Citation: *HB v Canada Employment Insurance Commission*, 2023 SST 915

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	H. B.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (441058) dated December 7, 2021 (issued by Service Canada)

Tribunal member:	Kristen Thompson
Type of hearing:	Teleconference
Hearing date:	January 11, 2023
Hearing participants:	Appellant Appellant's representative
Decision date:	January 17, 2023
File number:	GE-22-2730

Decision

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

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

[3] Also, the Claimant hasn't shown that the Canada Employment Insurance Commission (Commission) didn't act judicially when using its discretionary powers to reassess her claim for EI benefits.

Overview

[4] The Commission decided that the Claimant was disentitled from receiving EI regular benefits as of October 5, 2020 because she wasn't available for work. 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.

[5] 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.

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

[7] The Claimant disagrees and says that she was available to work on evenings and weekends. She says that she was working two part-time jobs.

[8] The Claimant also says that the Commission didn't act judicially when using its discretionary powers to reassess her claim for EI benefits. She says that the Commission acted in bad faith and misled her about her eligibility for EI benefits. She says that she reported her circumstances truthfully to the Commission and, if she wasn't supposed to be receiving benefits, they shouldn't have been provided.

Issue

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

[10] Did the Commission act judicially when using its discretionary powers to reassess her claim for EI benefits?

Analysis

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

[12] First, the *Employment Insurance Act* (Act) says that a claimant has to prove that they are making "reasonable and customary efforts" to find a suitable job.[1] The *Employment Insurance Regulations* (Regulations) give criteria that help explain what "reasonable and customary efforts" mean.[2] I will look at those criteria below.

[13] 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.[3] Case law gives three things a claimant has to prove to show that they are "available" in this sense.[4] I will look at those factors below.

[14] The Commission decided that the Claimant was disentitled from receiving benefits because she wasn't available for work based on these two sections of the law.

[15] In addition, the Federal Court of Appeal has said that claimants who are in school full-time are presumed to be unavailable for work.[5] 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.

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

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

Presuming full-time students aren't available for work

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

– The Claimant doesn't dispute that she was a full-time student

[18] The Claimant agrees that she was a full-time student, and I see no evidence that shows otherwise. So, I accept that the Claimant was in school full-time.

[19] The presumption applies to the Claimant unless she can rebut it, which I will look at below.

– The Claimant was a full-time student

[20] The Claimant was 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 wouldn't apply.

[21] There are two ways the Claimant can rebut the presumption. She can show that she had a history of working full-time while also in school.[6] Or, she can show that there were exceptional circumstances in her case.[7]

[22] The Claimant says she was working part-time while also in school.

[23] The Commission says the Claimant failed to rebut the presumption of non-availability considering the dedication, time and money invested in her studies. It says that the Claimant made the statement that she wasn't willing to leave her courses or change the schedule of her classes to accept full-time employment. It says that the Claimant would only accept employment that wouldn't interfere with the completion of

[6] See *Canada (Attorney General) v Rideout*, 2004 FCA 304.
[7] See *Canada (Attorney General) v Cyrenne*, 2010 FCA 349.

her program. It says that her priority was to complete the program while remaining employed on a part-time basis.

[24] The Claimant testified that she doesn't have a history of working full-time while in school. She says that she was working part-time in retail. She says that her retail employer didn't have a lot of work hours to give to her.

[25] The Claimant says that the purpose of her studies was to get a bachelor's degree. She says that she wasn't willing to leave her studies if she found a job with more hours. She says she was focused on graduating to get a full-time job in the future.

[26] The Claimant says that she took courses in the fall semester of 2020 and the winter semester of 2021. She says that her classes were online, weekdays, and ended by 5 p.m.

[27] The Claimant says she was obligated to attend classes and received marks for participation. She says some, but not all, of her classed were recorded.

[28] The Claimant says that, had she got a job, she could only drop her classes within a certain timeframe. Otherwise, she would receive a failing grade or only part of her tuition would be refunded.

[29] I find that the Claimant hasn't rebutted the presumption that she is unavailable for work, as she hasn't shown a history of working full-time while also in school, only part-time. I find that Claimant hasn't shown exceptional circumstances, through her testimony and as written in the file.

– **The presumption isn't rebutted**

[30] 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. 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 Claimant is presumed to be unavailable.

Reasonable and customary efforts to find a job

[31] The first section of the law that I am going to consider says that claimants have to prove that their efforts to find a job were reasonable and customary.[8]

[32] The law sets out criteria for me to consider when deciding whether the Claimant's efforts were reasonable and customary.[9] I have to look at whether her efforts were sustained and whether they were directed toward finding a suitable job. In other words, the Claimant has to have kept trying to find a suitable job.

