Citation: *CC v Canada Employment Insurance Commission*, 2022 SST 1676

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	C. C.
Representative:	R. M., MP
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (442714) dated December 17, 2021 (issued by Service Canada)

Tribunal member:	Angela Ryan Bourgeois
Type of hearing:	Teleconference
Hearing date:	March 29, 2022
Hearing participants:	Appellant Appellant's representative
Decision date:	May 9, 2022
File number:	GE-22-206

Decision

[1] The appeal is dismissed. The Tribunal disagrees with the Claimant.

[2] The Claimant hasn't shown that he was available for work while in school. This means that he can't receive employment insurance (EI) benefits.

Overview

[3] 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] The Claimant is from Prince Edward Island. He started his first year of a Bachelor of Science degree at X in September 2021. Like many students his classes are both synchronous and asynchronous.

[5] The Canada Employment Insurance Commission (Commission) decided it couldn't pay the Claimant EI benefits because he didn't meet the availability requirement. It imposed a disentitlement for availability as of August 30, 2021.

[6] 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.

[7] The Commission says that the Claimant wasn't available because he was in school full-time.

[8] The Claimant disagrees. The Claimant says his university classes didn't unduly limit his chances of returning to work. He could have easily worked full-time hours around the few hours he had to be in class.

Issue

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

Analysis

[10] The *Employment Insurance Act* (Act) says a claimant has to prove that they are "capable of and available for work" but aren't able to find a suitable job.[1] Case law gives three things a claimant has to prove to show that they are "available" in this sense.[2] I will look at those factors below.

[11] In addition, the Federal Court of Appeal has said that claimants who are in school full-time are presumed to be unavailable for work.[3] This is called the "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.

[12] I will start by looking at whether I can presume that the Claimant wasn't available for work.

Presuming full-time students aren't available for work

[13] The Claimant is a full-time student. He said so on his application for benefits, and at the hearing the Claimant confirmed that he took no fewer than 4 courses a semester. I find that this amounts to full-time studies.[4]

[14] But the presumption that full-time students aren't available for work can be rebutted (that is, shown to not apply). The presumption can be rebutted by showing exceptional circumstances or a history of working full-time while also in school.[5]

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[1] See section 18(1)(a) of the Act.
[2] See *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96.
[3] See *Canada (Attorney General) v Cyrenne*, 2010 FCA 349.
[4] The Claimant argued that his studies should not be considered full-time because he was in class for only a few hours a week. He referred me to a decision of the General Division called *CC v Canada Employment Insurance Commission*, 2020 SST 354 (Tribunal File Number GE-20-430). In that case, the Tribunal member found that being in class for 17 hours a week didn't amount to attending a full-time course of study. I reviewed the case but I was not persuaded by the reasoning. I am not obligated to follow decisions of the General Division of the Tribunal. Attending university "full-time" means that the student is taking four or five courses a semester. In the normal course, this would amount to about 15 hours of class time a week (3 hours per course). So if the presumption didn't apply to students who are in class 17 or fewer hours a week, it wouldn't apply to almost all university students. I am unaware of any binding authority that says this is the case.
[5] See Canada (Attorney General) v Rideout, 2004 FCA 304 and Canada (Attorney General) v Cyrenne, 2010 FCA 349.

[15] The Claimant hasn't proven that he has a history of working full-time while in school. He gave conflicting evidence about how many hours he worked a week while in school. I prefer the testimony he gave before I told him it conflicted with what he reported on his reconsideration request. His original testimony was that he worked about 12 to 16 hours a week. His reconsideration request form says that he worked daily and every weekend, up to and over 25 hours a week. I prefer the original testimony because:

- It is in line with what he reported on his application form.
- He completed the application form closer in time to when he worked. So his recall was likely better when he completed the application form than it was months later when he completed the reconsideration request.
- I didn't find his explanation for the conflict compelling – that he had given the times he worked more thought when he completed the reconsideration request.

[16] But the Claimant has rebutted the presumption because there are exceptional circumstances. His asynchronous classes are an exceptional circumstance. The presumption started before asynchronous classes were as readily available as they are today. Although the Claimant is attending university full-time, the combination of synchronous and asynchronous classes does not reflect a typical full-time course. This is an exceptional circumstance.

[17] Rebutting the presumption means only that the Claimant isn't presumed to be unavailable. I still have to look at whether the Claimant has proven that he was capable of, available for, and unable to find a suitable job.

