



[TRANSLATION]

Citation: *ZN v Canada Employment Insurance Commission*, 2023 SST 1220

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

**Decision**

**Appellant:** Z. N.  
**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** Canada Employment Insurance Commission  
reconsideration decision (456188) dated March 2, 2023  
(issued by Service Canada)

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**Tribunal member:** Josée Langlois  
**Type of hearing:** Teleconference  
**Hearing date:** August 4, 2023  
**Hearing participant:** Appellant  
**Decision date:** August 18, 2023  
**File number:** GE-23-795

## Decision

[1] The appeal is allowed in part.

[2] I find that the Commission could not verify the benefit periods for sickness benefits from September 28, 2020, to December 15, 2020, and from January 25, 2021, to February 12, 2021. This means that the overpayments created for those periods will be written off.

[3] But, I find that the Appellant hasn't shown that he was available for work within the meaning of the *Employment Insurance Act* (Act) between February 15, 2021, and May 18, 2021, between June 2, 2021, and July 7, 2021, and from August 30, 2021.

## Overview

[4] The Appellant made a regular benefits claim on April 17, 2020. On September 14, 2020, he declared that he was taking training full-time at Collège de Rosemont.

[5] On January 4, 2022, the Commission decided that the Appellant wasn't available for work from September 28, 2020, because he would not have been available for work if he hadn't been sick.

[6] The Commission also decided that the Appellant wasn't entitled to benefits from February 15, 2021, because he was taking training on his own initiative and wasn't available for work.

[7] The Appellant asked the Commission to reconsider both decisions. On February 8, 2022, the Commission told the Appellant that it had changed its decisions. It decided that the Appellant wasn't entitled to sickness benefits from September 28, 2020, to December 15, 2020, and from January 25, 2021, to February 12, 2021. It also decided that he wasn't available for work because he was taking training on his own initiative from February 15, 2021, to May 18, 2021, from June 2, 2021, to July 7, 2021, and from August 30, 2021.

[8] The Appellant appealed those decisions to the Tribunal. On March 23, 2022, the Commission submitted arguments saying that it was conceding the appeal in terms of sickness benefits but that the Appellant could not get regular benefits for the periods from February 15, 2021, to May 18, 2021, from June 2, 2021, to July 7, 2021, and from August 30, 2021.

[9] On September 16, 2022, the Tribunal's General Division found that the Commission hadn't exercised its discretion judicially when it decided to verify and reconsider the Appellant's claim for benefits. So, it found that the Appellant could get sickness benefits and regular benefits for the periods in question.

[10] The Commission appealed the General Division decision to the Tribunal's Appeal Division. It argued that the General Division had made an error of law by giving the power to verify the same power as the authority to reconsider under section 52 of the Act.

[11] The Tribunal's Appeal Division gave its decision on February 14, 2023. It decided that the Commission had properly used its discretion in a judicial manner when it made its decisions in the Appellant's case.

[12] At the same time, the Appeal Division returned the file to the General Division to determine whether the Appellant was available for work from February 15, 2021, to May 18, 2021, from June 2, 2021, to July 7, 2021, and from August 30, 2021.

[13] The Appellant has to be available for work to get Employment Insurance (EI) regular benefits. Availability is an ongoing requirement. This means that the Appellant has to be searching for a job.

[14] The Appellant disagrees with the Commission's decision. He admits that he is a student and that he was focusing on his studies, but he argues that he was honest by telling the Commission from the start that he was a full-time student.

[15] I have to decide whether the Appellant was available for work within the meaning of the Act and whether he can get EI benefits. The Appellant has to prove his availability on a balance of probabilities. This means that he has to show that it is more likely than not that he was available for work.

## **Issue**

[16] Was the Appellant available for work from February 15, 2021, to May 18, 2021, from June 2, 2021, to July 7, 2021, and from August 30, 2021?

## **Analysis**

### **Availability during a period of illness**

[17] On March 23, 2022, the Commission made submissions to the Tribunal. It conceded the appeal in terms of the benefit periods for sickness benefits. In fact, the Tribunal's Appeal Division returned the file to the General Division only in terms of the periods for regular benefits.

