



Citation: *MF v Canada Employment Insurance Commission*, 2022 SST 1302

Social Security Tribunal of Canada General Division – Employment Insurance Section

Decision

Appellant: M. F.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (434676) dated September 24, 2021 (issued by Service Canada)

Tribunal member: Leanne Bourassa

Type of hearing: Videoconference

Hearing date: March 9, 2022

Hearing participants: Appellant

Decision date: March 29, 2022

File number: GE-22-408

Decision

[1] The appeal is dismissed. The Tribunal disagrees with M. F., the Claimant.

[2] The Claimant hasn't shown that he was available for work while in school. This means that he can't receive Employment Insurance (EI) benefits.

Overview

[3] The Claimant was a student and was receiving Employment Insurance Emergency Recovery Benefits. When his benefits came to an end in October 2020, a claim for regular EI benefits was automatically established for him. In January 2021, the Claimant began making claims for benefits again, thinking that if he didn't qualify he would be refused. He reported that he was in school full-time.

[4] In August 2021, the Canada Employment Insurance Commission (Commission) decided that the Claimant was disentitled from receiving EI regular benefits as of January 13, 2021, because he had not proven his availability 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.

[5] 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.

[6] The Commission says that the Claimant wasn't available because he was in school full-time. He has not shown he was available while in school. When the Commission reconsidered their decision, they changed it to say that the Claimant was not available for the period of January 10, 2021 to July 9, 2021 and after September 6, 2021.

[7] The Claimant disagrees and says that he was honest in his reports and he needed to work while going to school. Because of lockdowns and curfews related to the

COVID-19 pandemic, it was difficult to find work. He would have been okay with not receiving EI if he was not eligible but since he was paid, he is now in a worse position than he would have been if he had not been paid benefits.

Issue

[8] Was the Claimant available for work while in school?

Analysis

Does the Commission have the power to review the Claimant's entitlement to EI benefits?

– The Commission's authority to review its decisions

[9] The law says specifically that the Commission has the authority to verify that a claimant who attends a non-referred course of study is entitled to benefits. They do this by requiring proof that the claimant was capable of and available for work on any day of their benefit period. They can do this at any point after benefits are paid to the claimant.¹

– Did the Commission exercise its authority judicially?

[10] The section of the law allowing the Commission to verify a student claimant's entitlement states that the Commission may verify the entitlement. The law does not say the Commission has to take this step. This means it is up to the Commission how to exercise their discretion to do this.

[11] Case law has told us that a Commission decision can only be interfered with if it is shown that they did not act judicially when exercising its discretionary authority.²

¹ As it applies to this case, this authority is set out in the temporary measures to access benefits that the government put in place to help Canadians during the COVID-19 pandemic. Subsection 153.161(2) of the Employment Insurance Act sets out this power.

² See for example the decision in *Canada (Attorney General) v. Purcell*, A-694-94

[12] Acting “non-judicially” can mean acting in bad faith, with an incorrect aim, considering non-relevant factors, not considering relevant factors or acting in a discriminatory manner.³

[13] I find that the Commission considered relevant factors when it decided to exercise its discretionary authority to verify the Claimant’s entitlement to benefits. The Commission paid the Claimant quickly under temporary measures put in place to facilitate access to benefits during the COVID-19 pandemic. They then had the authority to review that decision.

[14] Subsection 153.161(1) of the EI Act⁴ is clear about a student’s entitlement to benefits. A claimant is not entitled to receive benefits when they are in non-referred studies, unless they show they are available for work.

[15] The Commission considered the following aspects: the fact that the Claimant was not referred to his course, the Claimant’s course schedule, his statements on his training questionnaire, the statements he made that he was not available during traditional working hours because of school and his desire to prioritize school.

[16] I do not see any evidence that the Claimant was treated in a discriminatory manner. There is no evidence that his particular case was singled out because of any factors related to him personally.

[17] In reviewing the Claimant’s case, the Commission exercised its power in a judicial manner because it considered all the relevant elements before making a decision, and did not consider non-relevant factors.

