Citation: *AS v Canada Employment Insurance Commission*, 2023 SST 927

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	A. S.
Representative:	H. S.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (501350) dated July 20, 2022 (issued by Service Canada)

Tribunal member:	Elyse Rosen
Type of hearing:	Teleconference
Hearing date:	June 29, 2023
Hearing participants:	Appellant Appellant's representative
Decision date:	July 3, 2023
File number:	GE-23-1133

Decision

[1] The appeal is dismissed.

[2] The Appellant hasn't shown that he was available for work while attending school full time. This means that he can't receive Employment Insurance (EI) benefits.

Overview

[3] The Appellant is a high school student. He was working in a part-time job, evenings and weekends. He was laid off from his job and applied for EI benefits.

[4] The Canada Employment Insurance Commission (Commission) learned that he was in school full time while receiving benefits. It says he isn't entitled to benefits between January 2 and June 7, 2022, because he hasn't shown he was available for work while in school full-time. It asked him to pay back the benefits he received.

[5] The Appellant doesn't understand why he can't get benefits while in school. He says he was available for work. He was trying very hard to find another part-time job, but there weren't many part-time jobs available.

[6] I have to decide if the Appellant has proven that he was available for work while in school.

Matter I have to consider first

The appeal was returned to the General Division by the Appeal Division

[7] This appeal was originally heard by the Tribunal's General Division (GD) on November 28, 2022. The GD dismissed the appeal.

[8] The Appellant appealed the GD's decision to the Tribunal's Appeal Division (AD). The AD allowed the appeal and returned the matter to the GD on the issue of the Appellant's availability.

[9] The AD says it returned the matter to the GD because it didn't have sufficient evidence regarding the Appellant's part-time work history, his job search, or whether his benefits were based on part-time earnings. It determined that it couldn't make the decision the GD should have made without that evidence.

[10] Prior to the hearing, I asked the parties to provide evidence and additional submissions on these issues. Both parties did so.[1] I have considered this additional evidence, the evidence before the GD during the first hearing, as well as the testimony at the hearing that I held when making this decision.

The Appellant failed to provide additional documents showing his job search following the hearing

[11] Prior to the hearing, the Appellant provided some documents to prove that he had looked for work.[2]

[12] At the hearing, he said he applied to more jobs than the ones shown in those documents. He said he might have additional documents that would prove this. I gave him a deadline to provide them to the Tribunal.

[13] The Appellant didn't provide any additional documents within the deadline. So, I have made my decision without them.[3]

Issue

[14] Was the Appellant available for work while in school full time?

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[1] See RGD-3, RGD4, and RGD6.
[2] See RGD-3.
[3] The absence of these additional documents didn't impact my decision. As further set out below, I find that looking for part-time work doesn't make the Appellant available for work. So, even if the Appellant had proven a more extensive part-time job search my decision would have been the same.

Analysis

[15] Not everyone who is not working is able to get EI benefits. To get benefits you need to meet certain conditions. The law says that one of the conditions to get EI benefits is that you have to be available for work.

[16] Two different sections of the law say that a person claiming benefits has to show that they are available for work if they want to get benefits.[4] Since the AD has already decided that one of those sections of the law doesn't apply in this case, I will only be focussing on the other section of the law.[5]

[17] The law says that a person claiming EI benefits has to show that they are **capable of and available for work but aren't able to find a suitable job**.[6]

[18] When you want to show that you are available for work, you have to show you can work on every working day for which you could be paid benefits.[7] The law says working days are Monday to Friday.[8] So, these are the days you have to show you are available for work.

[19] Case law (in other words, decisions of the courts) explains that there are three things a claimant has to prove to show that they are available for work. I will look at what those three things are, below.

[20] There are also additional rules that apply to the availability of students.

