Citation: *EL v Canada Employment Insurance Commission*, 2023 SST 924

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant: E. L.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (447531) dated February 23, 2022 (issued by Service Canada)

Tribunal member: Kristen Thompson

Type of hearing: Videoconference
Hearing date: May 2, 2023
Hearing participant: Appellant
Decision date: May 5, 2023
File number: GE-23-410

Decision

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

[2] The Appellant 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 Appellant hasn't shown that the Canada Employment Insurance Commission (Commission) didn't act judicially when using its discretion to reassess her claim for EI benefits.

Overview

[4] The Commission decided that the Appellant was disentitled from receiving EI regular benefits from December 19, 2020 to the end of her claim because she wasn't available for work. An appellant has to be available for work to get EI regular benefits. Availability is an ongoing requirement. This means that an appellant has to be searching for a job.

[5] I have to decide whether the Appellant has proven that she was available for work. The Appellant 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 Appellant wasn't available because she was in school full-time. It says she didn't apply for any other jobs because she was already employed part-time.

[7] The Appellant disagrees and says she was trying to pick up as many shifts as she could at her part-time job(s). She says that her classes were online and many were available to review afterwards, if she didn't attend. She says that she was willing to skip class to work.

[8] The Appellant also says that the Commission didn't act judicially when using its discretion to verify her claim for EI benefits. She says that it acted in bad faith when it

didn't verify her entitlement at the beginning of her claim. 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. She says that she cannot afford to pay back the overpayment.

[9] The Commission disagrees and says it acted judicially when using its discretionary powers. It says that, since the Appellant provided it with evidence that she was unavailable, it verified her entitlement to EI benefits by considering relevant factors.

Matter I have to consider first

The Commission conceded part of the appeal

[10] The Commission provided evidence that the Appellant was given a verbal decision allowing her training from September 8, 2020 to December 18, 2020.[1]

[11] The Commission says that it is conceding this part of the appeal – the Appellant is considered available from October 4, 2020 to December 18, 2020.[2] So, my decision is about her availability from December 19, 2020 to the end of her claim.

Issue

[12] Was the Appellant available for work while in school?

[13] Did the Commission act judicially when using its discretion to verify the Appellant's entitlement to EI benefits?

Analysis

[14] 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, she has to meet the criteria of both sections to get benefits.

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[1] See GD3-17.
[2] See RGD2-5 and RGD5-1.

[15] 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.[3] The *Employment Insurance Regulations* (Regulations) give criteria that help explain what "reasonable and customary efforts" mean.[4] I will look at those criteria below.

[16] 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.[5] Case law gives three things an appellant has to prove to show that they are "available" in this sense.[6] I will look at those factors below.

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

[18] In addition, the Federal Court of Appeal has said that appellants who are in school full-time are presumed to be unavailable for work.[7] 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.

[19] I will start by looking at whether I can presume that 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.

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 doesn't dispute that she is a full-time student

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

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

[22] The presumption applies to the Appellant.

– **The Appellant is a full-time student**

[23] 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.

[24] 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.[8] Or, she can show that there are exceptional circumstances in her case.[9]

[25] The Commission says that the Appellant hasn’t rebutted the presumption.

[26] The Appellant says that she doesn’t have a history of full-time work while also in school. But she says that there are exceptional circumstances – she was trying to pick up as many shifts as she could at her part-time jobs, her classes were online and many were available to review afterwards, and she was willing to skip class to work. As well, she was paying her own tuition and other expenses.

[27] The Appellant says that she was in her fifth and final year of her undergraduate studies. She says that she worked part-time while in school since 2016. She says that she worked approximately 20 hours per week unless her hours were restricted due to the COVID-19 pandemic emergency measures.

[28] The Appellant says that her classes and studying took approximately 12 hours each week. She says that she worked more than she studied.

[29] The Appellant says that she worked at a restaurant throughout the time in question. She says that she was also working at a clothing store until approximately June 2021. She says that she tried to pick up as many shifts as she could at her part-time jobs.

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

[30] The Appellant says that she was required to pay for her own tuition and school supplies, phone bill, transportation, and necessities. She says that she didn't have to pay for rent or groceries.

[31] The Appellant says that her schooling was taught online. She says that she was able to review recorded classes and many of her teachers didn't require her to attend class. But she says that one of her teachers wanted her to attend the online class.

[32] The Appellant says that she would skip class to work.

[33] The Appellant says that during the summer semester (May to August 2021), she worked at the restaurant and may have had a summer class.

