Citation: *MJ v Canada Employment Insurance Commission*, 2023 SST 765

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	M. J.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (471306) dated May 13, 2022 (issued by Service Canada)

Tribunal member:	Leanne Bourassa
Type of hearing:	Videoconference
Hearing date:	October 19, 2022
Hearing participants:	Appellant
Decision date:	March 20, 2023
File number:	GE-22-1840

Decision

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

[2] The Appellant hasn't shown just cause (in other words, a reason the law accepts) for leaving his job when he did. The Appellant didn't have just cause because he had reasonable alternatives to leaving his job. This means he is disqualified from receiving Employment Insurance (EI) benefits.

[3] The Appellant is also disentitled from receiving benefits because he has failed to show that he was available for work while he was in school full time.

Overview

[4] The Appellant's employment came to an end. On December 7, 2021, he applied for EI benefits. The Canada Employment Insurance Commission (Commission) looked at the Appellant's reasons for leaving. It decided that he voluntarily left (or chose to quit) his job without just cause, so it wasn't able to pay him benefits.

[5] The Commission also decided that the Appellant had not shown that he was available for work from December 6, 2021, because he was taking a training course on his own initiative and has not proven his availability for work.

[6] I must first decide whether the Appellant left his job voluntarily and if so, has he proven that he had no reasonable alternative to leaving. Then I also need to decide if he has shown he was available for work while being in full-time studies.

[7] The Commission says that the Appellant ended his employment because he could have returned to work or met with his employer to set a date to return to work. If he was experiencing a medical issue, he could have had a doctor's support for leaving his job.

[8] The Commission also says that since the Appellant was enrolled in full-time studies, it is presumed that he is not available for work.

[9] The Appellant says that he didn't quit his job, but that his employer terminated his position when he took a leave because of the stressful working conditions.

[10] The Appellant also argues that his work as a teaching assistant was not considered to be work by the Commission. Because of that job, he did not want to look for other work. He says he did start looking once he was told by the Commission that he had to prove he was looking for work to show that he was available.

Matter I have to consider first

[11] In some cases, the evidence may make it unclear as to the cause of an Appellant's unemployment. In this case, there is some disagreement between the parties about whether the Appellant left his job or if the employer terminated his employment. The law has established that what I must deal with is the decision that the Commission made, not that which it might have made.[1]

[12] In this case, the Commission decided that the Appellant had voluntarily left his job. For reasons I outline below, I agree and find that the Appellant brought about the end of his employment.

Issue

[13] There are two issues that I have to address in this appeal:

> **Issue 1**: Is the Appellant disqualified from receiving benefits because he voluntarily left his job without just cause?
>
> **Issue 2**: Is the Appellant disentitled to benefits because he was not available for work while he was in full-time studies.

[14] To answer these, I must first address the Appellant's voluntary leaving. I then have to decide whether the Appellant had just cause for leaving. Finally, I will decide whether he has shown he was available for work.

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[1] See *Hamilton v. Canada (Attorney General)* A-175-87,

Analysis

Issue 1: The Appellant voluntarily left his job and he did not have just cause for doing so

I find that the Appellant had the choice to stay at his job

[15] I find that the Appellant voluntarily left his job. He had the choice to stay in his job.

[16] The Federal Court of Appeal says that the question to be asked when deciding if a person left their job or not is whether the employee had a choice to stay in his employment or leave.[2]

[17] The Appellant has argued that he did not voluntarily leave his job and it is not up to the employer to decide that he quit. He says his employment ended when the employer sent him a request to fill out an exit survey.

[18] I agree that an employer can not unilaterally decide an employee has quit. However, in this case, the Appellant told his employer he was not available to work. Then, the employer gave the Appellant several opportunities to discuss a return to work. The employer warned him that if he didn't return, they would interpret this as his quitting. In the end, the Appellant acted in a way that brought his employment to an end.