[21] The Federal Court of Appeal (FCA) has said that people claiming EI benefits who are in school or training full-time are presumed to be (in other words, considered to be) unavailable for work.[9] This is called a **presumption of non-availability**. It means we

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[4] See sections 18(1)(a) and 50(8) of the *Employment Insurance Act* (Act).
[5] The AD decided that section 50(8) of the Act doesn't apply in this case.
[6] See section 18(1)(a) of the Act.
[7] See section 18(1) of the Act.
[8] See section 32 of the Regulations.
[9] This presumption has been reaffirmed many times over the years. See *Canada (Attorney General) v Cyrenne*, 2010 FCA 349, *Canada (Attorney General) v Gagnon*, 2005 FCA 321, *Canada (Attorney General) v Rideout*, 2004 FCA 304; *Canada (Attorney General) v Primard*, 2003 FCA 349, *Landry v Canada (Deputy Attorney General),* [1992] F.C.J. No.965 (FCA); *Horton v Canada (Attorney General),* 2020 FC 743.

can suppose that people aren't available for work when they are studying or training full-time.

[22] To decide if the Appellant was available for work, I will start by looking at whether I can presume (in other words, suppose) that he isn't available for work because he is in school. Then, I will look at whether he can prove that he was available for work even though he is in school.

Is the Appellant presumed to be unavailable for work?

[23] Yes. The Appellant is presumed to be unavailable for work.

[24] As I have already explained, if you are in school or training full time, you are presumed to be unavailable for work.

[25] The Appellant argues that this presumption shouldn't apply to high school students.

[26] I see nothing in the law or the case law that suggests that the presumption doesn't apply to high school students. It applies to anyone who is studying full time. It doesn't matter what they are studying, or where they are studying. The only exception is when a claimant is studying in a program they were referred to by the Commission.[10] So, I find the presumption could apply to the Appellant.[11]

[27] The Appellant testified that he is in school from 9 a.m. to 3 p.m., Monday to Friday, which is about 35 hours a week.[12] He also studies about 10 hours a week, for about 2 hours a day after school.

[28] This is in keeping with what he originally told the Commission.[13]

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[10] See section 25 of the Act.
[11] Although I am not bound by their decisions, I note that both the GD and the AD members who heard the case before me also concluded that the presumption of non-availability applies to high school students.
[12] He testified that every second Friday is a shorter day.
[13] See GD3-21, where he said he spends 42 hours a week on school and studying.

[29] From this evidence, I conclude that he is in school full time.

[30] Because of this, I find that the presumption of non-availability applies to him. This means I will suppose that he isn't available for work unless he can prove otherwise.

Can the Appellant overcome the presumption of non-availability?

[31] No. The Appellant can't overcome the presumption of non- availability.

[32] In exceptional (in other words, rare) cases, a person who is claiming benefits can overcome the presumption of non-availability. One of the ways they can do this is by showing a history of working full time and being in full-time school or training at the same time.[14] But, it takes a significant history of managing work together with school or training, shown over a long period of time, to overcome the presumption of non-availability.[15]

[33] There are some decisions of the AD which say that the presumption of non-availability can be overcome by showing a history of part-time work.[16]

[34] I am not bound by (in other words, obliged to follow) these decisions. And, with the greatest of respect for my colleagues at the AD who have rendered these decisions, I don't agree with them.

[35] First, the FCA always refers to full-time work in its decisions about rebutting the presumption of non-availability by proving a work history while attending school or training. I know of no cases of the FCA which have accepted a part-time work history as an exceptional circumstance that would allow a claimant to rebut (in other words, set aside) the presumption.

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[14] See *Canada (Attorney General) v Rideout*, 2004 FCA 304.
[15] See *Canada (Attorney General) v Lamonde*, 2006 FCA 44 and *Landry v Canada (Deputy Attorney General)*, [1992] F.C.J. No. 965 (FCA).
[16] See *SS v Canada Employment Insurance Commission*, 2022 SST 749 and *JD v Canada Employment Insurance Commission,* 2019 SST 438.

[36] This Tribunal is bound by the decisions of the FCA. My reading of the decisions on the issue of rebutting the presumption of non-availability through proof of a work history is that a claimant can only rely on a full-time work history to do so.

[37] Second, it is far from exceptional for a student to work part-time, after school and on weekends.[17] The case law requires exceptional circumstances to rebut the presumption of non-availability. I find that working part-time is not an exceptional circumstance.