[18] On August 14, 2023, the Commission confirmed that it was conceding the appeal in terms of the benefit periods for sickness benefits from September 28, 2020, to December 15, 2020, and from January 25, 2021, to February 12, 2021. It explained that section 153.161 of the Act didn't give it the power to verify the Appellant's benefit periods for sickness benefits, but only his availability under section 18(1)(a) of the Act.

[19] If it hadn't been for that provision, which applies for those periods, the Appellant would have had to prove that he would have been available for work even though he was sick. The Appellant explained that he was focusing on his studies during those periods.

[20] I accept the Commission's explanations and am allowing the appeal on this issue. This means that the Commission will change the overpayment of benefits for those periods, and the Appellant won't have to pay back the benefits already paid for

the periods from September 28, 2020, to December 15, 2020, and from January 25, 2021, to February 12, 2021.

[21] But, for the benefit periods after February 15, 2021, the Appellant hasn't provided evidence that he was unable to work; he claimed regular benefits, and he indicated that he wasn't available for work while studying. I will now consider whether he was available for work and whether he can get benefits for the benefit periods after February 15, 2021.

## **Availability for work**

[22] Two different sections of the Act require claimants to show that they are available for work. The Commission decided that the Claimant was disentitled under both of these sections. So, he has to meet the criteria of both sections to get benefits.

[23] First, the Act says that a claimant has to prove that they are making "reasonable and customary efforts" to find a suitable job.<sup>1</sup> The *Employment Insurance Regulations* give criteria that help explain what "reasonable and customary efforts" means.<sup>2</sup> I will look at those criteria below.

[24] Second, the Act says that a claimant has to prove that they are "capable of and available for work" but aren't able to find a suitable job.<sup>3</sup> Case law gives three things a claimant has to prove to show that they are "available" in this sense.<sup>4</sup>

[25] In addition, the Federal Court of Appeal (Court) has said that claimants who are taking training full-time are presumed to be unavailable for work.<sup>5</sup> 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 or taking training full-time.

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<sup>1</sup> See section 50(8) of the *Employment Insurance Act* (Act).

<sup>2</sup> See section 9.001 of the *Employment Insurance Regulations*.

<sup>3</sup> See section 18(1)(a) of the Act.

<sup>4</sup> See *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96.

<sup>5</sup> See *Attorney General of Canada v Cyrenne*, 2010 FCA 349.

[26] I will start by looking at whether I can presume that the Appellant wasn't available for work. Then, if necessary, I will look at whether he was available based on the two sections of the Act on availability.

[27] I note that this presumption of non-availability must be assessed in the same way in the case of regular benefits or during a period of illness when a claimant is studying full-time. In his case, the Appellant didn't provide a medical certificate showing an inability to work during those periods; he claimed regular benefits, and the Commission made a decision dealing with section 18(1)(a) of the Act. But, to explain the nature of the analysis to the Appellant, even if he had a medical certificate showing an inability to work for those three periods, it would still have been necessary to determine whether the presumption of non-availability applies to him because he is a full-time student. So, the result would be the same at this stage of the analysis.

### **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 is a full-time student**

[29] The Commission argues that the Appellant hasn't rebutted the presumption of non-availability while taking non-referred training full-time. It says that he had to attend scheduled classes and that he wasn't available for work, since he had to devote a lot more time to his courses given that they were distance learning.

[30] The Appellant reported that he had been a full-time student at Collège de Rosemont since September 2020.

[31] He indicated that he was studying full-time throughout 2021. He completed two forms showing that he spent more than 25 hours per week on his studies. Despite indicating on September 14, 2021, that he spent between 15 and 24 hours on his studies, he said at the hearing that his situation was the same throughout 2021: He was

a full-time student, and he wasn't available for work because he had to devote time to his courses.

[32] I presume that the Appellant's training makes him unavailable for work within the meaning of the Act.

