Citation: *NL v Canada Employment Insurance Commission*, 2022 SST 1591

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	N. L.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (478831) dated June 13, 2022 (issued by Service Canada)

Tribunal member:	Gary Conrad
Type of hearing:	Teleconference
Hearing date:	December 5, 2022
Hearing participant:	Appellant
Decision date:	December 8, 2022
File number:	GE-22-2357

Decision

[1] The appeal is dismissed.

[2] The Claimant hasn't shown that she was available for work. This means that she is disentitled from receiving Employment Insurance (EI) benefits.

Overview

[3] The Canada Employment Insurance Commission (Commission) decided that the Claimant was not available for work from January 18, 2021, to April 22, 2022, because she was attending school. They say schooling restricted the Claimant's availability because she had to work around her class schedule.

[4] The Claimant says the Commission took far too long to decide on this issue as she always reported her schooling, but it was years after the fact that the Commission decided she was not available. They should have told her right from the start she would have to pay the money back.

[5] The Claimant says she needed to work to survive and would have shifted around her school schedule if necessary in order to work.

[6] 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 she was available for work.

Matter I have to consider first

50(8) Disentitlement

[7] In their submissions the Commission states they disentitled the Claimant under subsection 50(8) of the Employment Insurance Act (Act). Subsection 50(8) of the Act relates to a person failing to prove to the Commission that they were making reasonable and customary efforts to find suitable employment.

[8] While not bound by it, I find the reasoning in *TM v Canada Employment Insurance Commission*, 2021 SST 11 persuasive, in that it is not enough for the Commission to discuss job search efforts with the Claimant, instead they must specifically ask for proof from the Claimant and explain to her what kind of proof would meet a "reasonable and customary" standard.

[9] In looking through the evidence, I did not see any requests from the Commission to the Claimant to prove her reasonable and customary efforts, or any claims from the Commission that if they did, her proof was insufficient.

[10] I further find the Commission did not make any detailed submissions on how the Claimant failed to prove to them that she was making reasonable and customary efforts; the Commission only summarized what the legislation says in regard to subsection 50(8) of the Act and what it says about reasonable and customary efforts.

[11] Based on the lack of evidence the Commission asked the Claimant to prove her reasonable and customary efforts to find suitable employment under subsection 50(8) of the Act, the Commission did not disentitle the Claimant under subsection 50(8) of the Act. Therefore, it is not something I need to consider.

Issue

[12] Was the Claimant available for work?

Analysis

Was the Claimant available for work?

[13] The Claimant was a student. There is a presumption that full-time students are not available.[1] Since this presumption only applies to full-time students, the first thing I need to determine is whether the Claimant was a full-time student.

[1] See *Canada (Attorney General) v Cyrenne*, 2010 FCA 349

[14] I find the Claimant was not a full-time student. While she did say as such in every training questionnaire,[2] and told the Commission she was full-time, spending 25 hours per week on her schooling,[3] I find the amount of time she spent on her schooling supports she was not full-time.

[15] The Claimant says she only attended class three days a week, (Tuesday, Wednesday, and Thursday), which I find does not represent full-time. While it is not a necessity that class occur every single day of the week in order to be considered full-time schooling, her three days of school only totaled 15 hours of class a week.[4] I find 15 hours a week is far from full-time hours. Even if I take into account all the time she spent on her schooling, not just in-class time, and accept she was spending 25 hours a week total on her schooling, I find 25 hours a week is still not full-time.

[16] So, since she was not full-time, this means the presumption does not apply to her.

[17] However, this only means the Claimant is not presumed to be unavailable.

[18] I still have to look at the law and decide whether the Claimant was actually available.

[19] Case law sets out three factors for me to consider when deciding this. The Claimant has to prove the following three things:[5]

a) She wanted to go back to work as soon as a suitable job was available.

b) She 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.

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[2] GD03-73, GD03-89, and GD03-43
[3] GD03-49
[4] GD03-93
[5] 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.

[20] When I consider each of these factors, I have to look at the Claimant's attitude and conduct,[6] over the period of the disentitlement, from January 18, 2021, to April 22, 2022.

– **Wanting to go back to work**

[21] The Claimant has shown that she wanted to go back to work as soon as a suitable job was available.