[38] I also find that receiving benefits that are calculated on the basis of a history of part-time hours isn't an exceptional circumstance.[18] Everyone's benefits are calculated based on a formula set out in the law.[19] The fact that someone who works part-time may receive a lower benefit amount than someone working full time, because their part-time earnings are lower, isn't an exceptional circumstance.

[39] Third, when assessing availability, the law requires that I look only at availability from Monday through Friday, during regular hours.[20] I think that those same limits apply to the assessment of whether a claimant can overcome the presumption of non-availability. Therefore, in my view, part-time work during evenings and weekends shouldn't be considered when determining if a claimant has rebutted the presumption of non-availability.

[40] So, when looking at whether the Appellant can rebut the presumption of non-availability, I will not consider a history of part-time work, during after school hours and on weekends, as sufficient to do so.

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[17] See *Jean v Canada (Attorney General),* #A-787-88 (FCA), confirming *CUB 15439*.
[18] The AD seems to suggest otherwise in its decision in this matter, but hasn't explained the basis for its thinking.
[19] See section 14 of the Act.
[20] See section 18(1) of the Act, section 32 of the *Employment Insurance Regulations* (Regulations), *Canada (Attorney General) v Bertrand*, A-613-81 (FCA), and *Vezina v Canada (Attorney General),* 2003 FCA 198.

[41] Looking at the proof before me, I find there is no evidence of a full-time work history, or other exceptional circumstances, which would allow the Appellant to overcome the presumption of non-availability.

[42] The Appellant's representative (his father) told the Commission that the Appellant couldn't attend school and work full-time.[21] He also testified to this effect at the first hearing before the GD.[22]

[43] During the hearing before me, the Appellant testified that he could only work after school during weekdays, and only a few days a week. He confirmed that he had never worked more than 21 hours a week while going to school, and that most of those hours were during the weekend.

[44] So, I conclude that the Appellant doesn't have a history of working full time while going to school. And, his work history has taken place mostly on weekends, not on working days (as that term is defined in the law).

[45] Furthermore, there is nothing exceptional about this work history. It is typical of most students. In fact, the Appellant testified that it's very hard to find part-time work after school and on weekends because there are so many students looking for work during those hours.

[46] So, I find that the Appellant hasn't shown any exceptional circumstances which would allow him to overcome the presumption.

[47] In all events, the Commission submitted employment history files[23] and a record of employment audit trail[24] which show that the Appellant's employment history while in school involves a total of 16 weeks of work history.[25] In my view, this isn't a sufficiently long history of combining work and school to establish the exceptional circumstances

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[21] See GD3-26.
[22] See audio recording at timestamp 17:50.
[23] See RGD4.
[24] See RGD6.
[25] Some of his work history took place during the summer, when he was off school. I am only looking at his work history while going to school.

required to rebut the presumption of non-availability.[26] So, even if a part-time work history could serve to rebut the presumption, I would find that it wasn't rebutted in this case.

[48] For all of these reasons, I find the Appellant hasn't overcome the presumption of non-availability.

[49] The fact that the Appellant can't overcome the presumption is enough for me to decide that he wasn't available for work and can't get benefits while in school. But, I will still examine whether he can show the three things the case law says he needs to show to prove he is capable of and available for work. This is because I want to make sure the Appellant fully understands why he can't get EI benefits.

Was the Appellant capable of and available for work but unable to find a suitable job?

[50] No. The Appellant wasn't capable of and available for work but unable to find a suitable job.

[51] As I mentioned, above, case law sets out three things for me to consider when deciding if a person claiming benefits is available for work.[27] These three things are:

i. Wanting to go back to work as soon as a suitable job is available

ii. Making enough effort to find a suitable job

iii. Not setting personal conditions that might overly limit your chances of finding a suitable job

[52] The Appellant has to prove these three things. All three conditions have to be met in order for me to conclude he was available for work. When I decide if he has met the three conditions, I have to look at both the Appellant's attitude and the things that he did or didn't do to make himself available for work.

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[26] See *Canada (Attorney General) v Lamonde*, 2006 FCA 44.
[27] See *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96.

[53] All three of the conditions in the case law concern being available for a **suitable job**.

