Citation: *IW v Canada Employment Insurance Commission*, 2022 SST 1353

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	I. W.
Representative:	R. W.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (462663) dated March 14, 2022 (issued by Service Canada)

Tribunal member:	Lilian Klein
Type of hearing:	Teleconference
Hearing date:	June 14, 2022
Hearing participants:	Appellant Appellant's representative
Decision date:	July 19, 2022
File number:	GE-22-1300

Decision

[1] I am dismissing the Claimant's appeal. This decision explains why.

[2] The Claimant has not shown that he was available for work while taking a full-time course. This means that he is disentitled from receiving employment insurance (EI) benefits starting on September 8, 2021.

Overview

[3] On May 30, 2021, the Claimant was laid off from a job as a labourer for the city. He applied for EI benefits. On September 8, 2021, he began a full-time course and stated that he was available for work under at least the same conditions as before.

[4] The Canada Employment Insurance Commission (Commission) reviewed the Claimant's situation. It disentitled him from receiving EI regular benefits starting on September 8, 2021, after finding that he was not available for work.

[5] To get EI regular benefits, you must prove that you are available for work. To prove availability, you must search for work and set no personal conditions that might unduly (unreasonably) limit your chances of finding a suitable job.

[6] The Commission says the Claimant was not available since he made little effort to look for work; he did not have experience working full time while studying full time; and he gave priority to his course over finding work.

[7] The Claimant argues that he was available for work since his course lectures were online due to COVID-19, so he could listen to them at any time. He says it is unfair that his friends gave the same answers as he did and are not looking for work but they are still getting benefits while he is not.

The issue I must decide

[8] Was the Claimant available for work while taking a full-time course?

Analysis

[9] The law says all claimants must show that they are available for work.[1] A new temporary section of the *Employment Insurance Act* (EI Act) says students who attend a full-time course cannot receive benefits unless they prove that they are capable of and available for work.[2] They have to show it is more likely than not that they are available.

Presuming that full-time students are not available for work

[10] The Federal Court of Appeal says there is a presumption that claimants in school full time are unavailable for work.[3] This means we can assume that full-time students are unavailable unless they can show otherwise. I will start by looking at whether I can assume that the Claimant was unavailable. Then I will look at whether he showed that he was actually available.

[11] The Claimant says he is a full-time student. So, the presumption applies to him.

[12] The presumption can sometimes be rebutted, for example, where a claimant has experience working full time while studying full time or has exceptional circumstances. The Commission says the Claimant cannot rebut this presumption since i) he lacked that work/study experience; ii) he was not actively looking for work; and iii) his course was more important to him than finding a job.

[13] I agree with the Commission. On his benefit application, the Claimant declared that he had not worked before while taking a course.[4] He now says he had experience working with a tree service in his high-school summer breaks. He says he had this job in term time too but there is no evidence that it was more than occasional part-time work.

[14] The Claimant was also inconsistent on whether he would drop his course to take a full-time job. He first said he would not drop his course unless he could postpone the

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[1] S 18(1)(a) of the Employment Insurance Act (EI Act) says claimants are not entitled to benefits for a working day in a benefit period unless they can prove that on that day they were capable of and available for work and unable to obtain suitable employment.
[2] In March 2020, the EI Act was amended in response to COVID-19 (s 153.3 of the EI Act). S 153.161 requires claimants in non-referred training to prove that they are capable of and available for work.
[3] *Canada (Attorney General) v Cyrenne*, 2010 FCA 349.
[4] GD3-19.

start date of the job.[5] He contradicted that statement when asking for a reconsideration; he said he would drop his third-year course if it was for a well-paid job in management.[6] On appeal, he said he would drop his course even for a minimum wage job.[7]

[15] Spontaneous initial declarations are considered more reliable than statements claimants make after the Commission first refuses them benefits.[8] So, I put more weight on the Claimant's initial declaration. This is why I agree with the Commission that the Claimant put his course above the need to find work, full time or part time.

[16] As well, the Claimant has not shown that his circumstances were exceptional.

[17] For all these reasons, I find that the Claimant has not rebutted the presumption of non-availability. But I will still look at the law that applies in his case and consider whether he showed he was really available for work.

[18] The Commission says claimants must make "reasonable and customary" efforts to find work. But the Commission did not ask the Claimant for proof of his job search, or tell him what kind of proof it required. [9]

[19] For this reason, I make no decision on a disentitlement under section 50 of the EI Act for failing to carry out a reasonable and customary job search. I will only consider the following test for availability in sections 18(1)(a) and 153.161 of the EI Act.

Was the Claimant available for work and unable to find a suitable job?

[20] To show he was available for work, the Claimant had to prove three things:

i) he wanted to return to work as soon as he could find a suitable job;

ii) he tried to make that happen through efforts to find work; *and*

iii) he had no personal conditions that might unduly limit his chances of getting a suitable job.[10]

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[5] See GD3-19.
[6] See GD3-30.
[7] See GD2-13
[8] *Bellefleur v Canada (Attorney General),* 2008 FCA 13.
[9] The Commission did not ask for a job search so the Claimant cannot be disentitled under s 50(1) of the EI Act. See *LD v Canada Employment Insurance Commission,* 2020 SST 688.
[10] This is a plain language version of the factors used to assess availability for work. See the original language in *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96.

