Citation: *CD v Canada Employment Insurance Commission*, 2022 SST 1587

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	C. D.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (445627) dated December 23, 2021 (issued by Service Canada)

Tribunal member:	Lilian Klein
Type of hearing:	Teleconference
Hearing date:	February 24, 2022
Hearing participants:	Appellant
Decision date:	April 1, 2022
File number:	GE-22-252

Decision

[1] I am dismissing the Claimant's appeal on both issues: Voluntary Leaving and Availability for Work.

[2] The Claimant has not shown just cause for voluntarily leaving his employment on January 8, 2021. This means that he is disqualified from receiving Employment Insurance (EI) benefits as of that date.

[3] The Claimant has not shown that he made enough efforts to find suitable employment while studying full time starting on January 11, 2021. This means that he is disentitled from receiving EI regular benefits as of that date.

Overview

[4] The Claimant moved from Hamilton ON to Sault Ste. Marie ON to study aviation technology. In March 2020, he lost his part-time job at X in Sault Ste. Marie due to the COVID-19 pandemic. His course moved to online learning for the same reason. So, he returned to Hamilton ON, where he found work in July 2020 at X.

[5] On January 8, 2021, he quit his job at X. He applied for EI regular benefits. On January 11, 2021, he moved back in Sault Ste. Marie ON to resume his course via in-person learning. The Canada Employment Insurance Commission (Commission) looked at his reasons for leaving his job in Hamilton and decided that he voluntarily left this job (chose to quit) without just cause. So, it asked him to repay his benefits.

[6] The Commission says quitting your job to attend a course does not show just cause for voluntarily leaving your employment. It says studying is a personal choice and personal reasons do not count as just cause.

[7] The Commission also disentitled the Clamant from receiving benefits after deciding that he had not proved his availability for work while studying full time starting on January 11, 2021. It says he did not make enough efforts to find work while waiting for a recall to his previous job at X.

[8] The Claimant disagrees. He says he moved back to Sault Ste. Marie because his pay was cut when hours were reduced at X and his duties changed. He says he had reasonable assurance of another job with his previous employer, X, in Sault Ste. Marie and a Commission agent told him this was all he needed to get benefits. He argues that returning to his course was a secondary reason for quitting his X job in Hamilton.

[9] I first have to decide whether the Claimant left his job voluntarily. If I make that finding, I must then decide if he had just cause for leaving. I also have to decide whether he was available for work when he returned to Sault Ste. Marie and resumed his course.

The issues I must decide

[10] Is the Claimant disqualified from receiving benefits because he voluntarily left his job without just cause?

[11] Is the Claimant disentitled from receiving benefits because he did not show that he was available for work while a full-time student?

Matters I must consider first

[12] The Claimant argues that his procedural rights were infringed by the Commission's failure to provide hand-written notes and recordings of its conversations with him on January 17, 2021, and December 17, 2021. He says a supplementary record of claim is missing as well as handwritten notes from his initial reconsideration interview. He says there are inconsistencies, errors and omissions in the Commission's disclosures so far.

[13] The Claimant argues that this evidence would prove that the Commission told him he could get benefits while waiting for a recall to his job at X without having to search for other work.

[14] The Claimant did not argue that he was challenging the "constitutional validity, applicability or operability" of any provision of the *Employment Insurance Act* (EI Act) or regulations made under it.[1] He is challenging the fairness of the Commission's actions.

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[1] S 20 of the *Social Security Tribunal Regulations*.

[15] The Tribunal does not have the power to compel the Commission to provide the evidence that the Claimant is seeking, if it exists. The remedy is for the Claimant to make an application through an Access to Information and Privacy (ATIP) Request. I offered to adjourn the hearing or place his appeal in abeyance to give him time to make a request and get a response.

[16] The Claimant says he should not have to make an ATIP request because the Commission breached his Charter rights to life, liberty and security of the person [2] by failing to disclose all the evidence on his claim. He argues that this means I have the authority to proceed with a decision in his favour.

[17] I convened a pre-hearing conference call to clarify the limits of my jurisdiction, which only allows me to consider issues the Commission has already reconsidered.[3] My jurisdiction is therefore restricted to whether the Claimant had just cause to quit his job on January 8, 2021, and whether he was available for work while studying full time starting on January 11, 2021.