[54] Although he didn't say so in so many words, I understand that the Appellant's representative considers that any job that would require the Appellant to work hours that interfere with school wouldn't be a suitable job for him. He suggests that as a result, the Appellant should be entitled to restrict himself to looking for jobs that are compatible with his school schedule.

[55] The law sets out a number of criteria for determining whether a job is a suitable job.[28] I recognize that these criteria are not exhaustive, and that what constitutes a suitable job is a question of fact.[29]

[56] Some of my colleagues at the AD have said that the Commission and the Tribunal should take a contextual approach to determining what constitutes a suitable job.[30] This means that all of the facts, including a claimant's personal situation and work history, are relevant to determining whether a job is suitable for that particular claimant. As a general rule, I agree with them.

[57] Using the contextual approach, one could argue that a job where the hours of work are during class time isn't a suitable job for a high school student.

[58] However, the contextual approach can't be used to override the law.

[59] When it comes to work hours, the law says that there are two circumstances where the hours you are required to work would make a job unsuitable:

- when the work hours are incompatible with a claimant's family obligations
- when the work hours are incompatible with a claimant's religious beliefs

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[28] See section 9.002 of the Regulations and section 6(4) of the Act.
[29] See *Canada (Attorney General) v Whiffen*, A-1472-92.
[30] See *SA v Canada Employment Insurance Commission*, 2022 SST 1490, *and SS v Canada Employment Insurance Commission*, 2022 SST 749.

[60] Because the law only mentions these two situations, I conclude that these are the only two situations where work hours might make a job unsuitable.

[61] Applying this to the present case, I find that a job that would require the Appellant to work during the hours he goes to school wouldn't make that job unsuitable.

[62] I will now examine whether the Appellant meets the conditions to show he was available but unable to find a suitable job.

i. Wanting to go back to work

[63] The Appellant hasn't shown that he wanted to go back to work as soon as a suitable job was available.

[64] The Appellant testified that it is important for him to build up his savings. He says he is saving for his education and his future. Working allows him to do this. It is also his source of spending money.

[65] I found the Appellant to be a conscientious and credible young man. I believe that earning money toward his future is a high priority for him. I have no doubt that he wants to work.

[66] However, he doesn't want to work so badly that he would be prepared to leave school. He told the Commission this[31], and he confirmed it at the hearing.

[67] I believe that he wants to work as soon as a part-time job with hours outside of his school and study hours is available. However, this isn't sufficient for me to conclude that he wants to work as soon as a suitable job is available. This is because he isn't interested in suitable jobs that don't meet the requirements of his schedule.

[68] I am not suggesting that it is inappropriate for someone of the Appellant's age to prioritize school over work. To the contrary, I commend the Appellant for prioritizing his schooling.

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[31] See GD3-21.

[69] But by prioritizing his schooling, the Appellant can't meet the conditions to get EI benefits. It means he doesn't want to work as soon as a suitable job is available.

[70] So, the Appellant hasn't met this condition.

ii. Making efforts to find a suitable job

[71] I find that the Appellant wasn't making sufficient effort to find a suitable job.

[72] The Appellant testified that he went all over town with his resumé, to any potential employer who might have positions available after school and on weekends. He kept a lookout for help wanted ads and applied to all of the part-time jobs he saw advertised. He followed the opportunities posted on Indeed, and he uploaded his resumé to the site.

[73] He says he doesn't remember all of the places he applied to. However, he was able to give me the names of some of the places where he looked for work. They include Sport Shack, Walmart, Superstore, Volcom, Footlocker, and Dollarstore.

[74] In addition, he produced documents that show he applied for jobs through Indeed at Alley YMM, Supplement King, and Fort McMurray Toyota. He claims that he applied to many other jobs through Indeed, but no longer has any documents to show that. He says the notifications on Indeed are automatically deleted after a certain time, which is why he is unable to provide further documents.[32]

[75] He says that he applied to many of these places more than once, each time he saw them advertise for part-time workers.

[76] Eventually his search for work bore fruit. Since May 2023, he has been working at Western Restaurant.

[77] From his testimony, I conclude that his search for work began in March 2022.

