



[TRANSLATION]

Citation: *OB v Canada Employment Insurance Commission*, 2023 SST 1091

**Social Security Tribunal of Canada
General Division – Employment Insurance Section**

Decision

Appellant: O. B.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission
reconsideration decision (0) dated November 21, 2022
(issued by Service Canada)

Tribunal member: Manon Sauvé

Type of hearing:
Decision date: June 2, 2023
File number: GE-22-3775

Decision

[1] The appeal is allowed in part.

[2] The Commission conceded the appeal for the period from October 5, 2020, to December 21, 2020. I agree with the Commission.

[3] The Appellant has shown that he was available for work within the meaning of the law for the following periods: February 28, 2021, to May 4, 2021, and from September 7, 2021, to October 1, 2021. Because of this, I find that the Appellant isn't disentitled to benefits. So, he may be entitled to benefits.

[4] The Appellant hasn't shown that he was available for work within the meaning of the law for the period from January 15, 2021, to February 27, 2021.

Overview

[5] The Appellant works as a customer service representative in a movie theatre. He stopped working because of a shortage of work.

[6] He applied for Employment Insurance (EI) benefits. He told the Commission that he was attending university full-time in the fall 2020 and winter 2021 terms and in the fall 2021 term.

[7] The Commission told the Appellant that he wasn't entitled to benefits because he was a full-time student. The Commission says that the Appellant wasn't allowed to take that training and that he is presumed to be unavailable for work while in school.

[8] The Appellant disagrees with the Commission's decision. He lost his job because of business closures during the COVID-19 pandemic.

Background

[9] On July 22, 2022, the Tribunal allowed the Appellant's appeal.¹ In his decision, the Tribunal member found that the Commission didn't use its discretion judicially when it reconsidered the Appellant's entitlement to benefits. The Commission filed a notice of appeal regarding this decision with the Tribunal's Appeal Division.

[10] On November 21, 2022, the Appeal Division member allowed the Commission's appeal.² The Commission used its discretion judicially in deciding to reconsider the claim.

[11] The Appeal Division member returned the file to the General Division to decide whether the Appellant was available for work while in school.

[12] I asked the parties to provide me with additional information.

[13] The Commission sent the Tribunal additional arguments. It concedes the disentitlement imposed from October 5, 2020, to December 21, 2020, because it had already made a decision in the Appellant's favour for the fall 2020 term, on October 23, 2020. This decision was made under section 153.161 of the *Employment Insurance Act* (Act). The Commission could not make a second decision under the same section on December 2, 2021.

Issue

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

Analysis

[15] Two different sections of the law require appellants to show that they were available for work. The Commission decided that the Appellant was disentitled under both of these sections. So, he has to meet the criteria of both sections to get benefits.

¹ *OB v Canada Employment Insurance Commission*, 2022 SST 1372.

² *Canada Employment Insurance Commission v OB*, 2022 SST 1371.

[16] First, the 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) provide criteria that help explain what “reasonable and customary efforts” mean.⁴ I will look at those criteria below.

[17] 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 a claimant has to prove to show that they are “available” in this sense.⁶ I will look at those factors below.

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

[19] In addition, the Federal Court of Appeal has said that full-time students are presumed to be unavailable for work.⁷ This is called the “presumption of non-availability.” This means we can suppose that students aren’t available for work when the evidence shows that they are in school full-time.

[20] I will start by looking at whether I can presume that the Appellant wasn’t available for work. Then, I will look at whether he was available based on the two sections of the law on availability.

Presuming full-time students aren’t available for work

[21] The presumption that students aren’t available for work applies only to full-time students. I understand that the Appellant is a full-time student for the following terms: fall 2020, winter 2021, and fall 2021. There is no dispute that the Appellant was a full-time student during the periods in question.

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] But the presumption that full-time students aren't available for work can be rebutted (in other words, shown to not apply).

[23] This means that there are two ways the Appellant can rebut the presumption. He can show that he has a history of working full-time while in school.⁸ Or, he can show that there are exceptional circumstances in his case.⁹

[24] So, I will look at each of the periods of full-time study.

– **Fall 2020**

[25] I find that the Commission is conceding the appeal regarding the Appellant's disenfranchisement for the period from October 5, 2020, to December 21, 2020. The Commission says that it made its decision on October 23, 2020. This means that it had already checked the Appellant's eligibility.¹⁰

– **Winter 2021**

[26] I note that the Appellant completed his claim for benefits in January 2021. He says that he was in school for the period from January 15, 2021, to April 26, 2021. He spent 15 to 24 hours per week on his studies. His training hadn't been approved and he was available and capable of working in the same kind of job.

[27] But the Appellant didn't look for a job because he was waiting to be called back by his employer. When certain activities were resuming during the pandemic, the Appellant started working a few hours a week. He had the same job before the movie theatre closed because of the pandemic.

[28] I note that the Appellant reported his hours worked to the Commission, since it adjusted his benefits to reflect his return to work.¹¹

⁸ See *Canada (Attorney General) v Rideout*, 2004 FCA 304.