[33] This presumption of non-availability can be rebutted based on four principles that relate specifically to returning-to-studies cases.<sup>6</sup>

[34] These principles are:<sup>7</sup>

- the attendance requirements of the course
- the claimant's willingness to give up their studies to accept employment
- whether the claimant has a history of being employed at irregular hours
- the existence of "exceptional circumstances" that would enable the claimant to work while taking the course

[35] 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.

[36] There are two ways the Claimant can rebut the presumption. He can show that he has a history of working full-time while also in school.<sup>8</sup> Or, he can show that there are exceptional circumstances in his case.<sup>9</sup>

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<sup>6</sup> *Landry*, A-719-91; *Lamonde*, 2006 FCA 44; *Gagnon*, 2005 FCA 321 (CanLII); *Floyd*, A-168-93.

<sup>7</sup> This principle is explained in the following decision: *Gagnon*, 2005 FCA 321 (CanLII).

<sup>8</sup> See *Attorney General of Canada v Rideout*, 2004 FCA 304.

<sup>9</sup> See *Attorney General of Canada v Cyrenne*, 2010 FCA 349.

[37] In addition, the Court recently made a decision reiterating that a person who has a history of working part-time can get benefits:

Fact patterns where the presumption has been successfully rebutted include circumstances where the claimant indicated a willingness to give up their studies to accept employment or where a claimant has a history of being regularly employed while attending school and is searching for employment at hours similar to those formerly worked. One can imagine other considerations that might be relevant, such as the ability of a claimant to follow classes online at a time of their choice.

[38] The Court reaffirmed that the presumption of non-availability for a full-time student is a question of fact and that this presumption can be rebutted if there are exceptional circumstances.<sup>10</sup>

[39] Beginning on September 14, 2020, the Appellant simultaneously completed three forms indicating that he was taking training and that he would not leave his training to accept a job.

[40] On September 14, 2020, the Appellant indicated that he spent more than 25 hours per week on his studies. He explained that his course schedule was more demanding than before and that, in addition to attending classes in person and online, he devoted about two hours of study to passing his courses.

[41] The Appellant then said that he spent about 39 hours per week on his studies and that he also had to rest to pass his courses. He explained that he was already working for X but that the employer's proposed schedule didn't fit with his course schedule.

[42] On February 1, 2021, the Appellant indicated that he spent more than 25 hours per week on his studies. He indicated that he had to attend scheduled classes and that he wasn't capable of the same type of work and under the same conditions as before he started his training.

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<sup>10</sup> *Page v Attorney General of Canada*, 2023 FCA 169.



[43] On September 14, 2021, the Appellant indicated that he spent between 15 and 24 hours per week on his studies. He indicated that he was capable of working under the same conditions as before but that, if he were offered a job, he would finish his training before accepting it.

[44] As he had told the Commission on February 8, 2022, the Appellant said at the hearing that he wasn't available for work while studying. Even though he wasn't available during his terms, he explained that he was available for work after a term. Yet, at the hearing, he said that he had explained this situation several times to a Commission employee.

[45] The Appellant testified that his situation was the same for all his terms, namely, that he devoted time to understanding the material and that he wasn't available for work.

[46] The Appellant also says that he had reconstructive nasal surgery when he was a child and that he had to receive care in 2020. He argues that he was able to attend his courses at that time given that they were available online and that he didn't have to travel.

[47] The Appellant argues that when he filed his EI claim, an employee told him that he was entitled to benefits and that the Commission paid him those benefits. He says that he was honest about his situation and that he disclosed the number of hours spent on his studies whenever asked.

[48] I note that the Commission did impose a disentitlement only for the identified periods corresponding to the Appellant's terms. In his case, the Appellant admits that he wasn't available for work during those periods because he was concentrating on his studies.

[49] While he did say that some courses were taught online during those periods, this exceptional circumstance doesn't show that it allowed him to be available for work. In

fact, he said that he needed to spend more time on his studies to understand the material given that his courses were distance learning.

[50] To rebut the presumption of non-availability, I don't have to assess the Appellant's job search efforts. I have to decide whether these efforts are reasonable and customary only if the presumption of non-availability is rebutted.

