[TRANSLATION]

Citation: *SL v Canada Employment Insurance Commission*, 2023 SST 1094

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

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

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (460262) dated March 16, 2022 (issued by Service Canada)

Tribunal member:	Josée Langlois
Type of hearing:	Teleconference
Hearing date:	June 6, 2023
Hearing participant:	Appellant
Decision date:	June 8, 2023
File number:	GE-23-109

[1] The appeal is dismissed.

[2] The Appellant hasn't shown that she was available for work within the meaning of the *Employment Insurance Act* (Act) between October 11, 2020, and April 30, 2021.

Overview

[3] The Appellant applied for regular benefits on November 8, 2020. On April 20, 2021, she told a Commission employee that she had made efforts to find a part-time job and that she had found one. For this reason, she said that she was no longer looking for a job because she was studying full-time and was available for full-time work only during the summer.[1]

[4] On March 16, 2022, the Canada Employment Insurance Commission (Commission) reconsidered part of its initial decision in the Appellant's favour. It found that the Appellant hadn't voluntarily left her job at "Allo mon coco."

[5] But it upheld its decision about the Appellant's availability. It decided that she wasn't entitled to Employment Insurance (EI) regular benefits from October 11, 2020, to April 30, 2021, because she was taking training on her own initiative and wasn't available for work. The Commission said that, from December 6, 2021, the Appellant was available for only part-time work.

[6] The Appellant appealed this decision to the Tribunal's General Division.

[7] On October 28, 2021, the Tribunal's General Division decided that the Commission hadn't used its discretion judicially in deciding to verify and reconsider the Appellant's claim for benefits. So, the General Division decided that the Commission could not retroactively determine that the Appellant wasn't entitled to benefits.

[8] The Commission appealed this decision to the Tribunal's Appeal Division. It argued that the General Division had made an error of law in interpreting the issue as

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[1] See GD3-20.

the power to reconsider under section 52 of the Act when the decision was made under section 153.161(2) of the Act. In addition, it argued that the General Division didn't consider the evidence on file when it said that the Commission didn't ask the Appellant to prove her availability.

[9] On December 29, 2022, the Tribunal's Appeal Division allowed the appeal and decided that the Commission had used its discretion judicially under section 153.161 of the Act. The Appeal Division acknowledges that this section was adopted temporarily to allow the Commission to verify benefits it has already granted. But it is returning the file to the General Division to determine whether the Appellant was available for work from October 11, 2020, to April 30, 2021.

[10] It was decided that the Commission had properly used its discretion to verify. So, I have to decide only the issue of the Appellant's availability.

[11] To get EI regular benefits, the Appellant has to be available for work. Availability is an ongoing requirement. This means that the Appellant has to be searching for a job.

[12] The Appellant disagrees with the Commission's decision. She says that, even though she is a full-time student, she is available for work in the evenings and on weekends. She argues that she was honest in disclosing her entire situation when she applied for benefits.

[13] I have to decide whether the Appellant was available for work within the meaning of the Act and whether she can get EI benefits. The Appellant has to prove her availability 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.

Issue

[14] Was the Appellant available for work between October 11, 2020, and April 30, 2021?

Analysis

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

[16] First, the Act says that a claimant has to prove that they are making "reasonable and customary efforts" to find a suitable job.[2] The *Employment Insurance Regulations* give criteria that help explain what "reasonable and customary efforts" mean.[3] I will look at those criteria below.

[17] Second, the Act says that a claimant has to prove that they are "capable of and available for work" but aren't able to find a suitable job.[4] Case law gives three things a claimant has to prove to show that they are "available" in this sense.[5]

[18] In addition, the Federal Court of Appeal has said that claimants who are in training full-time are presumed to be unavailable for work.[6] This is called the "presumption of non-availability." It means that we can suppose that students aren't available for work when the evidence shows that they are in school or taking training full-time.

[19] I will start by looking at whether the presumption of non-availability applies to the Appellant's situation and whether I must find that she wasn't available for work while studying full-time. If necessary, I will then consider the two sections of the Act on availability.

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[2] See section 50(8) of the *Employment Insurance Act* (Act).
[3] See section 9.001 of *the Employment Insurance Regulations*.
[4] See section 18(1)(a) of the Act.
[5] See *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96.
[6] See *Canada (Attorney General) v Cyrenne*, 2010 FCA 349.

Presuming full-time students aren't available for work

[20] The presumption that students aren't available for work applies only to full-time students.

– The Appellant is a full-time student

[21] The Commission says that the Appellant's training wasn't authorized. It says that the Appellant devoted 45 hours per week to her coursework and attendance. Since she was a full-time student and said that she wasn't available for full-time work during that period, the Commission says that the presumption of non-availability applies and that the Appellant wasn't available for work within the meaning of the Act.

[22] The Commission also argues that the Appellant indicated that she was available for work only two or three mornings per week and that, had she been offered a job, she would not have abandoned her training. The Commission says that, during that period, the Appellant's priority was to finish her training.

[23] The Appellant says that she was studying full-time at Laval University from August 31, 2020, to April 30, 2021, to get a certificate in addictions. She says that she has a history of working part-time while studying full-time.

[24] She also told the Commission that she was devoting 45 hours to her training.[7]

[25] I presume that the Appellant's training makes her unavailable for work within the meaning of the Act.

[26] This presumption of non-availability can be rebutted based on four principles that relate specifically to returning-to-studies cases.[8]

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[7] See GD3-26.
[8] See *Landry*, A-719-91; *Lamonde*, 2006 FCA 44; *Gagnon*, 2005 FCA 321; and *Floyd*, A-168-93.

