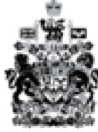

Citation: *JN v Canada Employment Insurance Commission*, 2023 SST 1115

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	J. N.
Representative:	P. N.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (502987) dated August 2, 2022 (issued by Service Canada)

Tribunal member:	Raelene R. Thomas
Type of hearing:	Teleconference
Hearing date:	June 15, 2023
Hearing participants:	Appellant Appellant's representative
Decision date:	July 14, 2023
File number:	GE-23-742

Decision

[1] The appeal is allowed. The Tribunal agrees with the Appellant.

[2] The Appellant has shown she was available for work within the meaning of the law from January 6, 2022. This means she isn't disentitled from receiving employment insurance (EI) benefits during this period.

Overview

[3] The Canada Employment Insurance Commission (Commission) decided the Appellant was disentitled from receiving EI regular benefits as of January 6, 2022 because she wasn't available for work.[1] A claimant has to be available for work to get EI regular benefits.[2] Availability is an ongoing requirement. This means that a claimant has to be searching for a job.

[4] I must decide whether the Appellant has proven she was available for work. The Appellant has to prove this on a balance of probabilities. This means she has to show it is more likely than not she was available for work.

[5] The Commission says the Appellant wasn't available because she was in school taking training full-time from January 6, 2022.

[6] The Appellant disagrees. She says she applied for EI, told the Commission she was in school and she was approved for EI benefits. The Appellant was under the impression she was not required to look for work because she was receiving her EI benefits. In January 2022 the Appellant could take her training on-line and could have picked up work had she known. Instead, she assumed that EI wanted her to stay in class because she reported she was in school full time on her bi-weekly claim reports.

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[1] Service Canada delivers the Commission's EI benefit program.

[2] A person who applies for EI benefits is called a "claimant." A person who appeals a decision of the Commission is called an "Appellant."

Matter I have to consider first

The Appellant did not attend the entire hearing

[7] The Appellant was present at the start of the hearing. She said she was not able to attend the whole hearing because she had another obligation for the day, and she could not take more than 15 minutes. The Appellant's representative was at the hearing and she agreed he could continue with the hearing without her. So, the hearing took place when it was scheduled, but without the Appellant.

The Appellant's appeal was returned to the General Division

[8] The Appellant first appealed the denial of EI benefits to the Tribunal's General Division in August 2022. The General Division (GD) allowed the appeal because it found the Appellant rebutted the presumption that full-time students are not available for work because she thought she was approved for EI benefits. The Commission appealed this decision to the Tribunal's Appeal Division.

[9] The Appeal Division agreed with the Commission the GD made an error in law when the GD found the Appellant rebutted the presumption and further when it failed to assess the Appellant's availability for work. It said the GD also made an important error of fact when it found the Appellant believed her training was approved by the Commission.

[10] The Appeal Division ordered the appeal be returned to the GD for it to determine the Appellant's availability while attending full-time training for the period starting January 6, 2022. This decision is a result of that hearing.

Issue

[11] Was the Appellant available for work from January 6, 2022 while in school taking training?

Analysis

[12] Two different sections of the law require claimants to show they are available for work.

[13] First, the Employment Insurance Act (EI Act) says the Commission may ask a claimant to prove they are making “reasonable and customary efforts” to find a suitable job.[3] The *Employment Insurance Regulations* (EI Regulations) give criteria that help explain what “reasonable and customary efforts” mean.[4]

[14] Second, the EI Act says a claimant has to prove they are “capable of and available for work” but aren’t able to find a suitable job.[5] Case law (decisions from the courts) gives three things a claimant has to prove to show they are “available” in this sense.[6]

[15] The Commission decided the Appellant was disentitled under both these sections. So, it says she must meet the criteria of both sections to get benefits.

[16] In addition, the Federal Court of Appeal (FCA) has said claimants who are in school taking training full-time are presumed to be unavailable for work.[7] This is called the “presumption of non-availability.” It means we can suppose students aren’t available for work when the evidence shows they are in school taking training full-time.