[18] I also clarified with the Claimant that Tribunal hearings are “de novo.” This means he is free to add new evidence and to correct any errors, inconsistencies or omissions in the evidence that the Commission provided.

[19] The Claimant agreed to proceed with the hearing based on his understanding of the limits of my jurisdiction, the fact that the hearing is held “de novo,” and his appeal rights to the Tribunal’s next level: the Appeal Division.

Post-hearing documents

[20] After the hearing, the Claimant submitted new information that I accepted as relevant to his appeal. I shared this information with the Commission and invited a response, but it made no further submissions.

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[2] Chapter 7 of the *Canadian Charter of Rights and Freedoms*.
[3] S 113 of the *Employment Insurance Act* (EI Act).

Analysis

Voluntary leaving

[21] I find that the Claimant voluntarily left his job. His employer issued a Record of Employment (ROE) documenting that he quit X on January 8, 2021. He agrees that he quit on that date. So, I accept this as fact.

[22] The parties do not agree on whether the Claimant had just cause for voluntarily leaving his job. The Commission says he did not have just cause. He disagrees.

[23] The law says you are disqualified from receiving benefits if you left your job voluntarily and did not have just cause.[4] Having a good reason is not enough to prove just cause.[5] So, returning to school may be a good reason to quit. But it is not just cause since that is a personal choice and personal reasons do not show just cause. [6]

[24] The law explains what it means by "just cause." The law says you have just cause if you had no reasonable alternative to leaving your job. It is up to the Claimant to prove this. He has to prove it on a balance of probabilities. This means he has to show it is more likely than not that his only reasonable alternative was to quit.[7]

[25] When I decide whether the Claimant had just cause, I have to look at all the circumstances at the time he quit.[8] The law sets out some of them, as discussed below.

The circumstances when the Claimant quit

[26] The Claimant says three circumstances listed in the law apply to him. He says they show that he had just cause for leaving his job when he did. He argues that the Commission failed to conduct a fair and proper investigation because it did not contact his employers. He says a proper review would have shown that these circumstances existed.

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[4] S 30 of the EI Act explains this rule.
[5] *Canada (Attorney General) v Imran,* 2008 FCA 17.
[6] *Canada (Attorney General) v Macleod,* 2010 FCA 301; *Canada (Attorney General) v Caron,* 2007 FCA.204. The only exception is where the Commission or a designated partner refers a claimant to a course.
[7] See *Canada (Attorney General) v White*, 2011 FCA 190 at para 4; and s 29(c) of the EI Act.
[8] *See White*, above, at para 3; and s 29(c) of the EI Act

[27] First, the Claimant says there was a significant change to his wages.[9] Second, he says there were significant changes to his job duties since the employer had to suspend outdoor activities such as sales and move him to duties in the service department that were seen as essential under COVID rules.[10] Third, he says he had reasonable assurance of another job with X, his former employer in Sault Ste. Marie.[11]

[28] The Claimant says going back to school was secondary to these considerations. But I find that there is not enough evidence to show that any of these considerations was a primary factor in the Claimant's decision to quit his job at X on January 8, 2021.

There was no significant change to the Claimant's wages

[29] The Claimant says he quit his job because his wages were reduced. The ROE issued after he quit shows some fluctuations between pay periods. But it does not show a significant reduction overall during his employment with X from July 27, 2020, to January 8, 2021. He reported that he had been hired at reduced hours in July 2021, which would have meant reduced wages from the start.

[30] Work in the automotive industry had already been affected by the COVID-19 pandemic. So, working fewer hours and earning less than he wanted at X was not a new circumstance when he decided to quit. The Claimant says the Commission should have contacted his employers and provided ROEs from his pre-March 2020 employment, but his hours and pay at previous jobs are not relevant to his circumstances when he quit.

There was no significant change to the Claimant's work duties

[31] The Claimant says he quit because his duties changed. I acknowledge that the pandemic caused significant changes to many claimants' work situations. The Claimant says these changes were in place when he started working at X in July 2020. This means he has not shown that there was a change to his duties *during* this X contract that forced him to quit.

