Citation: *DP v Canada Employment Insurance Commission*, 2023 SST 933

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	D. P.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (501941) dated August 5, 2022 (issued by Service Canada)

Tribunal member:	Raelene R. Thomas
Type of hearing:	Teleconference
Hearing date:	January 4, 2023
Hearing participant:	Appellent
Decision date:	February 6, 2023
File number:	GE-22-2883

Decision

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

[2] The Claimant has shown she available for work while in school/taking training. This means that she isn't disentitled from receiving Employment Insurance (EI) benefits. So, the Claimant may be entitled to benefits.

Overview

[3] The Canada Employment Insurance Commission (Commission) decided the Claimant was disentitled from receiving EI regular benefits from January 6, 2022 to April 8, 2022 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.

[4] I have to decide whether the Claimant has proven she was available for work. The Claimant 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 Claimant was not available because she was in school taking training full-time.

[6] The Claimant disagrees and says she was looking for work while in school. She was available for work outside of her practicum hours. Her courses were self paced during the practicum. Part of her school courses before and during the practicum included developing a resume, doing mock interviews and networking. She searched for a job during the practicum. She has worked while in school in the past but her former employer did not have a position for her.

Matters I have to consider first

My jurisdiction is limited

[7] A pre-hearing conference was held on December 5, 2022, to clarify the issue the Claimant was appealing and to discuss the method of hearing.

[8] The Claimant clarified that she received EI benefits bi-weekly from August 29, 2021 to December 25, 2021. She was paid a second time for those weeks on May 4, 2022 and the Commission is now asking the Claimant to repay that second amount of EI benefits.

[9] The Claimant explained she was also denied EI benefits from January 6, 2022 to April 8, 2022 because the Commission said she was not available for work while she was taking a training course on her own initiative. She did not agree with that decision.

[10] The Claimant explained she believed she was entitled to EI benefits from January 6, 2022 to April 8, 2022 and thought that if she were successful in her appeal to the Tribunal that any EI benefits she was owed would be used to reduce her debt.

[11] My jurisdiction, in other words my ability to make a ruling on an appeal, comes only after the Commission makes a decision on reconsideration that the Claimant then chooses to appeal.[1] My jurisdiction is limited to reviewing the reconsideration decisions the Commission has actually made. In this case, the Commission has only reconsidered its decision to not pay the Claimant EI benefits from January 6, 2022 to April 8, 2022 because it said that she was not available for work. So, I will issue a decision on that issue only.

The Claimant can ask the Commission to write off the debt

[12] I do not have any jurisdiction to write off the debt created by the Commission's double payment of EI for the weeks from August 29, 2021 to December 25, 2021.

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[1] See section 113 of the *Employment Insurance Act* (EI Act).

[13] The Claimant can write the Commission directly to request that the debt be written off in light of the error the Commission made by issuing the second payment to her despite already having paid her benefits for those weeks and the financial distress repayment will cause her. If the Claimant is not satisfied with the Commission's response she can appeal to the Federal Court of Appeal.

The method of hearing

[14] In her appeal to the Tribunal, the Claimant requested an in person hearing because it would be held in a quiet place away from her workplace. She explained she works 8:00 a.m. to 4:00 p.m.

[15] I am required by the *Social Security Tribunal Rules of Procedure* to interpret the *Rules* so that the appeal process is simple, quick and fair.[2]

[16] I offered to hold the hearing after Claimant's work hours and asked if she felt comfortable with a teleconference or videoconference hearing. The Claimant said she would be comfortable with a teleconference hearing. A notice of hearing by teleconference was issued for the agreed upon time and date and the hearing went ahead as scheduled.

Issue

[17] Was the Claimant available for work while in school taking training?

Analysis

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

[19] First, the *Employment Insurance Act* (EI Act) says a claimant has to prove they are making "reasonable and customary efforts" to find a suitable job.[3] The *Employment*

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[2] See section 6, Social Security Tribunal Rules of Procedure, SOR/2022-256

[3] See section 50(8) of the *Employment Insurance Act* (EI Act).

Insurance Regulations (EI Regulations) give criteria that help explain what "reasonable and customary efforts" mean.[4]

[20] 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 gives three things a claimant has to prove to show that they are "available" in this sense.[6] I will look at those factors below.

[21] The Commission decided the Claimant was disentitled from receiving benefits because she wasn't available for work based on these two sections of the law. So, it says she has to meet the criteria of both sections to get benefits.

[22] In looking through the evidence in the appeal file, I did not see any requests from the Commission to the Claimant 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 Claimant, her proof was insufficient.

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

[24] Based on the lack of evidence that the Commission asked the Claimant to prove she made reasonable and customary efforts under section 50(8) of the EI Act, I find the Commission did not disentitle the Claimant 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.

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

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[4] See section 9.001 of the *Employment Insurance Regulations* (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.