[17] I will start by looking at whether I can presume the Appellant wasn’t available for work. Then, I will look at whether she was available based on the two sections of the law on availability.

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[3] See section 50(8), EI Act. This is how I refer to the law that applies to the circumstances of this appeal.
[4] See section 9.001, EI Regulations.
[5] See section 18(1)(a) of the EI Act.
[6] See *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96. This is how I refer to the courts’ decisions that apply to the circumstances of this appeal.
[7] See *Canada (Attorney General) v Cyrenne*, 2010 FCA 349.

Presuming full-time students aren't available for work

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

– **The Appellant was not a full-time student from May 9 to August 13, 2022**

[19] The appeal file has a record of a conversation between the Appellant and a Service Canada officer on May 20, 2022.[8] She told the officer she was taking two courses from May 9, 2022 to August 13, 2022. This evidence tells me the Appellant was not a full-time student during this period because her course load is less than half of the course load she had from January to May 2022. As a result, the presumption does not apply to this period.[9]

– **The Appellant was a full-time student from January 6 to May 5, 2022**

[20] The appeal file has a record of a conversation between the Appellant and a Service Canada officer on May 26, 2022.[10] The Appellant told the officer she was enrolled in full-time training from January 6, 2022 to May 5, 2022. She told a Service Canada officer she was a full-time student. This evidence tells me the Appellant was a full-time student. Accordingly, the presumption applies to her from January 6, 2022 to May 5, 2022.

[21] 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 to the Appellant.

[22] There are two ways the Appellant can rebut the presumption. She can show she has a history of working full-time while also in school taking training.[11] Or, she can show there are exceptional circumstances in her case.[12]

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[8] See page GD3-30 in the appeal file.
[9] I will be deciding the Appellant's availability for this period below.
[10] See page GD3-32 in the appeal file.
[11] See *Canada (Attorney General) v Rideout*, 2004 FCA 304.
[12] See *Canada (Attorney General) v Cyrenne*, 2010 FCA 349.

– **The Appellant has rebutted the presumption**

[23] The Appellant has rebutted the presumption. The reasons for my finding follow.

[24] The Appellant's Representative said in January 2022 the Appellant moved from her residence to attend her training in another city. She returned to her residence in early May 2022 once the semester was over.

[25] The Appellant has not worked while she was in school. She has worked during the summer when not in school. The Appellant did work at the local hospital as a casual call-in employee from June 7, 2021 to August 9, 2021. She got that job because of her training. The Appellant was called in to work when needed. The shifts could be eight hours or 12 hours and from 4:00 p.m. to midnight or 8:00 to 8:00 depending on when she was needed. The Appellant's Representative said the Appellant told the hospital she was available while she was in school. He said she remained available for work while in school and could drive the 3 hours from where she was in school to the hospital if she was called in for a shift.

[26] The Appellant told a Service Canada officer the hospital was aware she was available and would give her enough notice of a call-in to allow her to drive to work.[13] The Appellant also told the Service Canada officer she was called in to work in October or November [2021] but was not called in again until June [2022] because they did not need her.

[27] The Appellant submitted to the Tribunal a letter from her employer dated August 15, 2022. It says the Appellant started work on June 10, 2021. She was hired as a temporary call-in at that time and continues to work when she is called in for work.

[28] The Appellant submitted to the Tribunal a memo from her school dated December 24, 2021. The memo says the school will be returning to a primarily remote teaching and learning environment for the start of the winter semester (January 10, 2022) until January 31, 2022.

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[13] This conversation took place on August 2, 2022. See page GD3-41 in the appeal file.