⁹ See *Canada (Attorney General) v Cyrenne*, 2010 FCA 349.

¹⁰ See RGD3-1.

¹¹ See GD3-37 and GD3-38.

[29] So, I find that the Appellant has rebutted the presumption of non-availability for the period from February 28, 2021, to May 4, 2021. The Appellant went back to the job he had while in school. He had fewer hours, but the slow resumption of activities explains the situation.

[30] Between January 15, 2021, and February 26, 2021, the Appellant didn't rebut the presumption of non-availability because of his studies. During this time, he was attending university and wasn't looking for a job. He was waiting to go back to his job.

– **Fall 2021**

[31] On September 11, 2021, the Appellant completed a claim for EI benefits. He told the Commission that he was in school more than 25 hours a week. He said that he was available for work.

[32] The Commission says that the Appellant was presumed to be unavailable from September 7, 2021, to October 1, 2021, because he was a full-time student. He didn't show that he was available for work.

[33] According to the Record of Employment for that period,¹² the Appellant worked more than 20 hours per week. It can't claim that he wasn't available because of his studies, since he was working.

[34] I will look at the winter 2021 and fall 2021 terms, since the Commission conceded the appeal regarding the fall 2020 term.

[35] I am of the view that the Appellant has rebutted the presumption of non-availability because of his studies, since he was already working.

¹² See GD6-10.

– **The presumption is rebutted**

[36] The presumption of non-availability is rebutted for the following periods:

- **October 5, 2020, to December 21, 2020: The Commission conceded the appeal for this period.**
- **February 28, 2021, to May 4, 2021: The Appellant already had a suitable job.**
- **September 7, 2021, to October 1, 2021: The Appellant already had a suitable job.**

– **The presumption isn't rebutted**

- **January 15, 2021, to February 27, 2021: The Appellant didn't have a suitable job and hadn't looked for a job. He dedicated all of his time to his studies.**

[37] Rebutting the presumption for certain periods means only that the Appellant isn't presumed to be unavailable. I still have to look at the two sections of the law that apply and decide whether the Appellant was actually available.

Reasonable and customary efforts to find a job

[38] 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.¹³

[39] The law sets out criteria for me to consider when deciding whether the Appellant's efforts were reasonable and customary.¹⁴ I have to look at whether his 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.

¹³ See section 50(8) of the Act.

¹⁴ See section 9.001 of the Regulations.

[40] 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 activities are the following:¹⁵

- assessing employment opportunities
- registering for job search tools, online job banks, or employment agencies
- contacting employers who may be hiring
- applying for jobs
- attending interviews

[41] The Commission says that the Appellant's efforts aren't enough. He had to look for a full-time job, even if he had a part-time job. He didn't make any efforts to do so.

[42] I don't accept the Commission's argument. Availability under the Act isn't a question of hours. You have to show that you are available every working day. A day consists of 24 hours. It isn't a question of having a job from 9:00 a.m. to 5:00 a.m. or looking for a job from 9:00 a.m. to 5:00 a.m., but of showing that you could work each working day. And that you would be working in a similar situation.

[43] I disagree with the Commission. I find that all of the factors have to be considered.

[44] As of October 2019, the Appellant was working for a movie theatre as a customer service representative. He worked a little more than 20 hours per week whether he was in school or not. So, this was his usual job.¹⁶

¹⁵ See section 9.001 of the Regulations.

¹⁶ See Records of Employment at GD6-7 to GD6-11.

[45] So, when the Appellant says that he was available for the same type of job, he is referring to his job at the movie theatre year-round. This is a suitable job for the Appellant.

[46] He lost his job because of health measures imposed by authorities during the pandemic. He applied for benefits.

[47] He wasn't looking for a job because he was waiting for his employer's call, which should have happened after the measures were lifted. During that period, from January 15, 2021, to February 17, 2021, he was waiting. He wasn't making reasonable and customary efforts to find a job.

[48] For two other periods in question, the Appellant was working for his employer. As a result, he showed that he had made efforts, since he had worked.

[49] I don't accept the Commission's argument. Availability under the Act isn't a question of hours. You have to show that you are available every working day. A day consists of 24 hours. It isn't a question of having a job from 9:00 a.m. to 5:00 a.m. or looking for a job from 9:00 a.m. to 5:00 a.m., but of showing that you could work each working day. And that you would be working in a similar situation.

Capable of and available for work

[50] I also have to consider whether the Appellant was capable of and available for work but unable to find a suitable job.¹⁷ Case law sets out three factors for me to consider when deciding this. The Appellant has to prove the following three things:¹⁸

- a) He wanted to go back to work as soon as a suitable job was available.
- b) He made efforts to find a suitable job.

¹⁷ See section 18(1)(a) of the Act.

¹⁸ 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.

- c) He didn't set personal conditions that might have unduly (in other words, overly) limited his chances of going back to work.

