Citation: *SR v Canada Employment Insurance Commission*, 2022 SST 1465

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant (Claimant):	S. R.
Respondent (Commission):	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (442224) dated January 21, 2022 (issued by Service Canada)

Tribunal member:	Gerry McCarthy
Type of hearing:	Videoconference
Hearing date:	June 2, 2022
Hearing participants:	Appellant
Decision date:	June 13, 2022
File number:	GE-22-1191

Decision

[1] The appeal is allowed.

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

Overview

[3] The Canada Employment Insurance Commission (Commission) decided that the Claimant was disentitled from receiving EI regular benefits from February 1, 2021, to August 19, 2021, because she 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 she was available for work. The Claimant has to prove this on a balance of probabilities. This means that she has to show that it is more likely than not that he was available for work.

[5] The Commission says the Claimant wasn't available because she was in school full-time.

[6] The Claimant disagrees and says she was available for work while attending school at "X College." The Claimant says she frequently asked for more hours from her employer ("A") while attending school. The Claimant further says she contacted other employers about potential jobs.

Issue

[7] Was 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, she 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 she wasn'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 she was available based on the two sections of the law on availability.

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[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.

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.

[15] The Claimant doesn't dispute that she was a full-time student.

[16] The Claimant agrees that she was a full-time student, and I see no evidence that shows otherwise. So, I accept that the Claimant was in school full-time.

[17] The presumption applies to the Claimant.

The Claimant is a full-time student

[18] 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.

[19] There are two ways the Claimant can rebut the presumption. She can show that she has a history of working full-time while also in school.[6] Or, she can show that there are exceptional circumstances in her case.[7]

[20] The Claimant says she worked while attending "Y College" from January 2020 to April 2020. The Claimant also says she was working at "A" while attending "X College" in 2021.

[21] The Commission says the Claimant could only perform part-time work around her course schedule.

[22] I find the Claimant did have a history of working and attending school. Specifically, the Claimant testified that she worked while attending "Y College" from January 2020 to April 2020. Furthermore, the Claimant testified she worked shifts for "A" while attending her paralegal courses at "X College" in 2021.

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[6] See *Canada (Attorney General) v Rideout*, 2004 FCA 304.
[7] See *Canada (Attorney General) v Cyrenne*, 2010 FCA 349.

[23] The Claimant has rebutted the presumption that she was unavailable for work.

The presumption is rebutted

[24] 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

[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.[8]

[26] The law sets out criteria for me to consider when deciding whether the Claimant's efforts were reasonable and customary.[9] I have to look at whether her 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:[10]

- preparing a résumé or cover letter
- contacting employers who may be hiring
- applying for jobs

[28] The Commission says the Claimant didn't do enough to try to find a job. Specifically, the Commission says the Claimant was working full-time then reduced her hours of work when she began attending school.

[29] The Claimant disagrees. The Claimant says she was working at "A" full-time and the plan with the employer was to work around her school schedule. However, the Claimant says she was demoted at work and her hours were reduced. The Claimant further says she assessed employment opportunities online and applied for jobs at

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[8] See section 50(8) of the Act.
[9] See section 9.001 of the Regulations.
[10] See section 9.001 of the Regulations.

"Roots" and "Harvey's." The Claimant also testified she corresponded with a former employer ("B") about returning to their workplace. The Claimant says her efforts were enough to prove that she was available for work.

[30] I find the Claimant made reasonable and customary efforts to find a job for the following reasons:

[31] First: The Claimant frequently asked her manager at "A" about additional hours. I realize the Commission argued the Claimant was working full-time then reduced her hours of work when she began attending her schooling. Nevertheless, I accept the Claimant's testimony that she wished to continue working her normal hours at "A" but was demoted by her manager. I accept the Claimant's testimony on this matter as credible, because her statements were plausible and supported by the fact she continued working for "A."

[32] Second: The Claimant testified that she looked for other employment and specified two employers ("Roots" and "Harvey's") that she contacted about jobs. Furthermore, the Claimant provided correspondence with a previous employer ("B") about returning to their workplace (GD6-13-19).

[33] The Claimant has proven that her efforts to find a job were reasonable and customary.

Capable of and available for work

[34] I also have to consider whether the Claimant was 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) She wanted too go back to work as soon as a suitable job was available.

[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.

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

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

[35] 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

[36] The Claimant has shown that she wanted to go back to work as soon as a suitable job was available, because she worked for an employer ("A") while attending "X College." The Claimant also provided correspondence with a previous employer about returning to their workplace (GD6-13-19).

Making efforts to find a suitable job

[37] The Claimant has made enough effort to find a suitable job.

[38] 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]

[39] The Claimant's efforts to find a new job included asking for additional hours at "A," assessing job opportunities online, and contacting employers about employment. I explained these reasons above when looking at whether the Claimant has made reasonable and customary efforts to find a job.

[40] Those efforts were enough to meet the requirements of this second factor, because the Claimant was seeking additional hours from "A" from February 2021 to August 2021 and provided names of employers she further contacted about additional employment.

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[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.
[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.

Unduly limiting chances of going back to work

[41] The Claimant didn't set personal conditions that might have unduly limited her chances of going back to work.

[42] The Claimant says she hasn't done this because she testified she could work from 2:30pm to 9pm at "A" (and for other employers) from Monday to Friday. The Claimant further says she available to work all day on Friday and Saturday.

[43] The Commission says the Claimant restricted her availability to only accept employment outside her school hours.

[44] I find the Claimant didn't unduly limit her chances of going back to work for the following reasons:

[45] First: The Claimant testified she was available to work from 2:30pm to 9pm Monday to Friday and all day on Saturday and Sunday. I accept the Claimant's testimony on this matter as credible, because she had previously worked while attending school at "Y" and "A" while attending "X College." I recognize the Commission submitted the Claimant had restricted her availability to only accept employment outside her school hours. Nevertheless, the Claimant was available after her classes finished at 2pm. In short, the Claimant was available to work approximately six-and-a-half hours every day from Monday to Friday and all day on Saturday and Sunday.

[46] Second: The Claimant asked for more hours at "A," but was only given two-shifts per week since her demotion in January 2021. I realize the Commission argued the Claimant's restricted availability impacted her ability to obtain and hold suitable employment. However, I accept the Claimant's testimony that she didn't restrict her availability to work because her statements about seeking more hours at "A" was plausible especially since she had worked for the same employer in 2020 while attending "Y College."

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

[47] Based on my findings on the three factors, I find the Claimant has shown that she was capable of and available for work but unable to find a suitable job.

Conclusion

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

[49] This means the appeal is allowed.

Gerry McCarthy
Member, General Division – Employment Insurance Section