[29] The Commission says the Appellant has failed to rebut the presumption because the evidence does not support that the Appellant was actively in search of suitable employment when she was attending school. It says although the Appellant was employed on-call, she was required to be available for, and must seek and accept, all hours of suitable work that are available in the labour market. It says this would include full-time, part-time, evenings, nights and shift work. The Commission says the Appellant's statement she was waiting for a call to work does not exclude her from the requirement to actively seek suitable employment, and as result, she cannot be considered available for work.

[30] The Commission says that while the Appellant argues she was willing to drop her course or rearrange her schedule if offered full-time employment, she did not support this statement by making any effort to secure full-time employment that would conflict with her ability to attend school.

[31] I do not agree with the Commission that the Appellant had to show she was available for full-time work while studying; there is no such requirement in the legislation. Her obligation was to show she was available for work consistent with her past work history.[14]

[32] In this case, prior to applying for EI benefits, the Appellant worked on a call-in basis during the summer period. She also worked full-time during a summer period in a prior year. She has not worked while she was in school in the past. This means she has not rebutted the presumption on this basis.

[33] I recognize online learning was an exceptional circumstance that gave students the flexibility to choose when they studied thus making them available for work. For the purpose of rebutting the presumption, the period under review is from January 6, 2022 to May 5, 2022. The Appellant has provided evidence that on-line learning was available from January 6, 2022 to January 30, 2022. This means the Appellant could

[14] Although I am not bound by decisions of the Tribunal's Appeal Division, I am persuaded by the reasoning in *JD v. Canada Employment Insurance Commission*, 2019 SST 438. It says that a claimant's pattern of working part-time means that only looking for part-time work is not an undue restriction on her availability.

reliably avail of online studies as an exceptional circumstance during that period to make her available for work.

[34] The appeal file has a list of the hours the Appellant spent attending her training.[15] In each week from February 1, 2022 to mid April 2022 the Appellant was required to spend 2.5 hours in labs and 8 hours in clinical. Her other courses totaled 3.5 hours. The Appellant wrote in her appeal her classes were recorded so she could attend school from her normal residence if she needed to go to work. The Appellant's Representative said the courses were online and the Appellant could view the courses at times of her own choosing. The ability to attend classes online means the Appellant was required to be physically present for a total of 10.5 hours a week only for the lab courses and the clinical.

[35] In my view, the continuation of online learning for the course portion of the Appellant's training is an exceptional circumstance that reduced her obligation to be present for training to an amount of time that is far less than a student required to attend full-time training. As a result, I find the Appellant has rebutted the presumption on this ground for the period February 1, 2022 to May 5, 2022.

[36] The Federal Court of Appeal hasn't yet told us how the presumption and the sections of the law dealing with availability relate to each other.

[37] 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 not presumed to be unavailable for the period January 6, 2022 to May 5, 2022

Reasonable and customary efforts to find a job

[38] In looking through the evidence in the appeal file, I did not see any requests from the Commission to the Appellant to prove she made reasonable and customary efforts to find a suitable job, or any claims from the Commission that if it did ask the Appellant, her proof was insufficient.

[15] See page GD3-32 in the appeal file.

[39] I note the Commission did not make any submissions on how the Appellant failed to prove to it she was making reasonable and customary efforts. The Commission only summarized what the legislation says in regard to section 50(8) of the EI Act and section 9.001 of the EI Regulations.

[40] Based on the lack of evidence the Commission asked the Appellant to prove her reasonable and customary efforts under section 50(8) of the EI Act, I find the Commission did not disentitle the Appellant under section 50(8) of the EI Act. Therefore, I do not need to consider that part of the law when reaching my decision on this issue.

[41] I will only consider whether the Appellant was capable and available for work under the section 18 of the EI Act.

Capable of and available for work

[42] As noted above, I only need to consider whether the Appellant was capable of and available for work under paragraph 18(1)(a) of the EI Act.[16] Case law sets out three factors for me to consider when deciding this. The Appellant has to prove the following three things:[17]

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

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

c) She didn't set personal conditions that might have unduly limited her chances of going back to work.

