



Citation: *RK v Canada Employment Insurance Commission*, 2022 SST 1209

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

Decision

Appellant: R. K.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (460388) dated April 7, 2022 (issued by Service Canada)

Tribunal member: Lilian Klein

Type of hearing: Teleconference

Hearing date: August 18, 2022

Hearing participants: Appellant

Decision date: October 14, 2022

File number: GE-22-1550

Decision

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

[2] I agree with the Canada Employment Insurance Commission (Commission) that the Claimant has not shown that he was available for work from May 4, 2020, to August 5, 2020, and from September 8, 2020, to December 31, 2020.

[3] So, the Claimant is disentitled from receiving employment insurance (EI) benefits during those periods.

Overview

[4] The Claimant, a full-time student, applied for EI benefits after he was laid off from his part-time job on April 18, 2020. Payment of benefits began.

[5] The Commission reviewed the Claimant's circumstances. On December 30, 2021, it decided that he was not available for work from May 4, 2020, to August 5, 2020, and from September 8, 2020, to December 31, 2020. It disentitled him from receiving EI benefits during those periods. The Commission says he must repay the benefits he got.

[6] 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.

[7] The Commission says the Claimant was not available since he made little effort to look for work.

[8] The Claimant argues that he was available for work since his course moved online due to COVID-19. He says he could have accepted work at any time but there were no jobs due to the pandemic. He says it is unfair to ask him to repay money that he does not have.

The issue I must decide

[9] Was the Claimant available for work during the above periods?

Analysis

[10] 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) confirms that students who are studying full-time cannot get 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.

Assuming that full-time students are not available for work

[11] There is a presumption that claimants in school full time are unavailable for work.³ This means we can assume (take for granted) 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 was actually available for work.

[12] When the Claimant applied for benefits, he reported that he is a full-time student. So, the presumption applies to him.

[13] The Commission says the Claimant cannot rebut this presumption since he was not willing to drop his course to accept work and was not looking for any type of suitable job.

[14] But I find that the Claimant can rebut the presumption based on his experience working part time while studying full time. The presumption can be rebutted where a claimant has experience working full time while studying full time⁴ or has exceptional circumstances.⁵

[15] I rely on a decision of Tribunal's Appeal Division (AD) in a similar fact situation.⁶ The AD found that the part-time nature of a claimant's previous employment and her ability to maintain that level of work while studying full-time was an exceptional circumstance. The AD said this was enough to rebut the presumption in her case.

¹ S 18(1)(a) of the *Employment Insurance Act* (EI Act) says you cannot get benefits for a working day unless you can prove that on that day you were capable of and available for work and unable to obtain suitable work.

² In March 2020, the Act was amended in response to COVID-19 (s 153.3 of the EI Act). S 153.161 of the EI Act requires students 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 *Canada (Attorney General) v Rideout*, 2004 FCA 304.

⁵ *Cyrenne*, see above.

⁶ See *J. D. v Canada Employment Insurance Commission*, 2019 SST 438. I do not have to follow the decisions of the Tribunal's Appeal Decision (AD) but their logic can guide me, as in this case.

[16] Although I have used the AD's logic to find that the Claimant has rebutted the presumption of non-availability, I must still consider whether he was available for work.

[17] The Commission says claimants must make "reasonable and customary" efforts to find work. But the Commission did not ask the Claimant for proof of a job search until after the period of his claim.

[18] For this reason, I will not be considering a disentitlement under section 50 of the EI Act for failing to carry out a reasonable and customary job search.⁷ 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?

[19] To show he was available for work, the Claimant had to prove these 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.
- iii) He had no personal conditions that might unduly limit his chances of finding a suitable job.⁸

[20] 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.⁹

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

[21] No. The Claimant has not proved that he wanted to get back to work as soon as a suitable job was available, unless it was to return to his previous part-time job.

[22] The Claimant was inconsistent on whether he would drop his course to take a full-time job. He first said he would not drop his course to accept a full-time job. He then said he would accept the job if he could change his course schedule. On appeal, he said he would put his course on hold to accept any form of full-time work.

⁷ Since the Commission did not ask for a job search, the Claimant cannot be disentitled under s 50(1) of the Act. See *LD v Canada Employment Insurance Commission*, 2020 SST 688.

⁸ 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.

⁹ *Canada (Attorney General) v Whiffen*, A-1472-92; *Carpentier v Canada (Attorney General)*, A-474-97.

[23] Spontaneous initial declarations are generally considered more reliable than statements claimants make after the Commission first refuses them benefits.¹⁰ So, I would normally put more weight on the Claimant's initial statement than his later ones.

[24] But on this point, I accept as credible the Claimant's explanation that he changed what he said after his course went online, which allowed him to accept work at any time.

[25] However, saying that you have the time to work and that you want to work is not enough. You must show by your actions that you really wanted to return to work.

[26] The Claimant did not show that he wanted to return to work to the extent that he was motivated to search for a new job. The same applies to his inability to find more hours once he was recalled to his previous part-time job with less hours than before.

Did the Claimant make enough efforts to find suitable employment?

[27] No. The Claimant says he was applying to jobs "constantly," but he did not show that he made constant efforts to find a suitable job. The law says you have to prove that you carried out a job search on every working day for which you claimed benefits.

[28] The Claimant says he did not know he had to prove he searched for work until the Commission told him this. But your benefit application tells you that you must be available for work, actively search for jobs and keep a record of your job search for six years. The training questionnaires also remind you that you must keep looking for work.