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[9] See s 29(c)(vii) of the EI Act.
[10] See s 29(c)(ix) of the EI Act.
[11] See s 29(c)(vi) of the EI Act.

[32] Even if there had been a change, I find it more likely than not that the employer would have expected students to work wherever they were needed on whatever tasks were considered essential at the time under COVID-19 rules.

The Claimant had no reasonable assurance of another job in the immediate future

[33] The Claimant argues that he had reasonable assurance of a job with his former employer in Sault Ste. Marie when he quit, but the evidence does not support this.

[34] The Claimant says when X laid him off in March 2020 due to the pandemic, it assured him that it would rehire him as soon as it could. He submitted a letter from X dated February 22, 2022, confirming that this had been a continuing commitment.

[35] But the Claimant had to show he had reasonable assurance of other employment in the "immediate future." The term "immediate future" is not defined in the legislation. It does not mean that he had to have an "imminent" recall date.[12] But the plain interpretation of the word "immediate" does not apply to a delay of close to a year, from March 2020 when he was laid off and promised a recall, to January 2021 when he was still waiting to be recalled. He remained so sure of a recall that he quit his job at X.

[36] In order to show that he had reasonable assurance of returning to X in the immediate future, the Claimant had to meet the following three requirements:

i) when he quit, he had to know he would have that other job;

ii) he had to know what that job would be; *and*

iii) he had to know when in the future that job would start.[13]

[37] I find that the Claimant only met the second requirement: he knew who the employer would be and the type of job. But when he quit in January 2021, he had no real assurance of a return to his old job in Sault St. Marie in the immediate future. He did not have even a tentative return date. I accept that the employer hoped to rehire him but assurances in March 2020 did not mean that he had a job to rely on in January 2021.

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[12] *MT v Canada Employment Insurance Commission*, 2020 SST 643.
[13] *Canada (Attorney General) v Bordage,* 2005 FCA 155.

[38] I accept the Claimant's sworn testimony that a Commission agent told him that having reasonable assurance of another employment would allow him to quit and get EI benefits. But I find it more likely than not that the agent was unaware that the Claimant had already been waiting close to ten months for a recall. And even if the agent gave him incorrect or incomplete information, I still have to apply the law.[14]

The Claimant quit his job to resume his studies

[39] I find it more likely than not that the Claimant quit his job to resume his studies in Sault Ste. Marie. This is consistent with the reason for leaving documented on his ROE: "Quit / Return to School."[15]

[40] The Claimant says moving back to Sault Ste. Marie to resume his course was only a secondary reason for quitting his job. He argues that his main reason was to return to X. But the reality is that while he had no job yet to return to, he was in the middle of a college course that he wanted to finish. He says gaining this qualification was important to him as a tool to achieve a better career and avoid future reliance on benefits.

[41] The Claimant says he moved back to Hamilton temporarily after his lost his job in Sault Ste. Marie because his course went online at the time and he could save on living expenses while he was home. He says he also moved because there were more job opportunities in Hamilton. But the college returned to in-person learning in January 2021, so continuing his course meant returning to Sault Ste. Marie.

[42] I agree with the Claimant's argument that the Commission provided incomplete or inconsistent evidence, as in its different descriptions of his study hours. So, I have given greater weight to his evidence on those issues. However, on his reconsideration request, he had stated clearly and unequivocally: "I relocated to Sault Ste. Marie to return to school … for my fifth semester."[16]

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[14] *Robinson v Canada (Attorney General)*, 2013 FCA 255.
[15] See GD3-13.
[16] Reconsideration Request, Schedule A, at GD3-39.

[43] I give more weight to this statement than to his later declarations that he moved back to Sault Ste. Marie to work there. A claimant's initial "spontaneous statements" are generally given more weight than statements made after benefits are refused.[17]

The Claimant was not referred to his course

[44] Sometimes, the Commission (or one of the Commission's designated partners) refers claimants to take a course. One of the circumstances I have to consider is whether the Commission referred the Claimant to take his course.

