



Citation: *NM v Canada Employment Insurance Commission*, 2022 SST 1000

Social Security Tribunal of Canada General Division – Employment Insurance Section

Decision

Appellant: N. M.
Representative: G. A.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission
reconsideration decision dated May 30, 2022 (issued by
Service Canada)

Tribunal member: Lilian Klein

Type of hearing: Teleconference
Hearing date: July 4, 2022
Hearing participants: Appellant
Appellant's representative

Decision date: August 15, 2022
File number: GE-22-1900

Decision

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

[2] The Claimant has not shown that he was available for work while in school full time from January 3, 2021, to April 10, 2021. This means that he cannot receive Employment Insurance (EI) benefits for those 14 weeks.

Overview

[3] The Claimant, a first-year university student who was laid off from his job, applied for EI regular benefits on July 3, 2021. The Canada Employment Insurance Commission (Commission) antedated (backdated) his claim to January 3, 2021.

[4] To get EI regular benefits, you have to be available for work. Availability is an ongoing requirement, so you have to keep searching for work.

[5] The Commission decided that the Claimant was disentitled from getting benefits from January 3, 2021, to April 10, 2021. The Commission allowed his later claim for benefits, starting in September 2021.

[6] The Commission says the Claimant did not show that he was available for work from January 3, 2021, to April 10, 2021, since he was not looking for full-time work. It says he did not apply to any jobs and was focusing on his course, not on finding work.

[7] The Claimant says he was as available for work during this period as he was from September 2021 onwards. He says the Commission documented his statements incorrectly. He argues that he had been looking for work but there were no jobs to apply for due to COVID-19 and his lack of qualifications and work experience.

The issues I must decide

[8] First, did the Claimant rebut the presumption that he was unavailable for work while studying full time from January 3, 2021, to April 10, 2021?

¹ This is the second time that the General Division (GD) has heard the Claimant's appeal. The Appeal Division overturned the GD's first decision and sent it back to the GD for a *de novo* (new) hearing.

[9] Second, did the Claimant show that he was available for work from January 3, 2021, to April 10, 2021?

Analysis

[10] Not everyone who stops working can get EI benefits. To get benefits, two different sections of the law say you must show that you are available for work.

[11] The first section says you have to prove that you are “capable of and available for work” and unable to find a suitable job.² There are three criteria you must meet to show you are “available” under this section.³ I will set out these criteria later in this decision.

[12] The second section of the law says you have to prove that you are making “reasonable and customary efforts” to find a suitable job.⁴ But the Commission did not disentitle the Claimant under this second section of the law. It only discussed his job search with him after it had already disentitled him from receiving benefits.⁵

[13] So, the Commission only disentitled the Claimant from receiving benefits after finding he did not meet the three-part test for availability in the first section of the law.

[14] In addition, the Federal Court of Appeal says full-time students are presumed to be unavailable for work.⁶ This is called the “presumption of unavailability.” It means we can assume students are not available for work when the evidence shows that they are in school full time.

[15] I will start by looking at the presumption that the Claimant was unavailable for work. Then, I will look at the legal test for availability.

Presuming that full-time students are unavailable for work

[16] The presumption that students are unavailable for work applies only to full-time students.

² See s 18(1)(a) and s 153.161 of the *Employment Insurance Act* (Act).

³ See *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96.

⁴ S 50(8) of the Act. S 9.001 of the *Employment Insurance Regulations* (Regulations) explains “reasonable and customary efforts.” It is only used for guidance in decisions under s 18(1)(a) of the Act.

⁵ See GD4-3.

⁶ See *Canada (Attorney General) v Cyrenne*, 2010 FCA 349.

[17] The Claimant agrees that he is a full-time student, and I see no evidence that shows otherwise. So, I accept that he was in school full time from January 3, 2021, to April 10, 2021. This means that the presumption applies to him.

[18] There are two ways the Claimant can rebut this presumption. He can show that he has a history of working full-time while also in school full-time.⁷ Or, he can show that there are exceptional circumstances in his case.⁸

The Claimant has not rebutted the presumption that he is unavailable for work

[19] Neither of the above situations applies to the Claimant. He has volunteer experience but has not worked full time while studying full-time. He only held a part-time job for a few months while taking his course. He reports no exceptional circumstances. So, he has not rebutted the presumption of unavailability.