[29] The Claimant did not submit any job search records, although he said he would try to do this after the hearing.¹¹ But he told the Commission that he applied for a part-time retail associate job at X, two part-time positions at X, and a part-time position as a cashier at X. He said he also applied for a full-time virtual position in human resources with X and a full-time position as a bank teller at X.¹² He agreed that he had no experience for the X and X jobs but said his course would help him.

¹⁰ *Bellefleur v Canada (Attorney General)*, 2008 FCA 13.

¹¹ In his post hearing submissions (GD3-5 and GD3-6), the Claimant submitted his lay-off letter and a resume but did not provide a job search.

¹² The Claimant gave the Commission this information on April 4, 2022 (GD3-35).

[30] The Claimant says he applied for the above six jobs in the first three months and then stopped his search. He says he looked online and networked with friends about jobs.

[31] This information, without supporting evidence, does not support the Claimant's argument that he "constantly" looked for suitable work.

[32] The Claimant's testimony does not match the following statements. This undermines his credibility.

[33] On April 2, 2020, the Claimant wrote on his training questionnaire that he had not looked for work since becoming unemployed because "I just work part time."¹³ On September 19, 2020, he wrote that he had not made efforts to find a job since although he was working with less hours than before, he could apply for CERB.¹⁴ On December 29, 2021, he told the Commission that he "tried to make the time for it [part time work]" to fit with his course schedule.¹⁵

[34] After considering these inconsistencies, I find that the Claimant has not shown that he searched for work on every day for which he claimed benefits. Without a documented job search, he cannot show that he applied for suitable jobs that were actually available.

[35] The Claimant says there were few vacancies due to the pandemic. I agree with him that it was a tough job market. But he had to try to find work even if he believed that he was unlikely to succeed.¹⁶

[36] However, applying to jobs where he had no work experience, such as the Nestle and TD Bank positions, does not show he carried out a realistic job search.

[37] So, I find it more likely than not that the Claimant was waiting for a recall to his previous part-time job even though his lay-off letter only said he "may" be recalled.¹⁷ But you cannot just wait for a recall. You have to look for other suitable work.

¹³ GD3-15.

¹⁴ GD3-23.

¹⁵ GD3-24.

¹⁶ *De Lamirande v Canada (Attorney General)*, 2004 FCA 311.

¹⁷ GD5-5.

[38] The resume the Claimant submitted after the hearing is the one he says that he used during the months of his claim.¹⁸ It looks like a summary that would be useful for getting retail jobs. It does not support the notion that he looked for any type of suitable work.

[39] A suitable job for the Claimant was one that was similar to his previous job and salary and within his health and physical capabilities.¹⁹ His resume shows that he had only held jobs in retail since 2018. He could still have looked for a suitable job in another sector. But there is no record that he tested the market for other types of jobs apart from ones that were beyond his qualifications.

[40] This is why I find that the Claimant did not show that he made enough efforts to find work.

Did the Claimant set personal conditions?

[41] Yes. I find it more likely than not that the Claimant set personal conditions on the jobs he would accept. Such conditions unduly limit your chances of finding work.²⁰

[42] The courts have found that focusing more time on school than on work is a personal condition that unduly limits your chances of finding a job.²¹

[43] The Claimant told the Commission that his part-time hours accommodated his full-time studies.²² So I agree that he prioritized his course over finding work.

[44] I also find that the Claimant prioritized his course over finding more hours for the extra income he needed. He was inconsistent on this point too. He first said he did not ask his employer for more hours after his recall; he now says he does not remember saying that. He recalls instead requesting more hours and even looking for a second part-time job.

[45] On this point, I find his first statement more reliable since he only changed his account after the Commission first refused him benefits.

¹⁸ GD6-2.

¹⁹ S 6 of the Act & s 9.002 of the *Employment Insurance Regulations* (Regulations) describe suitable jobs.

²⁰ *Gagnon v Canada (Attorney General)*, 2008 FCA 313.

²¹ *Duquet v Canada (Attorney General)*, 2008 FCA 313.

²² GD3-24.

[46] So, preferring to work part time hours was a personal condition that would have limited the Claimant's ability to find work.

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

[47] 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.

[48] I sympathize with the Claimant's financial circumstances. But EI is not a student grant. Students who want to receive benefits have to show by their actions that they are available for work, as interpreted above. I cannot change the law.²³

[49] Under the law, the Commission can retroactively verify whether students were entitled to the regular benefits they received.²⁴ Since the Claimant did not show, on a balance of probabilities, that he was available for work, he must repay those benefits.

[50] The Claimant says he does not have the money to repay them. I have no power to reduce or forgive his debt. But he has options.

[51] The Claimant can ask the Commission to consider writing off all or part of his debt because of undue hardship.²⁵ If the Commission's refuses, he can appeal to the Federal Court. Or, he can contact the Debt Management Call Centre at 1-866-864-5823 to arrange a repayment schedule that he can manage.

Conclusion

[52] The Claimant has not shown that he was capable of and available for work from May 4, 2020, to August 5, 2020, and September 8, 2020, to December 31, 2020. So, he cannot get benefits during those periods. This means that I am dismissing his appeal.

Lilian Klein

Member, General Division – Employment Insurance Section

²³ *Canada (Attorney General) v Knee*, 2011, FCA 301.

²⁴ S 153.161 of the Act.

²⁵ S 56 of the Regulations.