[43] When I consider each of these factors, I have to look at the Appellant's attitude and conduct.[18]

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[16] See section 18(1)(a) of the EI Act.
[17] 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.
[18] 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.

– **Wanting to go back to work**

[44] The Appellant has shown she wanted to go back to work as soon as a suitable job was available. The Appellant's Representative said the Appellant had worked during the summer when in high school and while taking her training.

[45] She worked at the local hospital on an on-call basis. She told the local hospital she would be available for work while she was in training. The hospital provided a letter dated August 15, 2022 saying the Appellant was hired on June 10, 2021 as a temporary call-in and continued to work at the hospital when she was called in to work.

[46] The Appellant was successful in 2022 getting a seasonal summer job in a retail store where she had worked in the summer of 2021. She was also called in to work at the hospital during the summer of 2022. This evidence tells me the Appellant wanted to go back to work as soon as a suitable job was offered.

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

[47] The Appellant made enough effort to find a suitable job.

[48] There is a list of job search activities to look at when deciding availability under a different section of the law.[19] This other section does not apply in the Appellant's appeal. But, I am choosing look at that list for guidance to help me decide whether the Appellant made efforts to find a suitable job.[20]

[49] There are nine job search activities in the list of job search activities. Some of the activities are: preparing a resume or cover letter, networking, contacting employers who may be hiring, submitting job applications, and attending interviews.[21]

[19] Section 9.001 of the EI Regulations, which is for the purposes of subsection 50(8) of the EI Act.
[20] 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.
[21] Section 9.001 of the EI Regulations.

[50] Case law has said when a claimant has good cause to believe she will be recalled to work she is entitled to a reasonable period to regard the promise of recall to work as the most probable means of obtaining employment.[22]

[51] The Appellant's Representative said the Appellant has a resume which she passed out to employers in the winter of 2022. She applied to the hospital, the town council, a museum, and a retail store. These jobs were all located where she normally lived. The Appellant's Representative said the retail store asked her at the end of the season in 2021 if she would be willing to return to work for the 2022 season. She told them yes. The Appellant's Representative said in early June 2022 the Appellant found out she was hired for the job in the retail store for the 2022 season. The reopening of the store was delayed due to the COVID-19 pandemic.

[52] As noted above, the hospital provided a letter dated August 15, 2022 saying the Appellant was hired on June 10, 2021 as a temporary call-in and continued to work at the hospital when she was called in to work.

[53] The Appellant told a Service Canada officer she could be available to work if called in to the hospital to work.[23] She was willing to drive 2.5 hours from the city where she was training back to the hospital. That the hospital did not call her back to work until the summer of 2022 is not determinative of the matter. She was aware the retail store wanted her to come back to the seasonal job in the summer of 2022.

[54] I find the Appellant's best chance for suitable employment, for a reasonable period of 17 weeks, was to continue to be available for her call-in position with the hospital. In my opinion, her call-in position taken together with her anticipated return to the seasonal retail store position, demonstrates she made efforts to find a suitable job.

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[22] See Canada Umpire Benefits (CUBs) 14685, 14554, and 21160. Although I am not bound by CUBs, I am guided by the principles contained in these CUBs in reaching my decision.
[23] See page GD3-41 in the appeal file.

[55] As a result, I find the Appellant has made enough effort to find a job and has met the requirements of this second factor.

– Unduly limiting chances of going back to work

[56] The Appellant did not set personal conditions that might have unduly limited her chances of going back to work.

[57] The Appellant completed a training questionnaire on May 6, 2022.[24] She indicated she was fulltime and taking classes that required her attendance at various times during the week. However, the Appellant later told a Service Canada officer she was taking two courses through on-line learning from May 5, 2022 to August 13, 2022.

[58] The training questionnaire used a set list of questions and didn't allow the Appellant to provide further information about her training schedule. So, I find it a less reliable source of information than the consistent statements the Appellant provided to the Service Canada officers, in her written submissions to the Tribunal and by the Appellant's Representative at the hearing. As a result, I prefer the information provided by the Appellant to the Service Canada officers, in her appeal to the Tribunal and by the Appellant's Representative at the hearing over that in the training questionnaire.