[19] I understand the Appellant was very dissatisfied with the way things were going at work and how he was being treated at his job. He told his manager he needed indefinite time off and he says she agreed to that. I also see from text messages from his manager that the Appellant would be put 'on leave' from July 12, 2021, and that meant he was still an employee.[3]

[20] A few days later, the Appellant's manager asked him to put in writing when he would be returning from leave. The Appellant answered that he would do this, but there is no evidence that he did. Another text message from his manager dated July 29 asks

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[2] This is set out in *Canada (Attorney General) v. Peace* 2006 FCA 56.
[3] This series of text messages are found in the documents GD2-33 and following.

him if he had forgotten the letter and the Appellant again said he would give her the letter soon. Again, I don't see any evidence that the Appellant actually did this. Finally on August 27, the Appellant's manager asked him to come in to work and he replied that he was not available for the moment, unless she was willing to offer him $50/hour.[4]

[21] The Appellant admits that he also received letters from the employer asking that he report to work, or he would be considered to have quit. The first letter, dated September 17, asked him to go to the workplace within 72 hours of the receipt of the letter to discuss a possible return to work. It also says that if he didn't do this, he would be considered to have resigned.[5] The Appellant says he ignored this letter.

[22] The employer sent the Appellant a second letter with the same text on September 28.[6] The Appellant answered that letter on October 2, 2021, saying that he had advised his manager that he was not available for work. His entire attention was on his schoolwork and nothing but an increase in his salary from $17.50 per hour to $50.00 per hour would make his return possible.[7]

[23] These two letters from the employer show me that the Appellant had the opportunity to return to work, or at least to meet with his employer to discuss a possible return. He made the choice to ignore the first letter. Then, in response to the second letter, he said he was focused on his studies and not available to work. His request for a salary more than double what he was already being paid cannot be considered as a serious offer to return to work. He even told me that the number was just "testing my luck". These actions lead me to believe he did not intend to return to work.

[24] I have taken note that on the exit survey email the employer sent to the Appellant, it says "Exit Survey-Terminate" and "Appellant (Terminated)". I am giving this document little weight because it is inconsistent with what the employer said in its letters to the Appellant, the Record of Employment, and the statement they made to the

[4] See the text message at GD3-40.
[5] This is the letter at GD2-36.
[6] This is the letter at GD2-37.
[7] This response is at GD2-38.

Commission during their investigation. Also, when filling out his application for benefits, the Appellant had the opportunity to say that he was terminated, and he did not do so.

[25] The Appellant argues that he did not intend to quit his employment. But, he had the choice to meet with his employer when asked and he chose to tell them he was not available. While he may have wanted his employer to inquire further, he had been told how his actions would be interpreted. It was his choice not to meet with his employer and instead to say he was not available to work.[8] He was told how that would be considered. So, I find it was the Appellant's choice to act in a way that would lead his employer to understand he had quit his job as of October 2, 2021.

The Appellant did not have just cause for leaving his employment

[26] The parties don't agree that the Appellant had just cause for voluntarily leaving his job when he did. I find that he had reasonable alternatives to leaving, so he did not have just cause.

[27] The law says that you are disqualified from receiving benefits if you left your job voluntarily and you didn't have just cause.[9] Having a good reason for leaving a job isn't enough to prove just cause.

[28] The law explains what it means by "just cause." The law says that you have just cause to leave if you had no reasonable alternative to quitting your job when you did. It says that you have to consider all the circumstances.[10]

[29] It is up to the Appellant to prove that he had just cause.[11] He has to prove this on a balance of probabilities. This means that he has to show that it is more likely than not that his only reasonable option was to quit. When I decide whether the Appellant had

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[8] See Canada (Attorney General) v. Coté, 2006 FCA 219 for the principle that an employee who advises their employer that they are less available than previously is for all intents and purposes asking the employer to terminate the employment contract. Dismissal is the only logical consequence of the employee's deliberate act and cannot erase the fact that there was first and foremost voluntary leaving on the part of the employee.
[9] Section 30 of the *Employment Insurance Act* (Act) explains this.
[10] See *Canada (Attorney General) v White*, 2011 FCA 190 at para 3; and section 29(c) of the Act.
[11] See *Canada (Attorney General) v White*, 2011 FCA 190 at para 3.

just cause, I have to look at all of the circumstances that existed when the Appellant quit.