[26] The Claimant was a student during the period she was disentitled from receiving benefits. The Federal Court of Appeal has said claimants who are in school full-time are presumed to be unavailable for work.[7] This is called a "presumption of non-availability." It means we can suppose that students aren't available for work when the evidence shows they are in school full-time.

[27] I have to consider the presumption that claimants who are attending school full-time are unavailable for work.[8] I am going to start by looking at whether this presumption applies to the Claimant. Then, I will look at the law on availability.

Presuming full-time students aren't available for work

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

– **The Claimant was a full-time student**

[29] The Claimant testified she was required to complete a certain number of hours in a practicum as part of her program. She said she attended the practicum from 8:00 a.m. to 4:00 p.m., Monday to Friday January 6, 2022 to February 18, 2022 in the first placement and 7:00 a.m. to 3:00 p.m., Monday to Friday, from February 28, 2022 to April 8, 2022 in the second placement.

[30] The evidence tells me the Claimant was a full time student during these periods. I see no evidence that shows otherwise. This means the presumption applies for these periods of time. 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.

[7] See *Canada (Attorney General) v Cyrenne*, 2010 FCA 349.
[8] This presumption is set out in *Canada (Attorney General) v. Gagnon*, 2005 FCA 321.

[31] There are two ways the Claimant can rebut the presumption. She can show she has a history of working full-time while also in school.[9] Or, she can show there are exceptional circumstances in her case.[10]

[32] The Claimant testified she has been working since she was 14 years old. She worked full time while she was in high school. She was working full-time prior to enrolling in a two-year college program in a health care profession. When she started the program in September 2020, she worked part-time while enrolled in full-time studies.[11] In January 2021 (the second semester) she came into some money and so did not work for the semester. The Claimant did not attend school from April to the end of August 2021 and worked full time. The Claimant returned to school for the third semester in September 2021. She was receiving EI benefits and did not work during that semester.

[33] The Commission says the Claimant has not rebutted the presumption of non-availability because she was attending a full-time practicum that restricted her hours of availability and has multiple statements on her file indicating she had not been actively seeking employment.

[34] The Claimant does not have 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.

[35] I find that the Claimant has rebutted the presumption that she was not available for work because she was a full-time student. The reasons for my finding follow.

[36] The Claimant indicated on the training questionnaire she completed as part of her application for EI benefits on February 28, 2022 that she was available for work and capable of working under the same or better conditions as she was before she started her course. At the hearing, the Claimant explained that in her first semester

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[9] See *Canada (Attorney General) v Rideout*, 2004 FCA 304.
[10] See *Canada (Attorney General) v Cyrenne*, 2010 FCA 349.
[11] These studies employed virtual classes

(September 2020 to December 2020) when she was in school full time she worked part-time. She worked full time when she was not attending classes in the summer months between the first and second year. The Claimant said she worked evenings and weekends during her first semester. She said that she could work those hours while she was completing the practicum.

[37] The Claimant testified she was looking for work while she was completing the practicum. She explained that while the practicum was ongoing students were required to complete assignments and modules. Some of the assignments related to the patients they were assigned. Other assignments related to conducting a job search. She prepared a resume. She and fellow students participated in mock interviews with each other one-on-one and by boards. She discussed job opportunities with a preceptor who was employed by the facility where she was completing her practicum. The Claimant testified that one student was hired during this process and completed the practicum as a paid employee. The Claimant reached out to her former employer to see if part-time work was available to her. Unfortunately, her former employer had their student contracts filled. The Claimant sent her resume unsolicited to employers in the health care field so that she could be hired in advance of graduation.

[38] I note the Claimant was asked on her application for EI benefits if she had made efforts to look for work.[12] She indicated “no.” The application asked, “Why have you not made efforts to look for work?” The Claimant replied that by the end of April [2022] she would be qualified to work in her chosen field and in the coming weeks the program would be teaching her how to create a resume and cover letter, complete mock interviews, and she was expected to submit her resume to wide range of potential jobs. She wrote that she was waiting to complete those assignments to ensure she was better prepared.

[39] The appeal file has a record of a conversation between the Claimant and a Service Canada officer on March 11, 2022. In that conversation the Claimant was asked what efforts she had made to look for work. She replied she had updated her

[12] The Claimant completed the application on February 28, 2022

resume, was looking for jobs after she graduated, and had searched on the Indeed website. The Claimant is recorded as saying that she was mostly focussed on school and has not been actively searching for work.

[40] I find the Claimant's testimony that she was actively looking for work from January 6, 2022 to April 8, 2022 to be more compelling and give it more weight because of its consistency with the information she provided in her application for EI benefits and also because she appeared before me and gave direct evidence, which I find more reliable than a Commission agent's recounting of what he or she believed the Claimant said.

[41] The Commission did not make any submissions concerning the Claimant's capacity to both work and attend school. Its submissions focused its disentitlement decision on a determination that the Claimant did not show that she was actively looking for work.