[33] I also have to consider the Claimant's efforts to find a job. The Regulations list nine job-search activities I have to consider. Some examples of those are the following:[10]

- preparing a résumé or cover letter
- registering for job-search tools, online job banks or employment agencies
- attending job-search workshops or job fairs
- networking
- applying for jobs
- attending interviews

[34] The Commission says that the Claimant didn't do enough to try to find a job.

[35] The Claimant disagrees. She says that she already had two jobs, so she didn't need to do a further job search. As well, she says that due the pandemic, there weren't a lot of jobs or hours to be had.

[36] The Claimant says she was working part-time while also in school. She says she was working one to three shifts each week at a retail store. She says she was also a Don at her university. She says that due to the COVID-19 pandemic, her retail job was unable to offer her a lot of hours.

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[8] See section 50(8) of the Act.
[9] See section 9.001 of the Regulations.
[10] See section 9.001 of the Regulations.

[37] The Claimant says that she could work weeknights and weekends. She says she would provide her availability to the retail store. She says she told the store that she had open availability on weekends and one weekday evening each week. She says that during school break she had open availability weekdays and weekends.

[38] The Claimant says she was also working as a Don. She says that she received a lump sum payment at the end of each semester, and free living-accommodations. She says the job required her to patrol residences some days or nights. She says that she had to co-ordinate her schedules between the retail store and Donning.

[39] The Claimant says that she wasn't willing to leave her studies if she found a job with more hours. She says that she wasn't really making an effort to find a job. She says she was focused on graduating to get a full-time job in the future. She says that she would try to have any prospective employer work around her schedule.

[40] The Claimant says she always had a résumé ready.

[41] The Claimant says that she had access to her university's online job bank. She says the job bank listed jobs available on campus, along with jobs for graduating students. She says that she would also glance at the job board for other retail work at the mall, but most of these jobs didn't pique her interest.

[42] The Claimant says that she attended Don training, which she could add to her résumé. She says that she networked through Donning, as her coworkers had jobs at the university that were of interest to her. She says that she attended a workshop at her school's career and co-op centre.

[43] The Claimant says she applied for the following jobs:

- A retail job at the mall. She was interviewed in April 2021 but not hired.[11]
- A job at the university's library.[12]

[11] See GD3-26. At the hearing, the Claimant says she was uncertain about the date.
[12] At the hearing, the Claimant didn't provide the date.

- A front desk job at the university's recreation centre. She says she applied in March or April 2021. She says the job was to start the next school term, in September 2021.
- An events job at the university's recreation centre. She says she applied in March or April 2021. She says the job was to start the next school term, in September 2021. She was interviewed but not hired.

[44] The Claimant says that she didn't submit any further job applications during 2020 and 2021. She says that she really started to submit job applications in April 2022, after she finished her university studies.

[45] As said by the Federal Court of Appeal, remaining part of the workforce while in school doesn't mean a claimant is available for work; the claimant mustn't impose restrictions on her availability as to unduly limit her chances of holding employment.[13]

[46] I find that the Claimant didn't make reasonable and customary efforts to find a job, as her efforts weren't sustained. Although the Claimant made some efforts to find a job including having a résumé on hand and looking at job postings online, she didn't make sufficient efforts. The Claimant testified that she wasn't really making an effort to find a job, as her focus was on her studies. She wasn't willing to leave her studies if she found a job with more hours. She applied to only four jobs throughout the time period, and most of those jobs had a start date that was months away.

Capable of and available for work

[47] I also have to consider whether the Claimant was capable of and available for work but unable to find a suitable job.[14] Case law sets out three factors for me to consider when deciding this. The Claimant has to prove the following three things:[15]

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

[13] See *Canada v. Gagnon*, 2005 FCA 321.
[14] See section 18(1)(a) of the Act.
[15] 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.

b) She has 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.

[48] When I consider each of these factors, I have to look at the Claimant's attitude and conduct.[16]

– **Wanting to go back to work**

[49] The Claimant hasn't shown that she wanted to go back to work as soon as a suitable job was available. She hasn't shown that she was available for each working day.[17] She testified that she already had two jobs, so she didn't do a further job search or want to work beyond the evening and weekend shifts she already had. She says her focus was elsewhere, including her schooling.

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

[50] The Claimant hasn't made enough effort to find a suitable job.

[51] 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.[18]

[52] The Claimant's efforts to find a new job included having a résumé on hand and looking at job postings online. I explained these reasons above when looking at whether the Claimant has made reasonable and customary efforts to find a job.