[21] I have to consider each of these factors to decide the question of availability. I must also look at the Claimant's attitude and conduct.[11]

Did the Claimant want to return to work as soon as he could find a suitable job?

[22] No. The Claimant has not proved that he wanted to get back to work as soon as a suitable job was available.

[23] I find that the Claimant wanted to finish his course before returning to the labour market. He has not shown by his actions that he was in any hurry to return to work.

[24] The Claimant says he can show he wanted to return to work because he was available many hours from Monday to Friday as well as all day Saturday and Sunday. But saying you are willing to work and having the time to work is not enough to prove availability. You have to show by your actions that you really wanted to return to work.

[25] I give little weight to the Claimant's argument on appeal that he would have dropped his third-year course to take a minimum wage job. That argument does not match his earlier statements. It does not show he wanted to return to work as soon as he could.

[26] The Claimant says he expected to get benefits without having to return to work since that is what his friends at university have been doing. This sense of entitlement does not match the attitude and conduct of a claimant who truly wants to return to work.

Did the Claimant make enough efforts to find suitable employment?

[27] No. The Claimant did not show that he made enough efforts to find a suitable job. The law says you have to show that you carried out a job search on every working day for which you claimed benefits.

[28] The Claimant's benefit application informed him of this fact. It says he had to be available for work, must actively search for jobs and keep a detailed record of his job search. His training questionnaire reminded him that he must still look for work and keep a list of the employers he contacted and the dates and results of each contact.

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[11] *Canada (Attorney General) v Whiffen*, A-1472-92 and *Carpentier v Canada (Attorney General)*, A-474-97.

[29] The Claimant did not do this; he kept no records. His sworn testimony on his job search was vague. He testified that he stopped looking for work after the Commission first refused him benefits since he felt "punished" enough. He then contradicted this statement, saying he had continued to look for work.

[30] I find it more likely than not that the Claimant stopped looking for work at least temporarily, as he initially testified. I make this finding since, as noted above, initial spontaneous statements are considered more reliable than later denials.

[31] I accept that the Claimant made some effort to look for work but not necessarily in response to posted job vacancies. On appeal, he reported asking for work at five businesses.[12] He now says he asked for work at garages, grocery stores, restaurants, the YMCA, the gym where he worked out and the fitness centre on campus. He says he looked for job vacancies online but did not register with any employment agencies.

[32] There is still no evidence that the Claimant searched for work on every day for which he claimed benefits or applied for jobs that were actually available.

[33] I find it more likely than not that there were vacancies that the Claimant could have found if he had carried out a serious job search. He says there were few vacancies. I agree with him that it was a tough job market but the Commission has given examples of jobs he could have applied to. He had to try to find work even if he believed that he was unlikely to succeed.[13]

Did the Claimant set personal conditions?

[34] Yes. The Claimant set personal conditions on the work he would accept. This would, more likely than not, have limited his chances of finding a job.

[35] Focusing on school rather than on searching for work is a personal condition. Some students wish to concentrate on their course; they do not want to work while studying. That is their choice. But EI is only paid to students who are genuinely trying to find work as well.

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[12] See GD2-15.
[13] *De Lamirande v Canada (Attorney General)*, 2004 FCA 311.

[36] The Claimant set other personal conditions. For example, he would only drop his course for a full-time job if it was in management. He would only drive an hour or so for work if it paid well. These conditions suggest he wanted more than just any suitable job.

[37] A suitable job for the Claimant was one that was similar to his previous job and salary and within his health and physical capabilities.[14] His last job was as a labourer at $13 per hour. So a well-paid management job was an unrealistic personal condition. It would have unduly limited his chances of returning to work in suitable employment.

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

[38] Based on my findings on the above three factors, I find that the Claimant has not shown that he was capable of and available for work and unable to find a suitable job.

[39] The Claimant says it is unfair for the Commission to stop his benefits when he knows students who are sitting around getting benefits without trying to find work. He says he should be able to get EI to help him reach his goal of becoming self-sufficient.

[40] But EI is not a student subsidy. Students who want to receive EI have to show by their actions that they are available for work, as defined above. The Claimant cannot justify his lack of action based on what his friends are doing and advising him to do.

[41] The Claimant has asked if he can get benefits during his winter break when he was not studying full time. But that issue is not before me since the Commission has not reconsidered it. The Claimant might want to ask the Commission to do that.

Conclusion

[42] The Claimant has not shown that he was capable of and available for work while taking his full-time course. As a result, he is disentitled from receiving EI regular benefits starting on September 8, 2021. This means that I am dismissing his appeal.

Lilian Klein
Member, General Division – Employment Insurance Section

[14] See s 6 of the EI Act and s 9.002 of the *Employment Insurance Regulations* for more details on what is, or is not, suitable employment.