[27] These principles are as follows:[9]

- the attendance requirements of the course
- the claimant's willingness to give up their studies to accept a job
- whether the claimant has a history of working irregular hours
- the existence of "exceptional circumstances" that would allow the claimant to work while taking their course

[28] The Appellant is a full-time student. But the presumption that full-time students aren't available for work can be rebutted (that is, shown to not apply). If the presumption were rebutted, it would not apply.

[29] There are two ways the Appellant can rebut the presumption. She can show that she has a history of working full-time while also in school.[10] Or, she can show that there are exceptional circumstances in her case.[11]

[30] On January 13, 2022, the Appellant told the Commission that she had left her job to go back to school.[12]

[31] On May 13, 2022, the Appellant sent a form to the Commission. She then said that she was a full-time student and that she was devoting more than 25 hours per week to her training. She then indicated that she had to attend her classes according to a specific schedule and that she attended her classes from Monday to Sunday.[13]

[32] She also said that if she was offered a job, she would change her course schedule to accept it and that she had made efforts to find a part-time job.

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[9] This principle is explained in the following decision: *Gagnon*, 2005 FCA 321.
[10] See *Canada (Attorney General) v Rideout*, 2004 FCA 304.
[11] See *Canada (Attorney General) v Cyrenne*, 2010 FCA 349.
[12] See GD3-28.
[13] See GD3-22 and following pages.

[33] While I understand that the Appellant has a history of working part-time while studying full-time, she hasn't shown that she has worked full-time while studying. She also hasn't shown any exceptional circumstances that would have allowed her to work while taking training.

[34] Even though she told the Commission that she had to attend her classes according to a specific schedule, at the hearing, she said that she had the option of attending her classes remotely.

[35] But, even though she had that option, the Appellant hasn't shown that, in her case, this would have allowed her to work full-time while taking training. In other words, the Appellant hasn't shown that this situation allowed her to be available for work. The Appellant was available to work evenings and weekends outside her course schedule, and she didn't intend to leave her training to accept a full-time job. During this period, her priority was to finish her training.[14]

[36] To rebut the presumption of non-availability, I don't have to assess the Appellant's job search efforts. I have to decide whether these efforts are reasonable and customary only if the presumption of non-availability is rebutted. But the Appellant indicated at the hearing that she hadn't made efforts to find a job between October 11, 2020, and early March 2021, because she was waiting for her employer to call her back. The circumstances surrounding the COVID-19 pandemic had also limited her ability to make efforts to find a job during that period.

[37] But she says that she approached an employer, Ben & Florentine, in early March 2021 and that she started working part-time for that employer in April 2021.

[38] On this point, the Tribunal's Appeal Division has made several decisions indicating that it isn't enough to wait until your employer calls you back to show that you

[14] See GD3-20, GD3-24, GD3-26, and GD3-28.

are available for work. A full-time student who shows that they have a history of working part-time isn't entitled to EI benefits.[15]

[39] While I understand that the Appellant says that she is available for part-time work while studying full-time, that intention isn't enough to rebut the presumption of non-availability. It isn't enough to say that you are available because availability, under the Act, is a question of fact.

[40] In my view, the Appellant hasn't rebutted the presumption of non-availability while studying full-time.

[41] The facts show that the Appellant was devoting 45 hours per week to her coursework and attendance.

[42] And, the Appellant's description of the option to attend her classes remotely isn't an exceptional circumstance that would have allowed her to work while taking her courses. The Appellant was busy with her classes and she didn't intend to give up her training, which was her priority during that period.

[43] This means that the Appellant hasn't shown that she has a history of working full-time while in school.[16] She also hasn't shown that there are exceptional circumstances in her case that would have allowed her to work full-time while studying full-time.[17]

[44] The Appellant hasn't rebutted the presumption that she wasn't available for work between October 11, 2020, and April 30, 2021.

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[15] See, for example: *Canada Employment Insurance Commission v RT* 2023 SST 223.
[16] See *Canada (Attorney General) v Rideout*, 2004 FCA 304.
[17] See *Canada (Attorney General) v Cyrenne*, 2010 FCA 349.

– **The presumption isn’t rebutted**

[45] Since the presumption isn’t rebutted, it means that the Appellant is presumed to be unavailable. The Appellant is a full-time student, and I find that she isn’t available for work between October 11, 2020, and April 30, 2021.

[46] In this case, since the presumption of non-availability isn’t rebutted, it isn’t relevant to analyze the following criterion.

[47] The Appellant wasn’t available for work within the meaning of the Act between October 11, 2020, and April 30, 2021. The presumption of non-availability applies.

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

[48] The Appellant said that she was honest when she applied for benefits and I believe her good faith. While I understand her disappointment, as I explained at the hearing, the Tribunal doesn’t have jurisdiction to grant a request to write off an overpayment. But the Appellant can ask the Commission directly for a write-off. A payment agreement can also be made.

[49] Based on the criteria set out in the Act and case law, it is more likely than not that the Appellant wasn’t available for work while taking training full-time because, in her case, the presumption of non-availability isn’t rebutted.

Conclusion

[50] The Appellant hasn’t shown that she was available for work within the meaning of the Act between October 11, 2020, and April 30, 2021. Because of this, I find that she can’t receive EI benefits during this period.

[51] This means that the appeal is dismissed.

Josée Langlois

Member, General Division – Employment Insurance Section