[45] Case law clearly states that if you quit your job to take a course without a referral, you do not have just cause for leaving.[18]

[46] The parties agree that the Claimant did not get a referral to his course. I have already found that resuming this course is the circumstance to consider in his decision to quit. So, the case law applies to him. This means that he does not have just cause for quitting his job at X.

[47] I understand that the Claimant had good reasons for choosing to quit this job in Hamilton to return to his course in Sault Ste. Marie. He had already invested time and resources in his studies and was due to start his fifth semester in January 2021. But studying is a personal choice. As such, it goes against the idea behind EI, which is to support those who lose their jobs through no action of their own.[19]

The Claimant had a reasonable alternative to quitting

[48] I must now look at whether the Claimant had any reasonable alternative to leaving his job when he did. This question is not whether his actions were reasonable, but whether they were his *only* reasonable alternative in the circumstances.[20]

[49] The Commission says the Claimant had the reasonable alternative of staying employed at X while looking for another job in the same city as his college.

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[17] *Oberde Bellefleur OP Clinique dentaire O. Bellefleur (Employer) v. Canada (Attorney General),* 2008 FCA 13.
[18] See *Canada (Attorney General) v Caron*, 2007 FCA 204.
[19] See *Canada (Attorney General) v Beaulieu*, 2008 FCA 133.
[20] See *Canada (Attorney General) v Laughland*, 2003 FCA 129.

[50] The Claimant does not agree that staying on at X was reasonable when his course was returning to in-person learning in January 2021. He says he had to return to Sault Ste. Marie since he was still paying rent there and had a car there.

[51] Based on the evidence, I agree with the Commission that the Claimant had the reasonable alternative of staying employed and postponing his return to Sault Ste. Marie until he found a job there.

[52] I note the Claimant's argument that the Commission is penalizing him for moving to another city to live and work; he says this contravenes his mobility rights. I agree with the Claimant that he is free to move anywhere he chooses to live and work. But the issue is whether he can receive EI benefits to help him make these personal choices.

[53] Claimants can get regular benefits if they lose their job because of such reasons as a lay-off or dismissal without cause. But they have a responsibility not to create or increase the risk of unemployment. That is why it is a reasonable alternative to stay employed wherever possible and ensure you can secure another job before quitting.[21]

[54] Considering the circumstances that existed when the Claimant quit—his need to move to return to school—I find for the above reasons that he had a reasonable alternative to leaving his employment when he did.

[55] This means that the Claimant did not have just cause for quitting his job.

[21] See *Canada (Attorney General) v Murugaiah*, 2008 FCA 10.

Availability for work

[56] The law requires claimants to show that they are available for work.[22] In addition, a temporary section of the EI Act requires claimants who attend a full-time course to prove that they are capable of and available for work.[23]

[57] The EI Act says all claimants have to prove that they are "capable of and available for work" but are unable to find a suitable job.[24] You have to show it is more likely than not that you were available for work on every working day during your claim. Availability is an ongoing requirement. Case law sets out three things claimants must prove to show they are "available."[25] I will look at these factors below.

[58] The Federal Court of Appeal says we first presume that claimants who are taking a full-time course are not available for work.[26] This is called the "presumption of non-availability." It means we can suppose that students are not available for work when the evidence shows that they are in school full-time.

[59] I will first consider whether the Claimant has rebutted this presumption. I will then look at the law on availability.

The Claimant has rebutted the presumption of non-availability

[60] The presumption that students are not available for work applies only to full-time students.

[61] The Claimant agrees that he was in a full-time course even though he did not have to attend classes every day. I see no evidence that shows otherwise so I find that he was a full-time student. This means that the presumption applies to him.

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[22] S 18(1)(a) of the EI Act says that claimants are not entitled to be paid benefits for a working day in a benefit period unless they can prove that on that day they were capable of and available for work and unable to obtain suitable employment.
[23] In March 2020, the EI Act was amended to add interim orders to mitigate the economic effects of COVID-19 – see s 153.3(1). S153.16 requires full-time students to prove they are capable of and available for work (unless the Commission refers them to a course, which does not apply to the Claimant in this appeal).
[24] See s 18(1)(a) of the EI Act.
[25] See *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96.
[26] See *Canada (Attorney General) v Cyrenne*, 2010 FCA 349.