[18] I find that the Commission exercised its discretionary authority in a judicial manner when it reviewed its prior decision to pay benefits to the Claimant.

³ This is outlined in the Federal Court of Appeal decisions Dunham, A-708-95 and Purcell, A-694-94.

⁴ Even in cases where the sections of the law relating to temporary measures to facilitate access to benefits are not in question, students in non-referred training can be required to show their availability to avoid being disentitled from benefits. In those cases, the Commission has the authority under section 52 of the Act to review a claim.

Availability for work

[19] 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.

[20] First, the *Employment Insurance Act* (EI Act) says that a claimant has to prove that they are making “reasonable and customary efforts” to find a suitable job.⁵ The *Employment Insurance Regulations* (Regulations) give criteria that help explain what “reasonable and customary efforts” mean.⁶ I will look at those criteria below.

[21] 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.⁷ Case law gives three things a claimant has to prove to show that they are “available” in this sense.⁸ I will look at those factors below.

[22] 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.

[23] In addition, the Federal Court of Appeal has said that claimants who are in school full-time are presumed to be unavailable for work.⁹ 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.

[24] A new, temporary section of the EI Act says claimants who attend a full-time course cannot receive benefits unless they prove that they are capable and available for work.¹⁰ This is different from presuming that they are not available. A claimant in full-time studies doesn’t need to rebut a presumption, he only needs to prove his availability like any other claimant. Since the Commission verify the Claimant’s eligibility under this

⁵ See section 50(8) of the *Employment Insurance Act* (Act).

⁶ See section 9.001 of the *Employment Insurance Regulations* (Regulations).

⁷ See section 18(1)(a) of the Act.

⁸ See *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96.

⁹ See *Canada (Attorney General) v Cyrenne*, 2010 FCA 349.

¹⁰ This is subsection 153.161(1) of the Act.

section of the EI Act, I will only look at whether or not the Claimant has shown he was capable and available for work.

Reasonable and customary efforts to find a job

[25] 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.¹¹

[26] The law sets out criteria for me to consider when deciding whether the Claimant's efforts were reasonable and customary.¹² 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.

[27] 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:¹³

- contacting employers who may be hiring
- applying for jobs
- attending interviews

[28] The Commission says that the Claimant didn't do enough to try to find a job. He simply declared there were no jobs available and that it was not possible for him to work Monday to Friday because he was busy with his studies.

[29] The Claimant disagrees. He was looking for jobs but with the COVID-19 pandemic and related restrictions and curfews, there was not much available. He did ultimately secure a job through a friend as a bartender, but it was far outside of downtown Montreal where he lived and studied. The Claimant says that his efforts were enough to prove that he was available for work.

¹¹ See section 50(8) of the Act.

¹² See section 9.001 of the Regulations.

¹³ See section 9.001 of the Regulations.

[30] I find that the Claimant has not proven he was making reasonable and customary efforts to find work. While I believe he was looking for work, he has not provided any evidence of businesses he approached, jobs he considered, applications he may have submitted or people he spoke to about a job. He claims it would usually have been possible to work around his school schedule, but that the COVID restrictions were making it impossible to find work. However, he has not shown that he was conducting any job search activities, so I can't see if the restrictions were really hampering efforts to find work.

[31] The Claimant hasn't proven that his efforts to find a job were reasonable and customary.

Capable of and available for work

[32] I also have to consider whether the Claimant was capable of and available for work but unable to find a suitable job.¹⁴ Case law sets out three factors for me to consider when deciding this. The Claimant has to prove the following three things:¹⁵

- a) He wanted to go back to work as soon as a suitable job was available.
- b) He has 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.

[33] When I consider each of these factors, I have to look at the Claimant's attitude and conduct.¹⁶

¹⁴ See section 18(1)(a) of the Act.

¹⁵ 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.

¹⁶ 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.

– **Wanting to go back to work**

[34] The Claimant has shown that he wanted to go back to work as soon as a suitable job was available.

[35] I find this for two reasons: first, the Claimant was still on the list and doing shifts as an integration aide with the X School board, even while he was in his full-time studies. He explained that he was still employed, but the hours for substitutes had been greatly reduced.