[34] I rely on a decision of the Tribunal's Appeal Division which said that the part-time nature of the appellant's previous employment and her demonstrated ability to maintain part-time employment over the long term, while simultaneously attending full-time studies, is an exceptional circumstance sufficient to rebut the presumption of non-availability.[10]

[35] I find that the Appellant has rebutted the presumption that she is unavailable for work. She says that she doesn't have a history of full-time work while also in school. However, she had a lengthy history of working part-time while in school, her courses were all online, most of her courses provided her with flexibility to determine when the material could be reviewed, and she was willing to work instead of attend class.

– **The presumption is rebutted**

[36] Rebutting the presumption only means that the Claimant is not presumed to be unavailable. I must still look at the law that applies in this case and decide whether the Appellant is in fact available.

[10] See *J.D. v. Canada Employment Insurance Commission*, 2019 SST 438.

Reasonable and customary efforts to find a job

[37] The first section of the law that I am going to consider says that Appellants have to prove that their efforts to find a job were reasonable and customary.[11]

[38] The law sets out criteria for me to consider when deciding whether the Appellant's efforts were reasonable and customary.[12] I have to look at whether her 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.

[39] 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:[13]

- assessing employment opportunities
- preparing a résumé or cover letter
- attending job-search workshops or job fairs
- applying for jobs
- attending interviews

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

[41] The Appellant disagrees. The Appellant says that her efforts were enough to prove that she was available for work. She says that she had at least one part-time job and was trying to pick up as many shifts as she could at her job(s).

[42] The Appellant says that she prepared a résumé and cover letter.

[43] The Appellant says that she looked at websites with job postings, once every week or two.

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[11] See section 50(8) of the Act.
[12] See section 9.001 of the Regulations.
[13] See section 9.001 of the Regulations.

[44] The Appellant says she didn't apply for any jobs during the time in question. However, she applied for a job before her claim, on March 9, 2020.[14] And she applied for five jobs after her claim, between October 27, 2021 and December 15, 2021.[15]

[45] The Appellant says that she was always employed at the restaurant during the time, even when it was closed due to emergency measures.

[46] The Appellant says that many employers weren't hiring due to the pandemic. But she says that she says saw postings for a few fashion jobs and a few customer service jobs. She says that she didn't apply for any of these jobs.

[47] The Appellant says that she didn't attend at any job fairs, as they were cancelled due to the pandemic. She says she didn't contact any prospective employers. She says she didn't attend at any interviews.

[48] I rely on decisions of the court that said an appellant can't just wait to be called back to work – she must look for employment to be entitled to benefits. The employment insurance program is designed so that only those who are genuinely unemployed and actively looking for work will receive benefits.[16]

[49] I also rely on a decision of the Appeal Division that said that the number of jobs available during the pandemic isn't relevant to the issue of whether an appellant was available for work within the meaning of the law.[17]

[50] Similarly, I find that the Appellant was waiting to pick up more shifts as her part-time jobs, instead of actively looking for work. She didn't do many job-searching activities – most notable, she didn't apply for any jobs during the time in question.

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[14] See GD5.
[15] See GD3-33 to 37.
[16] See *Canada Employment Insurance Commission* v *GS*, 2020 SST 1076; *D. B.* v *Canada Employment Insurance Commission*, 2019 SST 1277; *Canada (Attorney General)* v *Cornelissen-O'Neill*, A-652-93; *Faucher* v *Canada (Employment and Immigration Commission)*, A-56-96; *Canada (Attorney General)* v *Cloutier*, 2005 FCA 73; *De Lamirande* v *Canada (Attorney General)*, 2004 FCA 311.
[17] See *Canada Employment Insurance Commission* v *SL*, 2022 SST 556.

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

Capable of and available for work

[52] I also have to consider whether the Appellant was capable of and available for work but unable to find a suitable job.[18] Case law sets out three factors for me to consider when deciding this. The Appellant has to prove the following three things:[19]

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 (in other words, overly) limited her chances of going back to work.

[53] When I consider each of these factors, I have to look at the Appellant's attitude and conduct.[20]

– **Wanting to go back to work**

[54] The Appellant has shown that she wanted to go back to work as soon as a suitable job was available.

[55] The Appellant says that she wanted to work. She says that she tried to pick up as many shifts as she could at her part-time jobs. She says that she would skip class in order to work.

[56] I find the Appellant's testimony to be credible and consistent with the appeal record. I find that the Appellant's testimony showed that she wanted to go back to work as soon as a suitable job was available.

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[18] See section 18(1)(a) of the Act.
[19] 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.
[20] 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.

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

[57] The Appellant hasn't made enough effort to find a suitable job.

[58] 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.[21]

[59] The Appellant's efforts to find a new job included preparing a résumé, looking at online job postings, and picking up extra shifts at her current jobs. I explained these reasons above when looking at whether the Appellant has made reasonable and customary efforts to find a job.

