the Claimant didn't do enough to try to find a job. Specifically, the Commission says the Claimant "acknowledged" he hadn't been actively looking for work outside of his full-time training.

[35] The Claimant disagrees. The Claimant says he updated his resume, assessed employment opportunities, and submitted job applications to several employers including "X" and "X." The Claimant says his efforts were enough to prove that he was available for work.

[36] I find the Claimant was making reasonable and customary efforts to find a job for the following reasons:

[37] First: The Claimant provided details on the job applications he submitted to two employers. Furthermore, the Claimant testified he had two interviews with "X." I realize the Commission maintained the Claimant "acknowledged" he hadn't been actively looking for work outside of his schooling. However, I prefer the Claimant's testimony that he was looking for work outside of school hours because his testimony included specific details on employers he contacted about employment.

[38] Second: The Claimant was assessing employment opportunities through "Indeed." I accept the Claimant's testimony on this matter, because he eventually found a job in January 2022 through his own job-search efforts.

[39] The Claimant has proven that his efforts to find a job were reasonable and customary.

Capable of and available for work

[40] I also have to consider whether the Claimant was capable of and available for work but unable to find a suitable job.¹¹ Case law sets out three factors for me to consider when deciding this. The Claimant has to prove the following three things:¹²

¹¹ See section 18(1)(a) of the Act.

¹² 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.

- 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 (in other words, overly) limited his chances of going back to work.

[41] 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

[42] The Claimant has shown that he wanted to go back to work as soon as a suitable job was available, because he testified he was looking for work and provided details on the employers he contacted about employment.

Making efforts to find a suitable job

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

[44] 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

[45] The Claimant's efforts to find a new job included updating his resume, assessing employment opportunities, applying for jobs, and attending two interviews with a potential employer. I explained these reasons above when looking at whether the Claimant has made reasonable and customary efforts to find a job.

[46] Those efforts were enough to meet the requirements of this second factor, because the Claimant submitted job applications and attended two interviews with "Eaton Powering Business Worldwide."

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.

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

[47] The Claimant didn't set personal conditions that might have unduly limited his chances of going back to work.

[48] The Claimant says he hasn't done this because he was available to work afternoon and evening shifts during the period he was in school from October 13, 2021, to December 17, 2021.

[49] The Commission says the Claimant was obligated to attend classes each working day from 8:30am to 3:00pm and had been getting paid for the training he was attending.

[50] I find the Claimant didn't unduly limit his chances of going back to work for the following reasons:

[51] First: The Claimant attended classes online and could work afternoons and evenings Monday to Friday and on weekends. I realize the Commission submitted the Claimant attended classes each working day from 8:30am to 3:00pm and had been getting paid for the training he was attending. I realize the Claimant was paid an allowance during the 10-weeks he attended school. Nevertheless, this allowance wouldn't automatically mean the Claimant wasn't available as he would simply report any earnings (or allowance monies) on his claimant report as he did when he received regular benefits on his claim prior to October 13, 2021.

[52] Second: The Claimant completed his 10-week course by December 17, 2021. I realize the Commission concluded the Claimant was a full-time student for 20-weeks until March 4, 2022. However, I accept as credible the Claimant's testimony that he finished his schooling on December 17, 2021, because his statements on this matter were forthright, plausible, and supported by the fact he started a new job on January 24, 2022.

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

[53] Based on my findings on the three factors, I find the Claimant has shown that he was capable of and available for work but unable to find a suitable job until he started a new job on January 24, 2022.

Conclusion

[54] The Claimant has shown that he was available for work within the meaning of the law. Because of this, I find that the Claimant isn't disentitled from receiving benefits. So, the Claimant may be entitled to benefits.

[55] This means that the appeal is allowed.

Gerry McCarthy

Member, General Division – Employment Insurance Section