[30] The Appellant says that he left his job because of the working conditions. He had no reasonable alternative to taking a break at that time because his stress levels had built up. New employees had been hired and mistakes that he never would have made were being repeated. He needed to separate from the job for some time until the environment became ‘more sane’.

[31] The Commission says that the Appellant didn’t have just cause, because he had reasonable alternatives to leaving when he did. Specifically, it says that the Appellant could have resumed his employment when his employer asked, or at least provided a date of return as requested by the employer. If he was not satisfied with working conditions, he could have reported the issues to a higher level such as a human resources director. If he was having mental health issues brought on by his employment, he could have consulted a doctor to provide a medical certificate to request sick leave, or to advise he leave his employment because he could no longer continue in his state.

– **The Appellant did not leave his job for his studies**

[32] First of all, I find that the Appellant did not leave his job because of his schooling.

[33] At first glance, this would seem to be the case because the Appellant said on his application for benefits that he was not working because he was in an apprenticeship program. His employer also said on the Record of Employment that he had quit to return to school and said as much when contacted by the Commission. It was only after benefits were refused that the Appellant gave a different explanation.

[34] Despite this documentary evidence, I am giving more weight to the Appellant’s later statements about his feelings about the workplace, and especially his testimony at the hearing. This is because he has submitted documents that support what he says in

his detailed Notice of Appeal.[12] Also, during the hearing I was able to question him more fully on the circumstances surrounding the end of his employment.

[35] I also note that the Appellant had always been in school while working for this employer. He was working part-time, and his schedule allowed him to work and study. He was only working one day a week when he decided to take leave. Nothing seems to have changed in his school situation at the time he decided to stop working. While he might have told his employer the pressures of school were part of his reason for taking a break from work, I understand from his testimony that this was not the real reason for his leaving his job.

– **The Appellant stopped working because he was dissatisfied with his work environment**

[36] The Appellant testified that he was only working one day a week and felt that even that was too much when the newer employees didn't really contribute to the work environment. The Appellant felt his efforts were being wasted and he was mentally disturbed by what he felt to be unchanging toxicity in the workplace, regardless of his complaints. He provided text messages exchanged with his manager, in which he complains about situations he was unhappy with.

[37] The Appellant told me that while he said he was busy with his studies, the build-up of stress from work had gone beyond his comprehension. He had made complaints to his manager, and he could not bear it anymore. His manager had asked him what he wanted and he said he couldn't take it, so he was going to take some time off.

[38] After he left on leave, the Appellant's manager contacted him to ask for him to give a return date in writing. Despite a few attempts to set a return to work date, the Appellant never confirmed to his employer when he would return. In fact, he responded that he was not available for work.

[12] This includes copies of text messages exchanged with his manager and a complaint he made to the *Commission des normes de l'équité, de la santé de la sécurité au travail.*

[39] At the hearing, the Appellant told me he was not going to return from his leave until the employer took some time to restructure the workplace to make it more sensible. His possible return did not depend on his studies, because that was not a factor in his decision to stop working. He had been in his program for most of the time he had been working with his employer.

[40] I find that the Appellant left his job because he did not like the way things were being run at the company. He felt his fellow employees were making mistakes that were not being addressed and he felt his own hard work was not recognized. He says his workplace was toxic and his complaints and interventions were going nowhere. So, he told his employer he would not be working for an indefinite period of time.

[41] I find that at the time the Appellant left his job, he was facing situations at work where he felt his colleagues were unprofessional and his management was not addressing the complaints he had been raising about issues in the workplace.