[36] Also, the Claimant explained he was still looking for work and needed to work to cover his bills. He explained that he had always worked around school and would work as much as he could during the summer.

[37] However, saying that you are ready to work is not enough to meet the next step of the test. For that step, I need to see if the Claimant was demonstrating this desire to return to work by making efforts to find a suitable job.

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

[38] The Claimant hasn't made enough effort to find a suitable job.

[39] 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.¹⁷

[40] The Claimant's efforts to find a new job included talking to friends and looking for jobs that he could do around his class schedule. I explained these reasons above when looking at whether the Claimant has made reasonable and customary efforts to find a job.

[41] Those efforts weren't enough to meet the requirements of this second factor because the Claimant has not provided any examples of jobs he might have applied for. When I asked him specifically about his job search, he said that his main priority was on

¹⁷ 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.

being a student and that until COVID was over, that was where he was focused. While he did say he had the opportunity to work more because his classes were online, I do not see any evidence that he conducted an active job search.

[42] Finally, when completing his Training questionnaire in January 2021, the Claimant clearly answered that he has not made any efforts to find work since the start of his course or program or since becoming unemployed. He wrote that he had received full time work opportunities but that it would interfere with his studies.

[43] This statement and his testimony leads me to believe that the Claimant was not actively looking for employment. He was also setting a personal condition that would limit his chances of going back to work.

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

[44] The Claimant did set personal conditions that might have unduly limited his chances of going back to work.

[45] The Claimant says he hasn't done this because his course schedule would have allowed him to work almost full time around his program. He had worked part-time while being in school before, just not on a usual Monday to Friday schedule.

[46] The Commission says that the Claimant was limiting his availability to working solely outside his course schedule and only on specific days of the week. He was not willing to abandon his courses to accept employment without limitations.

[47] I find that the Claimant did set personal conditions that might have limited his chances of going back to work.

[48] The Claimant explained that even though he was focused on his classes, he was still able to work during the week and on the weekends. If it weren't for COVID restrictions he could have been able to do 40 hours around his classes. With online and recorded classes he could have done some class work at night.

[49] In January 2021 the Claimant filled out a training questionnaire. In this form, he said that he was spending 25 hours or more per week on his studies. He was obligated to attend scheduled classes. When he was asked to report if he was available and capable of working under the same or better conditions than before, he said he was not because to achieve a GPA to attend grad school, he must spend time he would be working to study and make sure assignments are complete.

[50] As I mentioned above, the Claimant also wrote that he had not been looking for work and had had full-time opportunities but they would interfere with his studies. This is consistent with his testimony that school was his priority.

[51] While prioritizing schooling over employment is a noble pursuit, it does have the effect of limiting the number of jobs available to you. Although I do believe that pandemic related restrictions were a factor in the Claimant's not being able to find a job, I also do find that his choice to only work around his school schedule was a condition he set himself that limited his chances of finding work.

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

[52] Based on my findings on the three factors, I find that the Claimant hasn't shown that he was capable of and available for work but unable to find a suitable job.

[53] I understand that the Commission's decision to retroactively disentitle the Claimant after he has received several months worth of benefits has put him in a worse financial position than if he had never applied for benefits in the first place. The fact that the Claimant also specifically asked agents of the Commission to confirm that he was entitled to benefits makes the situation even more frustrating. While I believe that pandemic restrictions made finding a job difficult, I also believe that the Commission's reassurance gave the Claimant a false sense of security with respect to his entitlement to benefits.

[54] Despite those factors, and a deep sympathy for the Claimant's position, I do not have the authority to make any decision that is not in compliance with the law. In every case, in order to be eligible for benefits a claimant must show they are available by

proving they have been looking for a job. In this case, the Claimant hasn't done that. The Commission is authorized by the law to review a claimant's eligibility and I cannot interfere with their decision.

Conclusion

[55] The Claimant hasn't shown that he was available for work within the meaning of the law. Because of this, I find that the Claimant can't receive EI benefits.

[56] This means that the appeal is dismissed.

Leanne Bourassa
Member, General Division – Employment Insurance Section