Available for work

[18] I have to consider whether the Claimant was capable of and available for work but unable to find a suitable job.[6] Case law sets out three factors for me to consider when deciding this. The Claimant has to prove the following three things:[7]

a) He wants to go back to work as soon as a suitable job is available.

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

c) He hasn't set personal conditions that might unduly (in other words, overly) limit his chances of going back to work.

[19] When I consider each of these factors, I have to look at the Claimant's attitude and conduct.[8]

– Wanting to go back to work

[20] The Claimant hasn't shown that he wants to go back to work as soon as a suitable job is available.

[21] The Claimant said that he was looking for any job, and would work any hours.

[22] He was looking for work around X, where he goes to university, and at home on Prince Edward Island. He provided a job search.

[23] When the job search was reviewed at the hearing, the Claimant testified that he couldn't work at a certain co-op position near his home on Prince Edward Island in December 2021, because the employer wanted someone that could work all winter, and he was only going to be there for three weeks during his Christmas break.[9] He was returning to university in X for the second semester.

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[6] See section 18(1)(a) of the Act.
[7] 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.
[8] 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.
[9] Approximately at 53:32 of the recording.

[24] Not pursuing the job on Prince Edward Island in December 2021, shows that he didn't want to return to work as soon as a suitable job was offered.

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

[25] The Claimant has proven that he was trying to find a suitable job.

[26] The Claimant testified that was looking for any type of work, including as a waiter and store clerk. His job search efforts included:

- asking businesses if they were hiring
- dropping off resumes at X, Joey's (a local restaurant), the Big Stop Restaurant, Dollarama, and Foodland
- calling about 35 other businesses between September 3, 2021, and January 6, 2022
- looking at online job banks a couple of times a week
- getting emails from a job bank
- attending an interview at Foodland

[27] His efforts are enough to meet the requirements of this second factor. I am satisfied that the Claimant made sufficient efforts to find a suitable job. His job search shows that there were few available jobs in the area.

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

[28] The Claimant says that his school schedule doesn't limit his availability for work.[10] He says that in high school he worked around his class schedule, and he could do the same with his university courses. In fact, his university courses impose fewer restrictions on his availability than high school did.

[10] For example, see page GD3-26.

[29] First semester, the Claimant had an in-person class from 12:30 p.m. to 1:20 p.m., Monday to Friday, and on Tuesdays, he had an in-person lab from 2:30 to 3:50. He had five more class hours that he took at his own schedule.

[30] Second semester, the Claimant took four courses. His classes were recorded but he had to attend three in-person labs on Tuesday and Thursday afternoons.

[31] The Claimant testified that he had an interview at Foodland. When they asked if he could work 36 hours a week, he said yes – on Friday, Saturday, Sunday and Monday. At the hearing, he said he could have worked any time except for Tuesday and Thursday afternoons (when he had to be at his in-person labs).

[32] The Federal Court of Appeal has held that restricting availability to certain times on certain days is setting personal conditions that might unduly limit the chances of getting back to work. [11]

[33] I find the Claimant restricted his availability to certain times on certain days. The Claimant's evidence about what he said during his Foodland interview is strong evidence that he was restricting his availability to certain times on certain days. If the Claimant had been available every day, it is more likely than not that he would have said so during the interview.

[34] The Claimant said he would leave his course for full-time work. I find this unlikely because university is expensive. He has invested close to $20,000 in his course this year, plus the expenses of living away from home. Further, if his intention was to work full-time, it's likely that he would have pursued the co-op job in Prince Edward Island in December 2021, rather than return to university in X.

[35] For these reasons, I find the Claimant set personal conditions that unduly limited his chances of going back to work. Although he was available in the mornings, and

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[11] *Duquet v Canada Employment Insurance Commission and Attorney General of Canada*, 2008 FCA 313. See also *Horton v Canada (Attorney General),* 2020 FC 743, where the court said that adapting a work schedule to a full-time program of study, at the risk of breaching the school's attendance policy, is not availability under the law.

some afternoons, evenings and weekends, for the purposes of the Act he was not available.

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

[36] Based on my findings on the three factors, I find that the Claimant hasn't shown that he was capable of and available for work but unable to find a suitable job.

Conclusion

[37] The Claimant hasn't shown that he was available for work within the meaning of the law. So he is disentitled from receiving EI benefits.

[38] The appeal is dismissed.

Angela Ryan Bourgeois
Member, General Division – Employment Insurance Section