Citation: *LB v Canada Employment Insurance Commission*, 2022 SST 1001

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	L. B.
Representative:	K. C.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (437015) dated November 4, 2021 (issued by Service Canada)

Tribunal member:	Audrey Mitchell
Type of hearing:	Teleconference
Hearing date:	August 23, 2022
Hearing participant:	Appellant's representative
Decision date:	September 1, 2022
File number:	GE-22-1718

Decision

[1] The appeal is allowed. The Tribunal agrees with the Claimant.

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

Overview

[3] The Claimant is a full-time student who lost her job at a restaurant due to the pandemic. She applied for EI benefits after losing her job. The Canada Employment Insurance Commission (Commission) decided that the Claimant is disentitled from receiving EI regular benefits as of from January 11, 2021 to April 20, 2021, and from September 2, 2021 to December 23, 2021, because she wasn't available for work.

[4] The Claimant appealed the Commission's reconsideration decision to the General Division of the Social Security Tribunal (SST). The General Division dismissed the appeal, finding that the Claimant wasn't available for work from January 11, 2021 to April, 2021, and from September 2, 2021 onward.

[5] The Claimant then appealed the decision of the General Division to the Appeal Division of the SST. She argued that the General Division assumed in error that the types of jobs she was applying for were primarily available in the afternoons, evenings and weekends. This was the basis of the General Division's decision that the Claimant set personal conditions that unduly limited her chances of returning to work.

[6] The Appeal Division returned the Claimant's appeal to the General Division. It found the General Division did not have sufficient evidentiary basis to support its conclusion about the types of jobs the Claimant applied for. The Appeal Division says the General Division's decision concerning the Claimant's reasonable and customary efforts to find suitable work, her desire to return to work, and her expression of that desire through efforts to find a suitable job should not be disturbed.

Matter I have to consider first

The Claimant wasn't at the hearing

[7] The Claimant wasn't at the hearing. But her representative attended. He said the Claimant asked him to make submissions on her behalf.

[8] The Claimant identified her representative for her Appeal Division appeal. He argued her case before the Appeal Division, and filed updated submissions on her behalf for the new General Division appeal hearing. I am satisfied that the Claimant has designated him as her representative. So, the hearing took place when it was scheduled with the Claimant's representative, but without the Claimant.

Issue

[9] Is the Claimant available for work?

Analysis

Capable of and available for work

[10] Case law sets out three factors for me to consider when deciding whether the Claimant is capable of and available for work but unable to find a suitable job. The Claimant has to prove the following three things:[1]

a) She wants to go back to work as soon as a suitable job is available.

b) She has made efforts to find a suitable job.

c) She hasn't set personal conditions that might unduly (in other words, overly) limit her chances of going back to work.

[1] 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.

[11] Due to the Appeal Division decision, I will only consider the third factor. When doing so, I have to look at the Claimant's attitude and conduct.[2]

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

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

[13] The Claimant says she hasn't done this because her courses are online and asynchronous. She says this gives her more time to work any day at different hours.

[14] The Commission says the Claimant hasn't shown that she can accept full-time work while in school. It notes that the Claimant said she was willing to accept full-time work from 11:00 a.m. to 3:00 a.m. while in school.

[15] The Claimant asked the Commission to reconsider its initial decision. In it, she said she had worked at least two jobs while she was a full-time student from September 2018 to March 2020. She added that she had also worked three jobs for several months in that time. The Claimant said that since her classes were online and asynchronous, it made it even easier to manage her school/work schedule.

[16] There are four training questionnaires in the Commission's file. In the ones covering the periods in question, the Claimant declared that she wasn't required to attend scheduled classes, but she worked at her own pace. She also said that if she found a full-time job that conflicted with school, she would change her course schedule and accept the job. In each of the four, she said she could work under the same conditions as she had before starting school.

[17] The Claimant spoke to the Commission about school. She said she could listen to her lectures and do homework, reading and assignments at any time. The Claimant said that she did her schoolwork on nights and weekends. According to the

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[2] 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.

Commission's notes, the Claimant said when she had worked three jobs in the past while in school, she would work sometimes from 11:00 a.m. to 3:00 a.m.

[18] In an email to the Commission, the Claimant again referred to her asynchronous classes. She said that because of this, she could work mornings, nights, days and weekends.

[19] In updated submissions after the Appeal Division decision, the Claimant again said she could access recorded classes, complete school work, and take tests around a regular work schedule. She said that she spent on average 17 hours a week on school, which left her 30 hours or more for full-time work.

[20] The Claimant said she was available from 6:00 a.m. to 4:00 a.m. the next day. She had applied for jobs that were open from 7:00 a.m. until 3:00 a.m. the next day. She says this shows she placed no restriction on her availability.

[21] The Claimant wasn't present at the hearing, so didn't give testimony about her availability for work. Her representative reviewed much of what was in the updated submissions. I accept the Claimant's statements to the Commission as credible. I do so because of their consistency through the adjudication of her application for benefits.

[22] I accept that the Claimant has a pre-pandemic history of working more than one job at a time while in school. I accept her statement that she did this because she says she needed to work to pay her bills. The Appeal Division decision's order that parts of the General Division decision not be disturbed means that the Claimant has already proven she wanted to work and made efforts to find a suitable job.

[23] Attached to her updated submissions are letters from two employers. Both refer to the Claimant asking about work with no restrictions on her availability. The Claimant's representative confirmed at the hearing that he is also the Claimant's manager and authored one of the letters. I still give the letters a lot of weight. I do so because they are from individuals who don't have an interest in the outcome of this appeal. They are also consistent with what the Claimant has said, namely that she can work on any day at any time.

[24] I don't agree with the Commission's submission that the Claimant repeatedly expressed that she was willing to accept full-time work from 11 a.m. to 3:00 a.m. while in school. Its file notes say that these were the hours the Claimant had worked in the past while in school. In spite of her full-time course load, I accept as fact and find that the flexibility of having asynchronous classes meant that the Claimant could accept a full-time job during or outside normal working hours.

[25] The Claimant gave information in updated submissions about the operating hours and work duties available at two of the places she used to work and the place she works now. The submission notes that the Claimant asked both former employers for any work available. It also says the Claimant told her current employer that she could help with one of their duties that is done from 9:00 a.m. to 4:00 p.m. I find from this that she expressed a willingness to work without restricting the days or hours.

[26] I give a lot of weight to what the Claimant said in the three training questionnaires covering the period in question. She said if she found a full-time job, she would change her schedule so she could accept the job. She explained to the Commission that her program of study at university is an interest of hers, but she's not in a rush to complete it. This supports what she said in the questionnaire.

[27] Even though the Claimant did not say that she would give up school to accept a full-time job, I don't find that she had to say this in the circumstances. I find that since she could reasonably do her school work and "attend" classes at any time, she didn't have to give up her studies to accept a full-time job.

[28] The Commission decided that the Claimant had not proven her availability for work for the periods January 1, 2021 to April 20, 2021 and September 2, 2021, to December 23, 2021. It decided this way because of the Claimant's full-time studies. But, I don't find that she prioritized school such that it would limit her ability to work. I don't find that her being a full-time student was a personal condition that might have unduly limited her chances of returning to work.

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

[29] Considering the decision of the Appeal Decision, and based on my findings on the factor above, I find that the Claimant has shown that she is capable of and available for work but unable to find a suitable job.

Conclusion

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

[31] This means that the appeal is allowed.

Audrey Mitchell
Member, General Division – Employment Insurance Section