



Citation: *RF v Canada Employment Insurance Commission*, 2022 SST 1471

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

# Decision

**Appellant:** R. F.

**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** Canada Employment Insurance Commission reconsideration decision (438729) dated December 9, 2021 (issued by Service Canada)

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**Tribunal member:** Gerry McCarthy

**Type of hearing:** Videoconference

**Hearing date:** May 13, 2022

**Hearing participant:** Appellant

**Decision date:** May 16, 2022

**File number:** GE-22-974

## Decision

[1] The appeal is allowed in part.

[2] The Claimant has shown that he was available for work while in school from October 5, 2020, to December 21, 2020, and from January 11, 2021, to April 23, 2021. This means that he isn't disentitled from receiving Employment Insurance (EI) benefits for those periods. So, the Claimant may be entitled to benefits for those periods.

[3] However, the Claimant hasn't shown that he was available for work while in school from September 13, 2021. This means that he can't receive Employment Insurance (EI) benefits from September 13, 2021.

## Overview

[4] The Canada Employment Insurance Commission (Commission) decided that the Claimant was disentitled from receiving EI regular benefits from October 5, 2020, to December 21, 2020, and from January 11, 2021, to April 23, 2021, and from September 13, 2021, because he 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.

[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 the Claimant wasn't available because he was in school full-time full-time.

[7] The Claimant disagrees and says he was available for work and applied for numerous jobs.

## Issue

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

## Analysis

[9] 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.

[10] 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.<sup>1</sup> The *Employment Insurance Regulations* (Regulations) give criteria that help explain what “reasonable and customary efforts” mean.<sup>2</sup> I will look at those criteria below.

[11] 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.<sup>3</sup> Case law gives three things a claimant has to prove to show that they are “available” in this sense.<sup>4</sup> I will look at those factors below.

[12] 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.

[13] In addition, the Federal Court of Appeal has said that claimants who are in school full-time are presumed to be unavailable for work.<sup>5</sup> 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.

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<sup>1</sup> See section 50(8) of the *Employment Insurance Act* (Act).

<sup>2</sup> See section 9.001 of the *Employment Insurance Regulations* (Regulations).

<sup>3</sup> See section 18(1)(a) of the Act.

<sup>4</sup> See *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96.

<sup>5</sup> See *Canada (Attorney General) v Cyrenne*, 2010 FCA 349.

[14] I will start by looking at whether I can presume that the Claimant wasn't available for work. Then, I will look at whether he was available based on the two sections of the law on availability.

### **Presuming full-time students aren't available for work**

[15] The presumption that students aren't available for work applies only to full-time students.

### **The Claimant doesn't dispute that he is a full-time student**

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

### **The Claimant is a full-time student**

[17] 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.

[18] There are two ways the Claimant can rebut the presumption. He can show that he had has a history of working full-time while also in school.<sup>6</sup> Or, he can show that there are exceptional circumstances in his case.<sup>7</sup>

[19] The Claimant says he has worked while attending school. Specifically, the Claimant testified he worked at a restaurant ("X") while attending high school. The Claimant further testified he worked at a bookstore while going to college.

[20] The Commission says the Claimant repeatedly stated in his questionnaires that his availability was only outside his course schedule on weekends.

[21] I find the Claimant has a history of attending school and working. I recognize the Claimant didn't necessarily always work full-time hours outside of school. Nevertheless, I'm reasonably satisfied the Claimant had a history of attending school and working.

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<sup>6</sup> See *Canada (Attorney General) v Rideout*, 2004 FCA 304.

<sup>7</sup> See *Canada (Attorney General) v Cyrenne*, 2010 FCA 349.

[22] The Claimant has rebutted the presumption that he is unavailable for work.

### **The presumption is rebutted**

[23] 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**

[24] 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.<sup>8</sup>

[25] The law sets out criteria for me to consider when deciding whether the Claimant's efforts were reasonable and customary.<sup>9</sup> 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.

[26] 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:<sup>10</sup>

- assessing employment opportunities
- preparing a résumé or cover letter
- applying for jobs

[27] The Commission says the Claimant didn't do enough to try to find a job. Specifically, the Commission says the job search submitted by the Claimant indicated he applied only for a few jobs during the three periods he was disentitled. The Commission further says the jobs the Claimant applied for in May 2021 would have been for the period where he wasn't disentitled.

[28] The Claimant disagrees. He says he applied for various jobs at gas stations in Niagara Falls including: "Fuelling Niagara," "Petro Canada," and "Esso." The Claimant

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<sup>8</sup> See section 50(8) of the Act.

<sup>9</sup> See section 9.001 of the Regulations.

<sup>10</sup> See section 9.001 of the Regulations.

also says he updated his resume and assessed employment opportunities through “Indeed.” The Claimant says his efforts were enough to prove that he was available for work.