[59] The Appellant remained a casual call-in employee at the hospital. She had a car so she could drive to go to work. She was willing to drive 2.5 hours to get to work, as that is how far away the hospital was from the city where she was training from January 6, 2022 to May 5, 2022. She said she would leave her classes to go to work. Her online courses from May 5, 2020 to August 9, 2022 did not require her to attend classes at a set time. During this later period, she was living in the community where the hospital is located. This evidence tells me the Appellant's studies did not limit her chances of going back to work from January 6, 2022 onward.

[24] See pages GD3-24 to GD3-29 in the appeal file

[60] Accordingly, I find the Appellant has not set a personal condition on the hours she would and could work that might have unduly limited her chances of returning to the labour market.

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

[61] Based on my findings on the three factors, I find the Appellant has shown she was capable of and available for work but unable to find a suitable job.

Other Matters

– **Disentitlement after benefits were paid**

[62] The Appellant wrote in her appeal she gave EI all her information about the hours she was in school and she was still approved for benefits every two weeks. She wrote she had been told when she first enquired about EI benefits a representative told her there were exceptions for nursing students. She was truthful filling out every claim.

[63] The Appellant's Representative said the Appellant was told by a Service Canada officer she should have gotten a letter from the start telling her she could not get EI benefits. She was never given any notice she was doing anything wrong. The Appellant's Representative felt the Appellant was investigated only because she contacted Service Canada when she finished school and asked what happens now. The Appellant's Representative said the Appellant followed the rules but because Service Canada made a mistake she is now paying for that mistake.

[64] The law says the Commission may reconsider a claim for benefits and may verify a claimant's entitlement to benefits already paid to them.[25] If you were paid benefits you were not entitled to receive, the Commission can ask you to repay those benefits.[26]

[65] I note that, in response to the COVID-19 pandemic, Parliament made a number of changes to the EI Act to facilitate access to EI benefits.[27] Those temporary

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[25] See section 52 of the EI Act. Usually, the Commission has 36 months to revisit its decisions.
[26] See section 52(3) of the EI Act.
[27] See section 153.5 of the EI Act.

measures apply to claims starting between September 27, 2020 and September 25, 2021. The Appellant's claim for EI benefits began on August 8, 2021, so those temporary measures apply to her.

[66] Two temporary measures apply to claimants who attend a course, a program of instruction, or training to which they were not referred.[28]

[67] The first measure says a claimant, who attends training to which they have not been referred, is not entitled to be paid EI benefits for any working day in a benefit period for which the claimant is unable to prove that on that day they were capable of and available for work.[29]

[68] The second measure says the Commission may, at any point after benefits are paid to a claimant, verify that a claimant who is attending unreferred training is entitled to those benefits by requiring proof they were capable of and available for work on any working day of their benefit period.[30]

[69] While it would have been preferable to have the entitlement decision made when the Appellant completed her application for EI benefits on August 15, 2021 indicating she was attending training, I find that section 153.161 of the EI Act as it is written allows for the Commission to retroactively review the Appellant's entitlement to benefits, even after the benefits were paid to her.

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[28] Section 25 of the EI Act says claimants who are referred to training by the Commission or a designated authority are considered to be available for work.
[29] See section 153.161(1) of the EI Act.
[30] See section 153.161(2) of the EI Act.

Conclusion

[70] The Appellant has rebutted the presumption she was not available for work due to attending school full-time.

[71] The Appellant has met all three factors to show that she was available for work within the meaning of the law. Because of this, I find the Appellant isn't disentitled from receiving EI benefits from January 6, 2022 onward. So, the Appellant may be entitled to benefits.

[72] This means the appeal is allowed.

Raelene R. Thomas

Member, General Division – Employment Insurance Section