[62] This presumption can be rebutted, which means that it would not apply. There are two ways the Claimant can rebut the presumption. He can show that he has a history of working full-time while also in school.[27] Or, he can show that there are exceptional circumstances in his case.[28]

[63] The Commission says the Claimant cannot rebut the presumption because he was not willing to drop his course to accept a full-time job and he was not available at all hours during the working week. The Commission argues that his history of working while studying is not enough to rebut the presumption since he only worked part time.

[64] I agree with the reasoning of the Tribunal's Appeal Division (AD), which addressed a similar fact situation. So, I find that the part-time nature of the Claimant's previous job and his demonstrated ability to maintain at least that level of employment while studying full time is an exceptional circumstance. I find that this allows him to rebut the presumption of non-availability.[29]

[65] Although the Claimant has rebutted the presumption, this only means that I do not automatically consider him unavailable. I must still look at the law that applies in his case to decide whether he was available for work.

[66] The Commission says claimants must make "reasonable and customary" efforts to find work. But there is no evidence that it requested details of the Claimant's job search efforts until right before it made the disentitlement decision.

[67] For this reason, I make no decision on a disentitlement under section 50 of the EI Act for failing to carry out a reasonable and customary job search. I will only consider the following test for availability in sections 18(1)(a) and 153.161 of the EI Act.

The Claimant has not shown that he was available for work

[68] To show availability, the Claimant had to meet three criteria. He had to show that

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[27] *Canada (Attorney General) v Rideout*, 2004 FCA 304.
[28] *Canada (Attorney General) v Cyrenne*, 2010 FCA 349.
[29] 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 but their logic often guides me, as in this case.

i) he wanted to return to the labour market as soon as a suitable job was available;

ii) he tried to do this through efforts to find work; and

iii) he had no personal conditions that might have unduly limited his chances of returning to the labour market.

[69] I have to consider each of these factors to decide the question of availability. When I consider them, I have to look at the Claimant's attitude and conduct.

Wanting to go back to work

[70] The Claimant says he wanted to return to work as soon as a suitable job was available.

[71] I accept the Claimant's sworn testimony that he wanted to return to work since this matches his history of working while studying. This history is shown on his ROE and in the other information in the evidence about his job at X before COVID-19 began. He argues that he had to pay rent in Sault Ste. Marie. This shows that he needed to work, which further supports the argument that he wanted to return to the labour market.

[72] The Commission wants the Claimant to show that he was prepared to drop his course to accept full-time work. However, the EI Act does not say claimants must work full time when their work history is part time. For this reason, I find that preferring to finish his course while working part time still shows that he wanted to return to work.

Making efforts to find a suitable job

[73] The Claimant has not shown that he made enough efforts to find a suitable job while studying full time starting in January 2021.

[74] The Claimant argues that due to COVID-19 and government shutdowns there were no jobs available. He says he was also expecting a recall to his pre-pandemic job in Sault St Marie. He says a Commission agent told him that he did not need to look for work if he had reasonable assurance of a job in the immediate future.

[75] The Claimant did not keep job search records although claimants are reminded to do this on their application for benefits and training questionnaires. He says he looked at online job sites such as Indeed and Workopolis but did not create accounts there. He looked at the government job bank. He did not contact employment agencies.

[76] The Claimant says his online searches showed him that no suitable jobs were available. He says a suitable job would be work within his areas of expertise in auto sales and service at his former employer or other dealerships, or in the food and beverage sector where he has experience. He says he also looked for aviation-related jobs at local airports and was willing to consider online customer service jobs "if I qualified." He argues that he did not know how to work remotely and believes no employer would train him.

[77] The Google search history that the Claimant submitted after the hearing does not prove that he looked for work regularly. It does not show any vacancies and gives few details of jobs he considered. Many entries are blacked out. Some are repeat entries on the same date; some are multiple repeat visits to the same site, AutoIQ. One hit is a dealership in another province. Several are generic "Visited Job Search" entries.

[78] This search history does not show that the Claimant looked at sites in the food and beverage industry where he reported having experience. The majority of his searches are in the auto industry. On a few occasions he looked for online jobs, work in aviation or as a recreational aide. On one occasion he looked at a job in a hotel.