[29] I find the Claimant has proven that his efforts to find a job were reasonable and customary for the period from October 5, 2020, to December 21, 2020, and from January 11, 2021, to April 23, 2021. I make this finding, because the Claimant provided the names of specific employers where he submitted job applications. Furthermore, the Claimant explained that he uploaded his resume to “Indeed” and assessed job opportunities online. I realize the Commission submitted the Claimant initially indicated he wasn’t seeking jobs during his full-time school. Nevertheless, I accept as credible the Claimant’s statement that the Commission misunderstood him and he was seeking work because his statements were forthright and plausible.

[30] However, I find the Claimant wasn’t making reasonable and customary efforts to find a job from September 13, 2021. I make this finding because the Claimant mentioned only one employer (“Scotiabank”) he approached about a job after September 13, 2021. Furthermore, the Claimant testified that “school was his main focus” after September 13, 2021, and the course work was “extremely hectic” during this period.

### **Capable of and available for work**

[31] I also have to consider whether the Claimant was capable of and available for work but unable to find a suitable job.<sup>11</sup> Case law sets out three factors for me to consider when deciding this. The Claimant has to prove the following three things:<sup>12</sup>

- 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.

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<sup>11</sup> See section 18(1)(a) of the Act.

<sup>12</sup> 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.

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

[32] When I consider each of these factors, I have to look at the Claimant's attitude and conduct.<sup>13</sup>

### **Wanting to go back to work**

[33] The Claimant has shown that he wanted to go back to work as soon as a suitable job was available from October 5, 2020, to December 21, 2020, and from January 11, 2021, to April 23, 2021. I make this finding because the Claimant testified that he wished to return to the labour market and could work evenings and weekends.

[34] However, I find the Claimant hasn't shown that he wanted to go back to work as soon as a suitable job was available after September 13, 2021, because he was forthright in his testimony that school was "the main focus" and that the course work during this period was extremely hectic.

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

[35] The Claimant has made enough effort to find a suitable job for the period from October 5, 2020, to December 21, 2020, and from January 11, 2021, to April 23, 2021.

[36] 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.<sup>14</sup>

[37] The Claimant's efforts to find a new job included: Updating his resume, assessing employment opportunities online, and submitting job applications to numerous employers. I explained these reasons above when looking at whether the Claimant has made reasonable and customary efforts to find a job.

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<sup>13</sup> 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.

<sup>14</sup> 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.

[38] Those efforts were enough to meet the requirements of this second factor, because the Claimant provided specific names of employers where he submitted job applications.

[39] However, I find the Claimant didn't made enough effort to find a suitable job for the period from September 13, 2021, because he mentioned only one employer he contacted about a job in November 2021. Furthermore, the Claimant testified that after school was his "main focus" after September 13, 2021, and the course work was extremely hectic.

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

[40] The Claimant didn't personal conditions that might have unduly limited his chances of going back to work for the period October 5, 2020, to December 21, 2020, and from January 11, 2021, to April 23, 2021.

[41] The Claimant says he hasn't done this because his course work involved 15-to-24 hours every week and he was available for work during weekday evenings and all weekend.

[42] The Commission says the Claimant's availability was only outside his course schedule on weekends and his preference was his course work over a full-time job

[43] I find the Claimant didn't unduly limit his chances of going back to work for the period October 5, 2020, to December 21, 2020, and from January 11, 2021, to April 23, 2021. I make this finding, because the Claimant was able to finish his classes by 4:30 pm Monday to Friday and could work evenings and weekends. I realize the Commission submitted the Claimant's preference was to concentrate on school over a full-time job. Nevertheless, I accept as credible the Claimant's testimony that he was available for work (after 4:30m) during the week and available all day during the weekends because his statements were detailed and plausible.

[44] However, I find the Claimant did set personal conditions that unduly limited his chances of going back to work for the period from September 13, 2021. I make this



finding because the Claimant testified his course schedule changed after September 13, 2021, and school was “extremely hectic.” Furthermore, the Claimant testified that school was his “main focus” after September 13, 2021. In short, the Claimant’s school obligations were more extensive after September 13, 2021, and this unduly limited his chances of going back to work.

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

[45] Based on my findings on the three factors, I find the Claimant has shown that he was capable of and available for work but unable to find a suitable job from October 5, 2020, to December 21, 2020, and from January 11, 2021, to April 23, 2021.

[46] However, based on my findings on the three factors, the Claimant hasn’t shown he was capable of and available for work but unable to find a suitable job from September 13, 2021.

**Conclusion**

[47] The Claimant has shown that he was available for work within the meaning of the law from October 5, 2020, to December 21, 2020, and from January 11, 2021, to April 23, 2021. Because of this, I find the Claimant isn’t disentitled from receiving benefits for those two periods. So, the Claimant may be entitled to benefits for the period from October 5, 2020, to December 21, 2020, and from January 11, 2021, to April 23, 2021.

[48] However, the Claimant hasn’t shown that he was available for work within the meaning of the law from September 13, 2021. Because of this, I find the Claimant can’t receive EI benefits from September 13, 2021.

[49] This means that the appeal is allowed in part.

*Gerry McCarthy*

Member, General Division – Employment Insurance Section