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[32] As I have already noted, the Appellant didn't provide further documents. However, I believe him when he says he looked for more jobs than those shown in RGD3.

[78] I found the Appellant's testimony about his efforts to find a job to be sincere and credible. It was given without any prompting by his father. He was honest about the fact that he only started looking for work in March 2022.

[79] But the Appellant's efforts weren't directed at finding a suitable job. They were only directed at finding a job that required him to work on weekends and a couple of days after school. This doesn't allow me to conclude that he was making sufficient efforts to find a suitable job. He was excluding all suitable jobs that required him to work daytime hours, Monday to Friday.

[80] So, I find that the Appellant hasn't met this condition.

iii. Unduly limiting his chances of going back to work

[81] The Appellant unduly limited his chances of going back to work while he was in school. Although he was looking for work, he put conditions on the hours of work he would be willing to accept.

[82] As I've already mentioned, being available for work means being available Monday through Friday, during normal working hours.[33] So, being in school Monday to Friday from 9 a.m. to 3 p.m., unduly limits your chances of going back to work. This is because most jobs require you to work during those hours. Those days and hours are considered normal working days.[34]

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[33] See *Canada (Attorney General) v Bertrand*, A-613-81 (FCA), *Vezina v Canada (Attorney General),* 2003 FCA 198, and *Duquet v Canada* (Attorney General), 2008 FCA 313.

[34] In *SS v Canada Employment Insurance Commission*, 2022 SST 749, my colleague at the AD makes the point that the workplace is changing, and that not everyone still works banker's hours (in other words, 9 to 5, Monday to Friday). His analysis is a thoughtful one. Although I agree with him that the nature of work has changed a lot since the provisions of the Act on availability were enacted, I believe that most jobs still require a claimant to be available during banker's hours. The Commission keeps statistics of work trends. Surely if that were not the case, it would change the definition of working day set out in the Regulations, as section 54(b) of the Act empowers it to do. Although I believe it is the role of our Tribunal to make suggestions to the Commission in its decisions when it believes the Regulations or the Commission's policies or procedures need to evolve, it is not our role to usurp the powers of the Commission by ignoring the clear intent of the Regulations it has enacted.

[83] The Appellant made it clear in his testimony at the hearing that he wasn't willing to work daytime hours from Monday to Friday. He was only prepared to accept work that didn't interfere with school.

[84] This is consistent with what both he and his father told the Commission.[35]

[85] The Appellant said that very few places were looking for part-time workers, which made finding a job very difficult.

[86] So, the evidence clearly demonstrates that only being willing to work after 3:00 p.m., a few days a week and on weekends, unduly limited the Appellant's chances of going back to work.[36]

[87] So, I find the Appellant hasn't met this condition.

[88] Based on my findings regarding the three conditions the Appellant must meet, I conclude that he wasn't capable of and available for work but unable to find a suitable job. This is because:

- he didn't want to work in a job that would require him to work during school hours but was otherwise suitable
- he wasn't looking for jobs that were suitable, but that conflicted with school
- he set conditions as to the hours and days he was prepared to work which limited his chances of finding work

[89] I recognize that the Appellant will find my conclusion harsh. He is clearly a hard-working and ambitious young man. I applaud him for putting his studies first, and for wanting to work in his spare time so that he can save for his future. However, the EI

[35] See GD3-21 and GD3-26.
[36] In fact, despite all of his efforts, he remained unemployed until May 2023.

system is not meant to subsidize him during periods that he is in school and unable to find part-time work that fits his schedule.[37]

[90] I wish to advise the Appellant that should he be unable to repay the debt that may result from this decision, he can ask the Commission or the Canada Revenue Agency to consider writing it off. Unfortunately, I don't have the authority to order the Commission to do this. I would however ask the Commission to consider the Appellant's age, his limited means, and his good faith efforts to find work outside of school hours when considering his request.

Conclusion

[91] The Appellant hasn't shown that he was available for work within the meaning of the law. Because of this, I find that he can't get EI benefits while in school full time.

[92] This means that the appeal is dismissed.

Elyse Rosen
Member, General Division – Employment Insurance Section

[37] See *Canada (Attorney General) v Martel*, A-1691-92.