– **The Appellant had reasonable alternatives to leaving his job**

[42] I find that the Appellant had reasonable alternatives to leaving his job.

[43] First, the Appellant could simply have responded to his manager's request of July 15, 2021, that he put in writing a date that he would return to work. He could have done that when she first asked him to do it, or when she asked him again on July 29. If he wasn't able to settle on a date, he could still have given her an estimated date of return.

[44] The Appellant's manager also asked him to come into work on August 27, 2021. The Appellant replied that he was not available for the moment, unless she offered him $50/hr. At that time, he could have again confirmed a date of return, rather than making it clear he was not willing to work. If his salary was the issue, he could have made a reasonable request for a raise and been willing to discuss it.

[45] The Appellant could also have responded to the employer's letter of September 17, 2021. The employer asked him to show up within 72 hours to discuss a possible return date. It was clear in the letter that if he did not show up, he would be considered

to have resigned. The Appellant ignored this letter. Responding to this letter was a reasonable alternative to leaving his job.

[46] The Appellant did respond to his employer's second letter, dated September 28, 2021. Instead of saying he would come back to work, in his letter of October 2, he explains in detail his academic obligations and confirms that his entire attention is directed towards teaching at the University and writing his doctoral thesis. He says that had already advised his manager that he was not available to work. He makes an unreasonable request to be paid more than twice his usual salary as a condition of his return.

[47] I asked the Appellant about this letter to his employer and he explained that he felt he was standing for his rights. He was doing something good for himself by not subjecting himself to his employer's demands. The Appellant say he is happy he did not go because he needed reassurance that things were going to change – the situation was not acceptable to him. He expected that the employer would call him and talk about the working conditions.

[48] There were several reasonable alternatives to writing what appears to be a letter of resignation. The Appellant could have presented himself at the workplace to discuss the situation with his employer. He could have set a date to return to work. He could have responded to his employer with details about the situations he felt needed to be addressed and that weren't being handled by his manager. He could have made a reasonable salary request and shown up at the workplace to discuss it.

[49] The Appellant also suggested that the situation at his work was causing him stress and mental health issues. In that case, a reasonable alternative to refusing to return to work would have been to have a doctor provide him with support for a leave of absence for a defined period of time.

[50] From the Appellant's testimony and the evidence before me, I conclude that there were possibilities for the Appellant to resolve his issues with his employer and return to work. However, his actions show that he was not genuinely interested in those

alternatives. So, he left his employment voluntarily without just cause, because there were reasonable alternatives available to him.

Was the Appellant available for work?

– The law about availability

[51] Two different sections of the law require Appellants to show that they are available for work. The Commission decided that the Appellant was disentitled under both of these sections. So, he has to meet the criteria of both sections to get benefits.

[52] First, the Employment Insurance Act (Act) says that an Appellant has to prove that they are making "reasonable and customary efforts" to find a suitable job.[13] The Employment Insurance Regulations (Regulations) give criteria that help explain what "reasonable and customary efforts" mean.[14]

[53] Second, the Act says that an Appellant has to prove that they are "capable of and available for work" but aren't able to find a suitable job.[15] Case law gives three things an Appellant has to prove to show that they are "available" in this sense.[16] I will look at those factors below.

– The presumption of non-availability of students

[54] Before I look at the factors to show availability, the Federal Court of Appeal has said that Appellants who are in school full-time are presumed to be unavailable for work.[17] 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.

[55] I will begin by looking at whether or not the presumption of non-availability of students applies to the Appellant.

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[13] See section 50(8) of the *Employment Insurance Act* (Act).
[14] See section 9.001 of the *Employment Insurance Regulations* (Regulations).
[15] See section 18(1)(a) of the Act.
[16] See *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96.
[17] See *Canada (Attorney General) v Cyrenne*, 2010 FCA 349.