[22] The Claimant testified that she was working at a retail job, but left to go to a different retail job to try and get more hours. She says that she also got a part-time job as a content creator in October 2021.

[23] I find the fact the Claimant was working during the period of the disentitlement, and even left one job to take a job that would give her more hours, shows that she had a desire to work.

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

[24] The Claimant was making sufficient efforts to find a job.

[25] The Claimant says she was working at a retail store, but was barely getting any hours. Her friends were working at a different retail store and recommended she apply at that store, as she would get more hours.

[26] The Claimant spoke to the manager at the retail store her friends worked for and ended up getting hired.

[27] However, the Claimant says that just because she had a job did not mean she stopped looking for work. She was signed up to various job banks and looked online on sites such as Indeed and LinkedIn.

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[6] 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.

[28] The Claimant says that in October 2021, she found another job working part-time as a content creator.

[29] I find the Claimant's efforts to find work by looking online, networking with friends, contacting prospective employers and applying to jobs and attending interviews, all represent sufficient efforts to find employment as they were ongoing throughout the period of the disentitlement and led to her getting two different jobs.

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

[30] The Claimant did set personal conditions that might have unduly limited her chances of going back to work.

[31] The Commission submits that although the Claimant attending school is commendable, doing so places restrictions on her availability which limited her chances of finding employment.

[32] The Claimant says her school did not overly limit her from returning to the labour market.

[33] She says that while she did tell the Commission she would not leave her schooling to take a full-time job, that was because she would have kept doing her school at the same time as a full-time job.

[34] She says that she would have taken night classes, or weekend classes, and worked around her schooling as only three classes a week were mandatory attendance, the others were recorded, so she could watch them at any time. The Claimant had friends in the classes who could have brought her up to speed on the class content if she was busy at work.

[35] The Claimant says that at her second retail job she was given shifts that worked around her schooling and if she had been given a shift during a mandatory class, she would have had to try and trade the shift with another employee.

[36] While the content creation job was full-time when she applied for it, in the interview, when the employer found out she was in school, they said they would have her work part-time so she could finish her schooling.

[37] I find the Claimant's schooling was a personal condition, since she chose to take the schooling, and it would have overly limited her chances of returning to the labour market.

[38] I understand the Claimant's arguments that she would have done night or weekend classes and had her friends help her keep up on her school work, but this is only a possibility of availability, as she was not taking such classes, and had mandatory classes that she had to work around; a possibility of availability is not actual availability.[7]

[39] While she did find work while attending school, this does not mean her schooling placed no restriction on her availability, as her mandatory classes were a restriction as any job had to work around them.

[40] The fact she had a class schedule that a job had to work around means her availability was restricted by her schooling, which means her schooling was overly limiting her chances of returning to the labour market.[8]

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

[41] Based on my findings on the three factors, I find that the Claimant has not shown that she was available for work.

Further Comments

[42] The Claimant expressed her frustration at the Commission taking so long to ask her to repay the money, saying she wished they had told her from the start there was a chance of having to repay the money.

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[7] See *Canada (Attorney General) v Primard*, 2003 FCA 349. para 9, which says a possibility of availability does not constitute availability.
[8] See *Horton v Canada (Attorney General)*, 2020 FC 743. Para 35 which supports this.

[43] I can fully understand her frustration at getting a massive bill in the mail years after she had originally been paid the benefits; however, the Commission can review a claim up to 36 months after benefits have been paid,[9] and they are well within that time frame in this case.

[44] The Claimant has also said that she understands she may have made a mistake and is willing to repay some of the money, but cannot afford to pay back all of it.

[45] I have great sympathy for the Claimant and her situation; however, I cannot alter the amount of the overpayment.[10] The Claimant would need to contact the Commission to ask them to write off part, or all, of the overpayment, as only they have the power to do this.

Conclusion

[46] The appeal is dismissed. The Claimant has not proven that she was available for work, so the disentitlement should be upheld.

Gary Conrad
Member, General Division – Employment Insurance Section

[9] See Section 52 of the *Employment Insurance Act*
[10] *Canada (Attorney Genera) v Villeneuve*, 2005 FCA 440. para 16