



Citation: *MZ v Canada Employment Insurance Commission*, 2022 SST 956

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

Decision

Claimant: M. Z.

Commission: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission
reconsideration decision (459871) dated February 28, 2022
(issued by Service Canada)

Tribunal member: Audrey Mitchell

Type of hearing: Videoconference

Hearing date: May 3, 2022

Hearing participant: Claimant

Decision date: May 17, 2022

File number: GE-22-908

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 January 3, 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 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 his classes are offered online and do not interfere with him finding a job.

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] 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 isn’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.

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 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.

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.

[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 that his courses were online so he was available for work.

[20] The Commission says the Claimant invested a significant amount of money on his studies and spends more than 25 hours a week studying.

[21] I find that the Claimant has rebutted the presumption of non-availability.

[22] The Claimant testified that he is studying accounting. He sent the Commission a copy of his class schedule. Some were scheduled during normal business hours, and others did not show specific times. The Commission asked the Claimant if he had to attend classes at specific times. He said that he did, but the classes were offered at numerous times during the week, and he could log into them.

[23] I asked the Claimant about his class schedule. I also asked him about his statement in his application for benefits that if he found full-time work that conflicted with his program, he would finish his program. He said that his courses don't conflict with his work schedule at all. He said that all of his classes are online. He added that he doesn't have to attend classes as scheduled since they are all recorded. The Claimant said that he had the option to attend the lectures or watch them at his own pace.

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

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

[24] I give more weight to the Claimant's testimony about his classes than to what he told the Commission. I do so, because I don't find his statement as recorded in the Commission's notes is clear. I also note that the Commission acknowledges that the Claimant's class schedule flexible. So I accept the Claimant's testimony as fact and find that he could watch recorded classes at his own pace.

[25] I asked the Claimant about exams. He said that they were all done online and that they were scheduled in a window of time over more than a day. The Claimant testified that he could take the exams at any time within the window. From this testimony, I don't find that the Claimant's exams would have interfered with his availability for work.

[26] The Claimant testified that he started studying in January 2018. He said that from 2013, he had been working full-time except for an eight-month period when he was collecting EI benefits. I have no reason to doubt the Claimant's testimony. So, I find that he has an almost four year history of working full-time while in school.

[27] I find that the flexibility of the Claimant's classes is an exceptional circumstance based on which he has rebutted the presumption of non-availability. I find that is the case as well because of his history of working full-time while in school

[28] The Claimant has rebutted the presumption that he is unavailable for work.

– **The presumption is rebutted**

[29] 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

[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.⁸

⁸ See section 50(8) of the Act.

[31] The law sets out criteria for me to consider when deciding whether the Claimant's efforts are reasonable and customary.⁹ 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:¹⁰

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

[33] The Commission says that the Claimant isn't doing enough to try to find a job.

[34] The Claimant disagrees. He says that he applied for jobs at an employment agency, through job search websites and in person. The Claimant says that his efforts are enough to prove that he is available for work.

[35] I find that the Claimant hasn't shown that his job search efforts are sustained. For this reason, I don't find that he has proven that he is making reasonable and customary efforts to find a job.

[36] In the job search record the Claimant sent to the Commission, he listed names of five companies where he applied for jobs between December 18, 2021 and February 2, 2022. The company to which the Claimant applied on February 2, 2022 is an employment agency. The Claimant said that the list he provided is in addition to in-person job applications he made.

[37] I asked the Claimant what he had done to find work, keeping in mind the examples of job search activities listed in the application for benefits. The Claimant said that he had applied through job search websites, especially the one at the school where

⁹ See section 9.001 of the Regulations.

¹⁰ See section 9.001 of the Regulations.

he was studying. He added that he had applied for jobs through an employment agency and in-person.

[38] The Commission submitted that the Claimant hadn't shown reasonable and customary efforts to find a job because he applied to only four jobs and an employment agency in a nearly two-month period. I asked the Claimant about this. He said that he didn't see any point in applying to more than one agency job, because the agency is "the main thing".

[39] I asked the Claimant if he had applied for jobs other than the ones in the record he sent to the Commission. He said he had, so I gave him an opportunity to add to the list post-hearing.

[40] The Claimant sent a post-hearing document with confirmation of 12 job applications. This job search record included the application to the employment agency and applications made to two other companies on the list he sent to the Commission. The Claimant applied for these 12 jobs between December 15, 2021 and February 28, 2022.

[41] On May 6, 2022, the Tribunal sent a follow-up letter to the Claimant. The letter asked the Claimant if he had applied for any jobs in March and April 2022, and if not, to explain what efforts he had made up to the date of the hearing to find work. To date, the Claimant has not replied to the letter.

[42] I am satisfied that the Claimant made some efforts to find work. However, there is no evidence before me that he has done anything since February 28, 2022. For this reason, I don't find that his efforts are sustained. Even though the Claimant said that he had applied to some jobs in-person, he did not give details of those job applications. So, the Claimant hasn't given me enough information to prove that his efforts to find a job are reasonable and customary.

Capable of and available for work

[43] I also have to consider whether the Claimant is 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

- 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.

[44] 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

[45] The Claimant hasn't shown that he wants to go back to work as soon as a suitable job is available.

[46] The Commission says that the Claimant hasn't shown a desire to return to work because he had applied to only four positions in a nearly two year period.

[47] The Claimant said that going to school didn't prevent him from being available for work. I agree that the Claimant's statement. But, the Claimant's overall conduct trying to find work doesn't support that he wanted to go back to work.

[48] As noted above, the Claimant didn't reply to the Tribunal's letter with evidence or an explanation of job search efforts after February 28, 2022. Without any evidence that the Claimant made any efforts to find a job after then, I don't find his conduct is that of someone who wants to go back to work.

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.

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] Before the hearing, the Claimant asked to adjourn the hearing. In his request, the Claimant said that he had to be “at [his] workplace” at the same time as the hearing. However, he attended the hearing as scheduled. The Claimant did not give any information about this work.

[50] I don’t have enough information about the Claimant’s “workplace” to conclude that he wants to return to work. For example, I don’t know if this is a full-time or part-time job. I don’t know if it is a temporary job or a permanent job. I don’t know if this is a volunteer or paid position. Without more information, in spite of what he referred to in his adjournment request, I don’t find that the Claimant has shown that he wanted to return to work.

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

[51] The Claimant hasn’t made enough effort to find a suitable job.

[52] 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

[53] The Claimant’s efforts to find a new job included looking for jobs on job search websites, applying for jobs online and in person, and applying to an employment agency. I explained these reasons above when looking at whether the Claimant has made reasonable and customary efforts to find a job.

[54] Those efforts aren’t enough to meet the requirements of this second factor. As noted above, the Claimant showed proof of applying for 12 jobs from December 15, 2021 to February 28, 2022. He did not respond to post-hearing question about any efforts he made to find work after February 28, 2022.

[55] The Claimant has to prove that he is making efforts to find a suitable job. I find that he has made some efforts of the kind listed in the law. In spite of this, and even

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.

though he referred to having to be at a workplace, there is not enough information before me to conclude that the Claimant is making suitable efforts to find a job.

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

[56] The Claimant hasn't set personal conditions that might unduly limit his chances of going back to work.

[57] The Commission did not make submissions on this factor. As noted above, they refer to the flexibility the Claimant has with his classes while in school.

[58] I have found that even though the Claimant is a full-time student, he has rebutted the presumption of non-availability. I do not find that he has set any personal conditions that might unduly limit his chances of going back 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.

Conclusion

[60] 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.

[61] This means that the appeal is dismissed.

Audrey Mitchell

Member, General Division – Employment Insurance Section