Citation: *KM v Canada Employment Insurance Commission*, 2023 SST 972

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	K. M.
Representative:	V. M.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (524558) dated August 30, 2022 (issued by Service Canada)

Tribunal member:	Gary Conrad
Type of hearing:	Teleconference
Hearing date:	December 20, 2022
Hearing participants:	Appellant Appellant's representative
Decision date:	January 3, 2023
File number:	GE-22-3020

Decision

[1] The appeal is allowed.

[2] Due to the Claimant's unique circumstances, she has proven that she is available for work, even when she was attending her schooling full-time. This means she is not disentitled from Employment Insurance (EI) benefits.

Overview

[3] The Claimant was working as an uncertified Continuing Care Assistant (CCA) at a long-term care home.

[4] Her employer started hiring certified nurses, which meant the Claimant would eventually have a significant reduction in her hours of work, since her employer would start giving more shifts to the certified nurses, rather than the Claimant who was uncertified.

[5] Her employer offered to send her to a CCA certification course if she agreed to work for them full-time for two years after she completed the course. The Claimant says she agreed and signed a contract as such with her employer.

[6] The Canada Employment Insurance Commission (Commission) decided the Claimant is disentitled from receiving EI regular benefits from May 15, 2022, onward because she isn't available for work due to her full-time schooling.

[7] The Claimant says that her schooling was like an apprenticeship, as her employer was the one directing it, and she continued to work for her employer while taking her schooling, just like an apprentice.

[8] The Commission says that there is no evidence the Claimant was referred to her course by her province, or was enrolled in any sort of apprenticeship program, so she must meet the availability requirements of any other Claimant.[1]

[9] I have to decide whether the Claimant has proven that she is 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 is available for work.

Matters I have to consider first

50(8) Disentitlement

[10] In their submissions the Commission states they disentitled the Claimant under subsection 50(8) of the Employment Insurance Act (Act). Subsection 50(8) of the Act relates to a person failing to prove to the Commission that they were/are making reasonable and customary efforts to find suitable employment.

[11] In looking through the evidence, I do not see any requests from the Commission to the Claimant to prove her reasonable and customary efforts, or any explanations from the Commission to the Claimant about what kind of proof she would need to provide in order to prove her reasonable and customary efforts.

[12] While not bound by it, I find the reasoning in *TM v Canada Employment Insurance Commission*, 2021 SST 11 persuasive, in that it is not enough for the Commission to discuss job search efforts with the Claimant, instead they must specifically ask for proof from the Claimant and explain to her what kind of proof would meet a "reasonable and customary" standard.

[13] Based on the lack of evidence the Commission asked the Claimant to prove her reasonable and customary efforts to find suitable employment under subsection 50(8) of the Act, the Commission did not disentitle the Claimant under subsection 50(8) of the Act. Therefore, it is not something I need to consider.

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[1] GD13

Post-hearing documents

[14] The Claimant has sent in multiple post-hearing documents, all of which I accepted and considered in making my decision, as it was all information I had asked for at the hearing.[2]

[15] The Commission also sent in post-hearing documents, which I accepted and considered, as it was information I had requested from the Commission.[3]

Issues

[16] The Claimant's argument of being an apprentice.

[17] The Claimant's availability for work.

Analysis

The Claimant's argument of being an apprentice

[18] If the Claimant was attending a program or course, at her own expense, that the Commission, or an authority the Commission has designated, referred her to, then she would be considered available for work.[4]

[19] While multiple arguments have been advanced by both parties about whether the Claimant was referred to her course, or on an apprenticeship, I find all of these arguments are moot.

[20] In order to meet the test under the law, the Claimant must have been the one paying for her course, as the law refers to attending a course at her own expense, but, as she testified,[5] and as the school she attended confirms,[6] she did not pay for the course.

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[2] GD09, GD11, GD12
[3] GD13
[4] See section 25 of the *Employment Insurance Act*
[5] The Claimant testified the course was free, paid for by the government of her province.
[6] See the cost breakdown of the Claimant's course on GD12-22 where it says her cost is $0.00.

[21] I find that since the Claimant did not pay for the course, in other words, was not attending at her own expense, she cannot meet the test under the law, so cannot be considered to be available for work while attending her course due to being referred to said course.

[22] This finding does not mean that it is impossible for her to be considered available for work while attending her course. It just means that she cannot be automatically considered available. I will have to do a detailed analysis to determine if she actually is available.

The Claimant's availability for work

The Claimant was a student

[23] The Claimant was a student.[7] There is a presumption that full-time students are not available.[8] Since this presumption only applies to full-time students, the first thing I need to determine is whether the Claimant was a full-time student.

[24] I find the Claimant was a full-time student as she testified that her school was Monday, Tuesday, Wednesday from 8 AM to 5 PM, and while classes were all online, attendance was mandatory. On Thursday and Friday she did her placement work, eight hours each day. I find the fact she was doing her schooling (I consider her placement work as schooling since it was a mandatory part of her course) five days a week, for 40 hours a week, shows she was a full-time student.

[25] Since she was full-time, this means the presumption of unavailability applies to her.

[26] However, it is possible to rebut the presumption with either exceptional circumstances,[9] or a history of working full-time while attending full-time schooling.[10]

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[7] I say "was" as the Claimant's school ended on December 9, 2022.
[8] See *Canada (Attorney General) v Cyrenne*, 2010 FCA 349
[9] See *Canada (Attorney General) v Cyrenne*, 2010 FCA 349.
[10] See *Canada (Attorney General) v Rideout*, 2004 FCA 304.