[51] I simply note that the Appellant indicated that he didn't look for another job during his terms. He explained that he didn't feel capable of working, and in this section, I also don't have to consider whether the Appellant has shown a personal condition that unduly limits his chances of going back to work.

[52] In my view, the Appellant hasn't rebutted the presumption of non-availability while studying full-time.

[53] The facts show that he was a full-time student at Collège de Rosemont from September 2020. While I understand that some courses were available online for a while, the Appellant hasn't shown that this exceptional situation allowed him to work while studying. He hasn't provided evidence of an exceptional circumstance that would have allowed him to work while studying between February 15, 2021, and May 18, 2021, between June 2, 2021, and July 7, 2021, and from August 30, 2021, within the meaning of the Act.

[54] The facts show that the Appellant spent more than 25 hours per week on his studies. He even said that he spent 39 hours per week on his studies. He himself admitted that he wasn't available for work during his terms and that, if he were offered a job, he would finish his training before accepting it. All the evidence and the Appellant's statements show that it is more likely than not that he wasn't available for work while studying full-time. The presumption of non-availability isn't rebutted.

[55] The situations described by the Appellant aren't exceptional circumstances that would have allowed him to work while taking his courses. On the contrary, because of

the online courses, the Appellant had to devote more time to his training, which was his priority during those periods.

[56] The Appellant hasn't rebutted the presumption that he wasn't available for work between February 15, 2021, and May 18, 2021, from June 2, 2021, to July 7, 2021, and from August 30, 2021.

– **The presumption isn't rebutted**

[57] Since the presumption isn't rebutted, this means that the Appellant is presumed to be unavailable. The Appellant is a full-time student, and I find that he wasn't available for work between February 15, 2021, and May 18, 2021, from June 2, 2021, to July 7, 2021, and from August 30, 2021.

[58] In this case, since the presumption of availability [*sic*] isn't rebutted, it isn't relevant to look at the next criterion.

[59] The Appellant wasn't available for work within the meaning of the Act between February 15, 2021, and May 18, 2021, from June 2, 2021, to July 7, 2021, and from August 30, 2021. The presumption of non-availability applies.

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

[60] While I understand the Appellant's arguments that he was honest from the start by declaring that he was a full-time student, measures were introduced during that period to facilitate the payment of benefits. As the Tribunal's Appeal Division decided, the Commission was justified in verifying the Appellant's benefit period.<sup>11</sup>

[61] I have to apply the criteria for determining whether the Appellant was available for work within the meaning of the Act and whether he can get benefits for the benefit periods in question.

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<sup>11</sup> Section 153.161(2) of the Act.

[62] In the Appellant's case, the presumption of availability [*sic*] while studying full-time isn't rebutted. But, to be entitled to benefits when the presumption of non-availability is rebutted, the Appellant also has to show that there were no personal conditions that unduly limited his chances of finding a job and that he was looking for a job.

[63] I have to make this decision on a balance of probabilities. Based on the criteria set out in the Act and case law, it is more likely than not that the Appellant wasn't available for work while taking training full-time because, in his case, the presumption of non-availability isn't rebutted.

[64] Lastly, the Appellant finds it unfair that he has to pay back the benefits he received. On this point, the Commission conceded the issue concerning the benefit periods for sickness benefits, and the overpayment of benefits will be reduced.

[65] For the balance, and while the Tribunal doesn't have jurisdiction to decide a request to write off an overpayment of benefits, the Appellant can make such a request directly to the Commission, explaining his reasons.

[66] However, based on the facts presented, the Appellant wasn't available for work within the meaning of section 18 of the Act during the periods in question.

## **Conclusion**

[67] I find that the Commission could not verify the benefit periods for sickness benefits from September 28, 2020, to December 15, 2020, and from January 25, 2021, to February 12, 2021.

[68] I also find that the Appellant wasn't available for work within the meaning of the Act between February 15, 2021, and May 18, 2021, from June 2, 2021, to July 7, 2021, and from August 30, 2021.

[69] The appeal is allowed in part.

Josée Langlois

Member, General Division – Employment Insurance Section