[20] The Federal Court of Appeal has not yet told us how the presumption and the law on availability relate to each other. Since this is unclear, I am going to continue on to decide the Claimant's availability. This is even though I have already found that we can assume he was unavailable for work while studying full time

Capable of and available for work

[21] The test for availability asks whether the Claimant was capable of and available for work and unable to find a suitable job.⁹ He has to prove the following three things:¹⁰

- a) He wanted to go back to work as soon as a suitable job was available.
- b) He made enough efforts to find a suitable job.
- c) He did not have personal conditions that might unduly limit his chances of getting back to work.

⁷ See *Canada (Attorney General) v Rideout*, 2004 FCA 304.

⁸ See *Canada (Attorney General) v Cyrenne*, 2010 FCA 349.

⁹ See s 18(1)(a) of the Act.

¹⁰ 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.

[22] When I consider each of these factors, I have to look at all the circumstances and the Claimant's attitude and conduct.¹¹

– **Wanting to return to work**

[23] The Claimant has not shown through his job search evidence that he wanted to return to work as soon as he could between January 3, 2021, and April 10, 2021.

[24] The Commission says the Claimant cannot show that he wished to return to work since he only wanted part-time work and would not drop his course for a full-time job.

[25] The Claimant says the Commission misinterpreted and misquoted him since his goal was to return to work as soon as he could. He says when he returned to his job in mid-February 2021 for the few shifts he could get, he kept asking for more hours.

[26] I accept that the Claimant has a good work ethic based on his volunteer record. I also accept that he wanted to work full time eventually. But his evidence does not show that he was in any hurry to return to work.

[27] Having the time to work and hoping to find work is not enough to show that the Claimant wanted to return to work as soon as he could.

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

[28] The Claimant has not shown that he made enough efforts to find a suitable job.

[29] The Commission says the Claimant did not apply for any jobs from January 3, 2021, to April 10, 2021. It says applying for work shows an active job search.

[30] The Claimant says he made efforts to find full-time work but could not find jobs to apply to that matched his qualifications and experience.

[31] This is in contrast to the Claimant's later efforts to find work. Based on those efforts, the Commission allowed him benefits starting in September 2021. This is because at that point he showed that he was available for work while studying full time.

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

[32] The Claimant says he was as available from January 3, 2021, to April 10, 2021, as he was in September 2021, so he should get benefits for the earlier period too.

[33] The Claimant argues that I should judge his job search efforts over the entire school year and not just from January 3, 2021, to April 10, 2021. He says job prospects at that time were non-existent due to COVID-19 lockdowns.

[34] But the Claimant's job search in the summer of 2021 and from September 2021 onwards are not relevant to the period under review in this appeal. Those efforts are admirable but they only prove his availability for work at a later time.

[35] I note the Claimant's argument that the Commission only told him about the job search requirement in August 2021. This requirement is set out in the benefit application, but he did not apply for benefits until July 2021, so he says he was unaware of it.

[36] The Claimant says he still searched for jobs by registering with online job search tools, assessing their daily job alerts,¹² updating his resume¹³ and networking with friends and co-workers. He says he contacted prospective employers by walking around the outlet mall where his old job was located. He later said he went to a second mall and other places to ask for work. He did not contact any employment agencies.

[37] I accept that it was difficult to find work during the pandemic. The Claimant says the stay-at-home order in Peel Region (ON) lasted until early March 2021, except for essential work. He says he was not qualified for any of the jobs that were available.

[38] But being willing to work and wanting to work does not prove availability.¹⁴ You have to show that you actively tried to find work. You do this by applying for jobs, even if you think you have little chance of getting them.¹⁵

[39] The list the Claimant submitted of vacancies sent to his email is almost illegible. But the dates on the list appear to show that he included vacancies after the period under review. As noted above, those jobs are not relevant to this appeal.

¹² GD3-25 to GD3-28.

¹³ GD3-23 to GD3-24.

¹⁴ *Canada (Attorney General) v Leblanc*, 2010 FCA 60, citing CUB 25057.