[27] I find the Claimant has presented exceptional circumstances that rebut the presumption of non-availability while in full-time school.

[28] I find the Claimant's exceptional circumstances are that her job (working at the long-term care facility)[11] which she kept while attending her schooling, offered shifts 24 hours a day. The Claimant provided examples of the types of shifts offered by her employer,[12] and I find her examples credible, as it is completely reasonable that a long-term care facility would require staff to be working 24 hours a day.

[29] This means the Claimant had the possibility of working full-time, without any special accommodation on her part or her employer's, due to the unique nature of her work offering shifts 24 hours a day. I find she cannot be presumed to be unavailable when she had the very real possibility of working full-time hours.

[30] However, rebutting the presumption only means that the Claimant isn't presumed to be unavailable. I still have to look at the law and decide whether the Claimant is actually available.

The availability factors

[31] Case law sets out three factors for me to consider when deciding whether the Claimant is available. The Claimant has to prove the following three things:[13]

a) She wants to go back to work as soon as a suitable job is available.

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

c) She didn't set personal conditions that might unduly (in other words, overly) limit her chances of going back to work.

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[11] I am not looking at the work she did as placement work for her school. While her placement work was for the same employer she was actually working for, I am only considering the work she did for her employer outside of that mandated by her schooling.
[12] GD12-1
[13] 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.

[32] When I consider each of these factors, I have to look at the Claimant's attitude and conduct,[14] over the period of the disentitlement (May 15, 2022, onward).

– **Wanting to go back to work**

[33] The Claimant has shown that she wants to go back to work as soon as a suitable job is available.

[34] I find the fact the Claimant was working throughout her schooling,[15] had signed a contract to begin full-time work with her employer as soon as school was over, and immediately started her full-time job the day after her school ended, shows her desire to work.

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

[35] The Claimant has made sufficient efforts to find a job.

[36] The Claimant's efforts are sufficient as they have resulted in the Claimant securing a full-time position in her industry (working in long-term care) starting on December 10, 2022, as per her testimony.

[37] On top of that, she had a job she was working at while in school and was looking for another job, since she was not getting all the hours she wanted, and made multiple applications to various employers as shown in her job search record.[16] This shows that she is not looking to EI as a top-up to her work hours, or treating EI as a wage subsidy, since she was actively looking for additional employment on an ongoing basis.

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

[38] The Claimant hasn't set personal conditions that might unduly limit her chances of going back to work.

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[14] 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.
[15] When I say "working throughout her schooling" I am not considering her two days a week of placement which was a mandatory part of her schooling, I am considering the fact that she worked outside of those two mandatory days while doing her schooling.
[16] GD03-31

[39] Generally, full-time students who are working around their school schedule are considered unavailable.[17]

[40] However, in the Claimant's case, due to her unique circumstances, I find the Claimant's schooling, while it was a personal choice, did not overly limit her chances of returning to the labour market.

[41] The Claimant testified that her experience and education is working in long-term care facilities. The Claimant says there are shifts available 24 hours a day in her industry and she provided examples of some of these shifts.[18]

[42] I find the Claimant's unique circumstances of working in an industry (long-term care facilities) which has shifts available 24 hours a day, makes her situation an exception to the general rule regarding full-time students working around school being considered unavailable.

[43] I find that since shifts are available to the Claimant 24 hours a day, this means her schooling is not overly limiting, because it would not present a large obstacle the employer would struggle to accommodate, or a large obstacle for the Claimant to work around in order to work full-time.

[44] This is also not solely speculation; there is evidence of this shown in the Claimant's paystubs.

[45] For example, in the pay period of September 18, 2022, to October 1, 2022, the Claimant accumulated 70 hours of work, which is extremely close to the general standard of 40 hours a week (80 hours per two weeks) of a full-time job. As she was in school during this period it shows the possibility she has, due to the 24 hours availability of shifts in her industry, of working full-time with her schooling.

[46] The Claimant also testified that she can take shifts in half increments, which means she can come into a shift at any point in time that works for her. There are also

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[17] *Horton v Canada (Attorney General)*, 2020 FC 743. para 35.
[18] GD12-1

occasions where she said she worked a full shift, and then stayed for part of a following shift to pick up more hours. I find this further shows the flexibility in her industry and supports her schooling would not overly limit her from working.

[47] I find the Claimant's unique circumstances also differentiates her situation from situations where a claimant has only the possibility of being available,[19] as the Claimant being able to pick up shifts 24 hours a day, and work increments of shifts, is not a possibility but a reality, one that the Claimant was actively taking advantage of.

[48] While she was not obtaining full-time hours, this was not due to any restriction placed on her by her schooling; her employer was simply not giving her the hours.

[49] I further find, that with shifts available 24 hours a day, seven days a week, it is possible for the Claimant to work full-time when only considering working days, which the law defines as Monday to Friday.[20]

[50] Finally, I find that when the Claimant's schooling ended on December 9, 2022, from December 10, 2022, onward, as she was not attending school, she also had no personal conditions that would overly limit her chances of returning to the labour market.

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

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

[19] Such as in *Canada (Attorney General) v Primard*, 2003 FCA 349 where the claimant in that case argued she could move her classes to night classes if she found a job, but was found to be unavailable as that was only a possibility of availability, because it was only something she could have done.
[20] Section 32 of the *Employment Insurance Regulations*

Conclusion

[52] The appeal is allowed.

[53] Due to her unique circumstances that Claimant has proven that she is available for work.

[54] This means she is not disentitled from EI benefits.

Gary Conrad
Member, General Division – Employment Insurance Section