[60] Those efforts weren't enough to meet the requirements of this second factor because she didn't take active steps to find a job. For example, she didn't apply for any jobs during the time in question.

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

[61] The Appellant didn't set personal conditions that might have unduly limited her chances of going back to work.

[62] The Appellant says she hasn't done this because her classes were online and many were available to review afterwards, and she was willing to skip class to work.

[63] The Commission says she limited her chances because she only made herself available for work outside of her course schedule. It says that she was only available for part-time employment and had only worked part-time while in school.

[64] I rely on the Appeal Division's decision mentioned above which also said that the appellant remained available to accept a job with the same or greater number of work hours as her prior part-time job, within her school scheduling constraints, similar to

[21] 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.

those that pre-existed her loss of employment. And, as such, didn't unduly limit her chances of returning to the labour market.[22]

[65] I find that due to the flexible nature of the Appellant's online classes, her willingness to skip class and work the same or greater number of hours, she didn't unduly limit her chances of going back to work.

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

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

Did the Commission act judicially when using its discretion to verify the Appellant's entitlement to EI benefits?

[67] The Commission says that it used its discretion under section 153.161(2) of the Act to require the Appellant to verify her entitlement. It says that it didn't determine the Appellant's entitlement to EI benefits at the beginning of her claim. It says that she was told, when she filed her reports, that the information she provided is subject to verification. It says that on November 15, 2021 it took steps to verify her entitlement.

[68] The Commission says that it's required to use its discretion judicially when it verified the Appellant's entitlement under that section. It says that it used its discretion judicially because it considered relevant factors including the Appellant's class schedule, the efforts she reported having made to find a job, the priority she gave to her studies, and the restrictions she imposed on her availability.

[69] The Appellant says that the Commission acted in bad faith. She says that says that she reported her situation truthfully. She says that the Commission should have verified her entitlement at the beginning of her claim.

[70] The Appellant says that she was never told that, when she was switched to Regular EI benefits from the Canada Emergency Response Benefit (CERB), that the

[22] See *J.D. v. Canada Employment Insurance Commission*, 2019 SST 438.

requirements were different. But she also says that she took steps to learn about her rights and responsibilities when she was switched to receiving EI regular benefits.

[71] The Appellant says that she shouldn't have been provided with benefits if she wasn't entitled to them. She says that as was automatically accepted into receiving benefits, she assumed that she was entitled to them.

[72] The Appellant says that she cannot afford to pay back the overpayment. She asked me to decrease the amount of the overpayment.

[73] The Appellant says she received a letter from the Commission that said her CERB will end soon. It said that the Commission will automatically review her file and start a new claim for EI regular benefits if she qualifies.[23]

[74] The Appellant completed reports on Jan 22, 2021, April 30, 2021, and September 17, 2021. The reports say that the information she provides is subject to verification.[24]

[75] When the Commission revisits a decision, it has to use its discretion judicially. The Tribunal can set aside a discretionary decision if, for example, an appellant can establish that the Commission: [25]

- 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

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

[23] See RGD2-10 and 11.
[24] See RGD2-13 to 37.
[25] See *SF v Canada Employment Insurance Commission,* 2022 SST 1095; *Canada (Attorney General)* v *Purcell*, 1995 CanLII 3558 (FCA).

the level required to suggest it acted in bad faith, in a discriminatory manner, or for an improper purpose.[26]

[77] As well, case law says that no matter how little chance of success an appellant 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.[27]

[78] The court, in similar situations related to the EI Act, said that ignorance of the law is not relevant, even if you act in good faith.[28]

[79] I sympathize with the Appellant's situation. However, the Act allowed the Commission to provide EI benefits to the appellant before verifying her entitlement. I find that the factors the Commission looked at to assess whether to verify her entitlement were in fact relevant. I find that the use of the Commission's discretionary powers to reassess the Appellant's eligible for EI benefits was done judicially.

Conclusion

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

[81] The Appellant hasn't shown that the Canada Employment Insurance Commission (Commission) acted in bad faith, or in any other way that would indicate improper exercise of discretion, when using its discretionary powers to verify her entitlement to EI benefits.

[82] This means that the appeal is dismissed.

Kristen Thompson

Member, General Division – Employment Insurance Section

[26] See *IP v Canada Employment Insurance Commission*, 2022 SST 786.
[27] See *Cornelissen-O'Neill*, A-652-93; CUB 13957.
[28] See *Canada (Attorney General) v Albrecht,* A-172-85 and *Canada (Attorney General) v Somwaru*, 2010 FCA 336.