¹⁵ *Canada (Attorney General) v Cornelissen-O'Neil*, A-652-93, citing CUB 13957.

[40] The Claimant could not explain for sure why he did not apply to *any* of the positions on his list of vacancies from January 3, 2021, to April 10, 2021. He says when he clicked on the job link, there was always a reason why they were unsuitable; either he did not have qualifications or the job location was too far away.

[41] Without details of these jobs—including the location and the qualifications and experience needed—the Claimant cannot show that *all* of them were unsuitable.¹⁶ He cannot show that it was not worth applying to any of them. The only risk was rejection.

[42] For the above reasons, I find that the Claimant's job search efforts were not enough to meet the second part of the test for availability.

– **Unduly limiting his chances of getting back to work**

[43] The Claimant set personal conditions that might have unduly (unreasonably) limited his chances of getting back to work.

[44] The Commission says the Claimant's full-time course was a personal condition that would have restricted him to working part time only. It says his course requirements would have limited his chances of finding work to certain days or certain times.

[45] The Claimant does not agree. He says he was free the whole working week. He says he did not need to restrict himself to part-time jobs because his lectures were online.

[46] I agree with the Claimant that needing to attend school was not a personal condition in his case that unduly limited his chances of finding work. This is because he could follow his course online at his own pace.

[47] I do not find that the Commission has shown the Claimant was only searching for part-time work either. There is not enough evidence of a job search to make that finding.

[48] But I find it more likely than not that the Claimant was relying at least in part on returning to the job he lost,¹⁷ or another job in retail. These were personal conditions that would, more likely than not, have unduly limited his chances of finding work.

¹⁶ 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.

¹⁷ See the Claimant's statement at GD3-20.

[49] I accept the Claimant's sworn testimony that the Commission made some incorrect assumptions about his availability and did not document all his statements accurately. This testimony is supported by his mother (his Representative) who says she overheard the questions and answers on his calls with the Commission.

[50] But the Claimant said in his own words that since there were no suitable vacancies, "I was therefore force to wait till the lockdown got lifted and got called back to work (*sic*)."¹⁸

[51] This statement shows it is more likely than not that the Claimant was waiting for a recall rather than actively searching for other work. He accepted a limited recall to his job in mid-February 2021 with very few shifts and waited to get more hours.

[52] Case law says it is not enough to wait for a recall.¹⁹ It is also not enough to wait for more hours when none are available. You need to continue looking for other work. This is especially true given the uncertainty of the pandemic.

[53] This is why I find that preferring to return to his old job was a personal condition that unduly limited the Claimant's chances of finding other work.

[54] I agree with the Commission that the Claimant's evidence shows a preference in general for jobs in the retail sector. This was another personal condition that would have unduly limited his chances of finding other work.

[55] I find it more likely than not that this was the type of work that the Claimant prioritized in his job search. His list of vacancies include a number of retail jobs. He says he walked through two shopping outlets asking for work. His updated résumé focuses solely on skills in retail work. Restricting yourself to one type of work does not show a proper job search.²⁰ It is a personal condition.

[56] As far as I can decipher from the Claimant's list of vacancies, there is at least one warehouse job within the period under review. He argues that his application for a warehouse job in September 2021 proves that he had been looking for this type of work

¹⁸ GD3-20.

¹⁹ *De Lamirande v Canada (Attorney General)*, 2004 FCA 311.

²⁰ *Canada (Attorney General) v Boland*, 2004 FCA 251.

from January 3, 2021, to April 10, 2021, as well. But according to his testimony, he did not apply to any warehouse jobs during this period.

[57] This also supports the Commission's argument that the Claimant limited his job search mostly to the retail sector.

[58] For the above reasons, I find that the Claimant set personal conditions that unduly limited his chances of finding work in an already difficult job market.

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

[59] 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.

Conclusion

[60] The Claimant was not able to rebut the presumption that he was unavailable for work while a full-time student from January 3, 2021, to April 10, 2021. He has not shown that he met the legal test for availability during those weeks either. So, he cannot get EI benefits for this period,

[61] This means I have to dismiss the Claimant's appeal.

Lilian Klein

Member, General Division – Employment Insurance Section