[79] The Claimant included in his search history hits on a job as a Managing Partner and another as a Financial Services Manager at a dealership. But there is no evidence that his skills and qualifications as a student matched these positions. A job search means looking for jobs you can get. He made single visits to the Air Canada, FedEx and MAG Aerospace sites but included no details to explain why he did not check those sites regularly.

[80] The Claimant's post-hearing evidence shows that he arranged for help updating his resume in May 2021. This is a recommended job search activity.[30] But he did not

[30] S 9.001 of the *Employment Insurance Regulations* lists recommended job search activities. When making a decision under s 18(1)(a) of the EI Act, I consult that list for guidance only.

include any of the resumes he used when searching for jobs starting in January 2021. His evidence shows that he attended a campus presentation for potential jobs but this was for employment after graduation. The one job he applied for was for after graduation too.

[81] You have to be actively looking for work on every working day for which you are claiming benefits. This is even if you think it is reasonable not to do so because you are waiting for a recall to a previous job.

[82] The Claimant says he believed waiting for a recall was enough job search activity based on the advice the Commission gave him. But as the weeks progressed with still no recall, he failed to show that he conducted an intensive job search on every day for which he was claiming benefits.

[83] I agree with the Claimant that the pandemic and government shutdowns limited the job market, which made it difficult to find work. I accept his testimony that he was willing to work. But willingness to work and having the time to work is not the same as making real efforts to find work. You have to apply for jobs. Passive research is not enough.[31] Even if you think it might be hard to get a job, you still have to show you tried.

[84] Without applying for any jobs throughout the months he got EI benefits, the Claimant cannot show that he made enough efforts to find work.

Unduly limiting your chances of returning to work

[85] I find, on a balance of probabilities, that the Claimant had personal conditions that would have unduly (unreasonably) limited his chances of returning to work.

[86] The Claimant says he had no personal conditions such as location or pay. I accept his testimony that he did not set those types of conditions.

[87] The Commission says the Claimant's course schedule limited his chances of finding work. But I accept the Claimant's testimony that the Commission's evidence on

[31] CUB 12563. I am not bound by CUBs but their logic guides me.

this point is inconsistent. This is why I find that his course requirements did not limit his chances of managing both work and studying, as he was able to do at X and X.

[88] So, taking his course was not a personal condition that limited the Claimant's chances of returning to work.

[89] However, the Claimant's job search does not reflect daily motivation to find work while he was expecting a recall to X. Waiting for a recall is not the same as wanting to get back to the labour market any way you can. It is a personal preference.

[90] The Claimant's job search shows a marked preference for jobs in the auto sector where he says no jobs were available in Sault Ste. Marie. I find it more likely than not that this personal condition limited his chances of securing other suitable jobs.

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

[91] Based on my findings on the above three factors, I find that the Claimant did not show that he was capable of and available for work when he resumed his course in Sault Ste. Marie on January 11, 2021.

[92] The Claimant has argued financial hardship if he has to repay the overpayment of benefits. I sympathize with his situation but I do not have the power to change the law.[32]

[93] The Claimant still has some options. He can ask the Commission to forgive or reduce his debt because of undue hardship.[33] If the Commission refuses, he can appeal to the Federal Court of Canada.[34] The Federal Court has exclusive jurisdiction over this issue.

[94] The Claimant can also contact the Debt Management Call Centre of the Canada Revenue Agency at 1-866-864-5823. He can ask about applying for debt relief or arranging a repayment schedule.

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[32] *Canada (Attorney General) v Knee*, 2011 FCA 301.
[33] S 56(1)(f)(ii) of the EI Regulations.
[34] *Canada (Attorney General) v Villeneuve,* 2005 FCA 440.

Conclusion

[95] The Claimant is disqualified from receiving Employment Insurance (EI) regular benefits because he did not show just cause for voluntarily leaving his job on January 8, 2021.

[96] The Claimant is also disentitled from receiving EI regular benefits as of January 11, 2021, because he did not show that he was available for work while studying full time starting from that date.

[97] This means that I am dismissing the Claimant's appeal both of the disqualification and of the disentitlement.

Lilian Klein
Member, General Division – Employment Insurance Section