[42] As noted above, case law says the presumption is rebutted when a claimant can show she worked full-time while studying full-time or there are exceptional circumstances. The Claimant has a history of working part-time while studying and attending classes full time. Previously she worked evenings and weekends when she was required to attend all her classes virtually. Once she started the practicums in January 2022 she was required to be present 8 hours a day, Monday to Friday. This means the Claimant could be available for work on the evenings and weekends as she had been previously.

[43] The Claimant contacted her former employer to see if she could return to part time work. She sent her resume to employers in her area of expertise. It was possible for her to complete her practicum as a paid employee. In my opinion, the job search activities that formed a part of the program's curriculum is a special circumstance that would allow the Claimant to be available for work under the same or better terms and conditions as she previously worked. She was successful in getting full-time employment in July 2021 outside her field of study and she has since started work in a position related to her field of studies. Considering this evidence, I find that the

Claimant has rebutted the presumption that she is not available for work due to attending school full-time.

[44] 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.

[45] Rebutting the presumption means only that the Claimant isn't presumed to be unavailable. I still have to look at the section of the law that applies in this case and decide whether the Claimant is actually available.

Capable of and available for work

[46] I also have to consider whether the Claimant was capable of and available for work but unable to find a suitable job.[13] Case law sets out three factors for me to consider when deciding this. The Claimant has to prove the following three things:[14]

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 did not set personal conditions that might have unduly (in other words, overly) limited her chances of going back to work.

[47] When I consider each of these factors, I have to look at the Claimant's attitude and conduct.[15]

– Wanting to go back to work

[48] The Claimant has shown she wanted to go back to work as soon as a suitable job was available.

[13] See section 18(1)(a) of the Act.
[14] 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.
[15] 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.

[49] The Claimant testified she has worked since she was in high school. She needed money to pay her bills while in school because she was responsible for her living expenses. The Claimant asked her former employer for work during this time, she applied for jobs while she was completing the practicum. The Claimant testified she accepted a job after graduation that was not within her area of education. This evidence tells me the Claimant wanted to go back to work as soon as a suitable job was offered.

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

[50] The Claimant made enough effort to find a suitable job.

[51] I have considered the list of job-search activities referred to above in deciding this second factor. For this factor, that list is for guidance only.[16]

[52] There are nine job search activities in the list of job-search activities: assessing employment opportunities, preparing a resume or cover letter, registering for job search tools or with online job banks or employment agencies, attending job search workshops or job fairs, networking, contacting employers who may be hiring, submitting job applications, attending interviews and undergoing evaluations of competencies.[17]

[53] The Claimant testified that she reached out to her former employer to see if there was work available, created a resume, uploaded her resume to a job search website, sent her resume to potential employers, regularly looked at a job search website and the Job Bank for job opportunities, networked with family members and her preceptor to see if they knew of job opportunities and she participated in mock interviews to prepare her.

[54] I think the Claimant's job search efforts expressed her desire to return to the labour market as soon as a suitable job was offered. She was actively engaged in looking for a job by preparing a resume, sending that resume to prospective employers,

[16] 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.
[17] Section 9.001 of the EI Regulations.

asking her former employer, friends and her preceptor about job opportunities. In my opinion, the Claimant has provided sufficient proof of her efforts show she has met this factor.

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

[55] The Claimant has not set personal conditions that might have unduly limited her chances of going back to work.

[56] The Claimant testified she has a driver's licence and access to transportation to go to work. There are no distance restrictions on where she would drive to go to work. There are no jobs that she could not do due to moral convictions or religious beliefs. She is willing to accept a job that might require on the job training.

[57] Although I am not bound to follow a Canada Umpire Benefits (CUB) decision, I consider the reasoning in CUB 52365 to be persuasive. In that case, the claimant left her job to take a course that left her with the ability to work from 6:00 to 10:00 each day, six days of the week for a total of 24 hours. The Umpire considered that it was significant that the claimant's current availability while in school was not less than it had been when the claimant had been working. The Umpire stated that the facts supported that the claimant would be available for work as much as she was previously where her employment consisted of 20 hours. He determined the claimant had proven she was available for work.

[58] The Claimant testified she had worked evenings and weekends during the first semester of her program when she was attending school full-time. She said she attended the practicum from 8:00 a.m. to 4:00 p.m., Monday to Friday January 6, 2022 to February 18, 2022 in the first placement and 7:00 a.m. to 3:00 p.m., Monday to Friday, from February 28, 2022 to April 8, 2022 in the second placement. In my opinion, this means the Claimant was as available for work on any working day as she had been previously while attending school.[18] As a result, I find the Claimant's studies, that of

[18] Section 32 of the EI Regulations says that for the purposes of section 18 of the EI Act a working day is any day of the week except Saturday and Sunday

attending the practicum, did not limit her chances of going back to work during those periods.

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

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

Conclusion

[60] The Claimant has shown she was available for work within the meaning of the law. Because of this, I find the Claimant isn't disentitled from receiving benefits. So, the Claimant may be entitled to benefits.

[61] This means that the appeal is allowed.

Raelene R. Thomas

Member, General Division – Employment Insurance Section