– **The presumption of non-availability applies to the Appellant**

[56] In his application for benefits dated December 7, 2021, the Appellant said that he was in a course or training program and that he spent 25 or more hours per week on his studies. He said his program was considered to be a full-time program. He also said if he found full-time work, he would finish his course or program. He had committed about $15,000.00 to his program and he was nearing the end of it.

[57] The application form for benefits also says that all of the Appellant's course obligations occurred outside of his normal work hours. He says he was available for work and capable of working under the same or better conditions as before he started his course. He said had made efforts to find work since the start of his program.

[58] At the hearing, I asked the Appellant about these statements. He clarified that he did not have 25 hours of class time, but that he was doing research related activities, lab work and writing, as well as part time work as a teaching assistant. He was a doctoral student and planned on finishing his program in December 2022.

[59] The Appellant also confirmed that he was not about to drop his studies. He was ready to take part-time work. He had never worked full-time during his studies but did work as a teaching assistant.

[60] I have considered that the Appellant's school commitments are somewhat flexible given that he was in the later stages of his post-graduate studies in a highly research-based field. However, since he himself said that his studies did not allow for full-time work, I would consider that he was in full-time studies. He was also committed to finishing his program, over finding work. So, the presumption of non-availability would apply to the Appellant.

[61] The presumption of non-availability can be rebutted if a student can show that they have a history of working full-time while also studying[18] or by showing exceptional circumstances.[19]

[62] The Appellant explained that he had been a full-time student all along the duration of his part-time work. So, he has not shown a history of working full-time while also studying.

[63] I also do not see any evidence of exceptional circumstances that would rebut the legal presumption that the Appellant was not available for work during his full-time studies. So, the presumption of non-availability has not been rebutted and applies to the Appellant.

[64] The Federal Court of Appeal has not yet told us how the presumption and the sections of the law dealing with availability relate to each other. Because this is unclear, I am going to continue on to decide the sections of the law dealing with availability, even though I have already found that the Appellant is presumed to be unavailable.

Reasonable and customary efforts to find a job

[65] I find that the Appellant has not proven that he was making reasonable and customary efforts to find a job.

[66] The first section of the law about availability that I am going to consider says that Appellants have to prove that their efforts to find a job were reasonable and customary.[20]

[67] The law sets out criteria for me to consider when deciding whether the Appellant's efforts were reasonable and customary.[21] I have to look at whether his efforts were sustained and whether they were directed toward finding a suitable job. In other words, the Appellant has to have kept trying to find a suitable job.

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[18] *Canada (Attorney General) v. Rideout*, 2004 FCA 304.
[19] *Canada (Attorney General) v. Cyrenne*, 2012 FCA 349.
[20] See section 50(8) of the Act.
[21] See section 9.001 of the Regulations.

[68] I also have to consider the Appellant's efforts to find a job. The Regulations list nine job-search activities I have to consider. Some examples of those are the following:[22]

- assessing employment opportunities
- preparing a résumé or cover letter
- contacting employers who may be hiring
- applying for jobs

[69] The Commission says that the Appellant didn't do enough to try to find a job. They say this because the Appellant said that his courses were full-time, and he was not available for work since the end of his employment. He said he would only be available for full-time work after he finished his PhD. The Appellant also told the Commission he had not been looking for work or full-time employment since October 6, 2021, because he was concentrating on his studies.

[70] While I note that the Commission did not ask the Appellant to give it a record of his job search activities, its notes show that the Appellant was clear in March 2022 that he wasn't really looking for a job because he was focused on school. He repeated this to the Commission again in May 2022. So, they had no evidence that the Appellant was making efforts to find a job and did not see the need to ask for details about a search.

[71] With his notice of appeal, the Appellant submitted screenshots of 5 job applications. I note that these applications all appear to have been made on May 13, 2022. This is considerably after he originally applied for benefits. In fact, it was only after he was denied benefits on reconsideration that the Appellant made these applications. So, this does not demonstrate he has proven his availability since December 6, 2021.