[53] Those efforts weren't enough to meet the requirements of this second factor because she applied for only four jobs throughout the time period, and most of those jobs had a start date that was months away.

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[16] 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.
[17] See section 18 of the Act and section 32 of the Regulations, which states that a working day is any day of the week except Saturday and Sunday.
[18] 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.

– Unduly limiting chances of going back to work

[54] The Claimant did set personal conditions that might have unduly limited her chances of going back to work, including taking full-time university courses to complete her degree. Her courses restricted her availability to weeknights and weekends. She testified that she was obligated to attend classes and could only drop classes within a limited timeframe.

[55] Federal Court of Appeal case law says that a claimant has to be available during regular hours for every working day of the week. As well, restricting availability to only certain times on certain days of the week, including evenings and weekends, is a limitation on availability for work and a personal condition that might unduly limit the chances of going back to work.[19]

[56] In a recent Appeal Division decision, the Tribunal said that a claimant wasn't available because she was available for work only outside her school hours (on weekday evenings and weekends) and she was unwilling to drop her course to accept a full-time job.[20]

[57] In this case, I find that the Claimant's restrictions included limiting her availability to a weeknight and weekends, focusing on her studies, and requiring a prospective employer to work around her schedule. These restrictions unduly limited her chances of going back to work.

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

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

The Commission's discretionary powers to reassess

[59] The Claimant says she was misled by the Commission. She says that she wasn't directly told by the Commission about the requirement of availability. Instead, she was

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[19] See *Vezina* v *Canada (Attorney General)*, 2003 FCA 198; *Canada (Attorney General)* v *Rideout*, 2004 FCA 304.
[20] *Canada Employment Insurance Commission v CB*, 2022 SST 1017.

told by the Commission's agent that she wasn't looking for a full-time job and she needs to make sure she has proof that she was looking for a full-time job.

[60] The Claimant's representative says that the Commission acted in bad faith, misled the Claimant, and didn't act in a timely manner. The representative says that the Claimant reported her circumstances faithfully to the Commission. The representative says that the Claimant should have been notified if she wasn't entitled to benefits at the time of submitting her EI reports, instead the Commissions retroactively assessed an overpayment. The representative says that the Claimant shouldn't have had to look for a full-time job when there weren't any jobs available. The representative says that she shouldn't have to quit school if she found a full-time job.

[61] The Commission relies on the Act which says that it may verify that the Claimant is entitled to benefits by requiring proof that she was available for work on any working day of the benefit period, at any point after the benefits are paid.[21]

[62] When the Commission revisits a decision, it has to use its discretion judicially. The Tribunal can set aside a discretionary decision if, for example, a person can establish that the Commission: [22]

- acted in bad faith
- acted for an improper purpose or motive
- took into account an irrelevant factor
- ignored a relevant factor
- acted in a discriminatory manner

[63] In a recent Appeal Division decision, the Tribunal said that the Commission's long delay, throughout the pandemic, to reassess a claimant's benefits didn't rise to the

[21] See section 153.161 (2) of the Act.
[22] See *SF v Canada Employment Insurance Commission,* 2022 SST 1095; *Canada (Attorney General)* v *Purcell*, 1995 CanLII 3558 (FCA).

level required to suggest it acted in bad faith, in a discriminatory manner, or for an improper purpose.[23]

[64] The Act allows the Commission to reconsider a claim for benefits within 36 months after the benefits have been paid.[24]

[65] Case law says that no matter how little chance of success a claimant may feel a job search would have, the EI Act is designed so that only those who are genuinely unemployed and actively seeking work will receive benefits.[25]

[66] I sympathize with the Claimant's situation. However, I find that the use of the Commission's discretionary powers to reassess the Claimant's eligible for EI benefits was done judicially.

Conclusion

[67] The Claimant hasn't shown that she was available for work within the meaning of the law. Because of this, I find that the Claimant can't receive EI benefits.

[68] The Claimant hasn't shown that the Canada Employment Insurance Commission (Commission) acted in bad faith or improperly, or in any other way that would indicate improper exercise of discretion, when using its discretionary powers to reassess her claim for EI benefits

[69] This means that the appeal is dismissed.

Kristen Thompson
Member, General Division – Employment Insurance Section

[23] See *IP v Canada Employment Insurance Commission*, 2022 SST 786.
[24] See section 52(1) of the Act. The timeline is extended to 72 months if a false or misleading statement or representation is made in connection with a claim, under section 52(5) of the Act.
[25] See *Cornelissen-O'Neill*, A-652-93; CUB 13957.