[51] When I consider each of these factors, I have to consider the Appellant's attitude and conduct.¹⁹

– **Wanting to go back to work**

[52] I am of the view that the Appellant has shown that he wanted to go back to work as soon as a suitable job was available. This is because he worked during the following two periods of unemployment:²⁰

- February 28, 2021, to May 4, 2021: The Appellant already had a suitable job.
- September 7, 2021, to October 1, 2021: The Appellant already had a suitable job.

[53] For the period from January 15, 2021, to February 27, 2021, the Appellant didn't look for a job. He could not just wait for his employer's call.²¹

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

[54] I find that the Appellant made enough efforts to find a suitable job for the periods from February 28, 2021, to May 4, 2021, and from September 7, 2021, to October 1, 2021.

[55] I have considered the job search activities given above in deciding this second factor. For this factor, that list is for guidance only.²²

¹⁹ See *Canada (Attorney General) v Whiffen*, A-1472-92; and *Carpentier v Canada (Attorney General)*, A-474-97.

²⁰ I want to clarify that the Commission conceded the appeal for the period from October 5, 2020, to December 21, 2020.

²¹ *Lamirande v Canada (Attorney General)*, 2004 FCA 311.

²² 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.

[56] As I mentioned earlier, the Appellant already had a job during these two periods and he reported his income to the Commission.

[57] For the period from January 15, 2021, to February 17, 2021, the Appellant didn't look for a job.

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

[58] The Commission says that the Appellant limited his chances of going back to work because he refused to work full-time. He wanted to keep his part-time job because of his studies.

[59] The Commission relies on *Duquet*²³ to show that the Appellant unduly limited his chances of going back to work. In this case, the claimant was studying full-time and working part-time (on call) in his field of study—teaching.

[60] The Federal Court of Appeal has confirmed that a claimant who is in school and whose availability depends on their course schedule is limiting their chances.

[61] The Commission finds that the Appellant limited his chances of working while in school. It must be understood that, before the health measures authorities adopted because of the pandemic, the Appellant worked an average of 20 hours per week.

[62] When the health measures came into effect, the employer closed the movie theatre. The Appellant applied for EI benefits. He told the Commission that he was in school full-time.

[63] The Commission conceded the appeal for the fall 2020 term. I understand that the Commission had already decided the Appellant's eligibility on October 23, 2020.

[64] In the winter of 2021, the Appellant said that he was studying full-time and that he was available for work. He wasn't looking for a job because he was waiting for a call from his employer.

²³ *Duquet v Canada (Employment Insurance Commission)*, 2008 FCA 313 (CanLII).

[65] In my view, the Appellant isn't available for the period from January 15, 2021, to February 27, 2021. He dedicated all his time to his studies and was waiting for the cinema to reopen.

[66] That happened in late February 2021 when health measures were relaxed. The movie theatre reopened. The Appellant went back to work a few hours a week in March and April. He worked a few days a week in May. In June, he started working the same 20 hours a week as before until December 16, 2021.²⁴

[67] The Commission says that the Appellant was eligible during the summer because he wasn't in school. Yet, he worked about 20 hours a week. This is a part-time job.

[68] With this in mind, I don't accept the Commission's argument about part-time work. In fact, what the Act says is that you have to be available every working day. As noted above, a day has 24 hours. Not everyone has a 9-to-5 job. This interpretation lacks nuance. There are many types of jobs and work schedules. In fact, the notion of a suitable job allows for a fairer interpretation of the reality of the job market.

[69] That being said, I am of the view that the Commission's interpretation varies. While in school, he wasn't available for a full-time job, but he can work part-time during the summer.

[70] But I find that the Appellant didn't limit his chances of going back to work for the periods from February 28, 2021, to May 4, 2021, and from September 7, 2021, to October 1, 2021. This is because the Appellant already had a job and he reported his income to the Commission. This was a suitable job, since he worked the same job with the same conditions as before the movie theatre closed because of the pandemic.

²⁴ See GD6-10.

– **So, was the Appellant unable to and available for work?**

[71] Based on my findings on the three factors, I find that the Appellant has shown that he was capable of and available for work but unable to find a suitable job for the following periods: February 28, 2021, to May 4, 2021, and September 7, 2021, to October 1, 2021. He hasn't shown that he was capable of and available for work during the period from January 15, 2021, to February 27, 2021.

Conclusion

[72] The Commission conceded the appeal for the period from October 5, 2020, to December 21, 2020. I agree with the Commission.

[73] The Appellant has shown that he was available for work within the meaning of the law for the following periods: February 28, 2021, to May 4, 2021, and from September 7, 2021, to October 1, 2021. Because of this, I find that the Appellant isn't disentitled from receiving benefits. So, the Claimant may be entitled to benefits.

[74] The Appellant hasn't shown that he was available for work within the meaning of the law for the period from January 15, 2021, to February 27, 2021.

[75] This means that the appeal is allowed in part.

Manon Sauvé
Member, General Division – Employment Insurance Section