[72] The Appellant also sent in copies of email correspondence which he says show his efforts to find work. Again, I note that these few exchanges all took place in August, September, and October 2022, so long after he had been denied benefits.

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[22] See section 9.001 of the Regulations.

[73] It is clear to me that the Appellant was not looking for employment. Even though he says he discussed a return to work with his employer in April 2022, he also explained he was negotiating to get his Record of Employment modified as a condition of returning to the job one day per week. This demonstrates to me that his objective was not necessarily a return to work.

[74] The Appellant hasn't proven that his efforts to find a job were reasonable and customary.

Capable of and available for work

[75] I also have to consider whether the Appellant was capable of and available for work but unable to find a suitable job.[23] Case law sets out three factors for me to consider when deciding this. The Appellant has to prove the following three things:[24]

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.

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

[76] When I consider each of these factors, I have to look at the Appellant's attitude and conduct.[25]

– Wanting to go back to work

[77] The Appellant has said that he was willing to go back to work and did not intend to stop working.

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[23] See section 18(1)(a) of the Act.
[24] 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.
[25] 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.

[78] Since the Appellant had the opportunity to go back to work with his employer, but refused to return when asked to do so, I am not convinced that he wanted to go back to work.

[79] I do take note that the Appellant was working as a teaching assistant while doing his doctoral studies. However, the Record of Employment related to this work shows only 120 hours of work over a 33-week period. This is also a job that is intimately related to his studies, so it does not convince me that he had a desire to return to work.

[80] I also considered that the Appellant did talk to his employer about coming back to work in April 2022. As I mentioned above, his comments lead me to believe that the point of those discussions was not necessarily a return to work, but rather a change in the Record of Employment. So, it does not convince me that it was more likely than not that he wanted to go back to work.

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

[81] The Appellant hasn't made enough efforts to find a suitable job.

[82] 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.[26]

[83] The Appellant's efforts to find a suitable job seem to have only begun after he was refused benefits. He provided evidence that he had applied online for 5 jobs in one evening. I also note he made a few applications to nonspecific positions in Cegeps and for a postdoctoral fellowship at a university in Japan, all in the fall of 2022.

[84] While the Commission argues that the Appellant should have been seeking full-time work, since the Appellant was engaged in part-time work prior to his leaving his job in October 2021, I would consider part-time work to be suitable for the Appellant while he was in school full-time. However, I do not see any evidence that he was looking for

[26] 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.

any new work, even part-time work beyond his teaching obligations, from December 2021 until May 2022. At that point he only made minimal efforts to find a job.

[85] Those efforts weren't enough to meet the requirements of this second factor because they were minimal and only undertaken after the Appellant had been denied benefits. So, I am not convinced the Appellant was making enough efforts to find a job.

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

[86] The Appellant also set personal conditions that might have unduly limited his chances of going back to work.

[87] The Appellant says he hasn't done this because he was willing to go back to his employer for one day a week and he was looking for part-time jobs that he could do around his school schedule.

[88] The Commission says that the Appellant was significantly limiting his availability while taking his full-time courses and he was only willing to accept part-time work outside of his school hours.

[89] I see a few ways in which the Appellant was limiting his chances of going back to work: he was only looking for part-time work, he was looking for work that could be done around his school commitments and he was limiting his job search to jobs related to his field of study.

[90] While these limits are all understandable because the Appellant was prioritizing his schooling and his previous experience when looking for jobs, they did reduce the chances of his returning to the workforce. Also, the one position he says he would have considered outside of his field of study was with his previous employer. Even then he was still only willing to return one day per week and on the condition that his Record of Employment was modified.

[91] So, because of those factors, I find that the Appellant did have personal conditions that limited his chances of returning to work.

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

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

Conclusion

[93] I find that the Appellant is disqualified from receiving benefits. He left his job voluntarily without just cause. He has not proven he was available for work.

[94] This means that the appeal is dismissed.

Leanne Bourassa

Member, General Division – Employment Insurance Section