Citation: *GZ v Canada Employment Insurance Commission*, 2023 SST 1222

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	G. Z.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision dated June 10, 2022 (issued by Service Canada)

Tribunal member:	Marisa Victor
Type of hearing:	Teleconference
Hearing date:	August 10, 2023
Hearing participants:	Appellant Interpreter
Decision date:	August 29, 2023
File number:	GE-23-1132

Decision

[1] The appeal is allowed. The Tribunal agrees with the Appellant.

[2] The Appellant has shown that he was available for work while in school. This means that he isn't disentitled from receiving Employment Insurance (EI) benefits. So, the Appellant may be entitled to benefits.

Overview

[3] The Canada Employment Insurance Commission (Commission) decided that the Appellant was disentitled from receiving EI regular benefits from May 10, 2021 to April 2, 2022 because he wasn't available for work. An appellant has to be available for work to get EI regular benefits. Availability is an ongoing requirement.

[4] I have to decide whether the Appellant has proven that he was available for work. The Appellant has to prove this 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.

[5] The Commission says that the Appellant wasn't available because he was in school full-time.

[6] The Appellant disagrees and says that even though he was in school, retraining to be a computer programmer, he would have quit for a suitable job. His previous job was as a senior designer in a ship building company. He also says he was looking for work in his field even while he was taking his college retraining program.

Matter I have to consider first

The Appeal Division returned this matter to the General Division

[7] The Appellant's appeal was returned to the General Division.

[8] The Appellant first appealed the denial of his EI benefits to the Tribunal's General Division in June 2022. On December 18, 2022, the General Division member dismissed

the Appellant's appeal on the basis that the Appellant had not shown that he was available for work.

[9] The Appellant appealed to the Appeal Division. On April 8, 2023, the Appeal Division issued its decision allowing the appeal and cancelling the December 18, 2022 General Division decision. The Appeal Division ordered the case back to the General Division for a new hearing on the issue of availability under section 18(1) of the *Employment Insurance Act* (Act) only. The Appeal Division determined that the General Division did not have jurisdiction to consider s. 50(8) of the Act.

[10] This decision is a result of the new hearing ordered by the Appeal Division.

Issue

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

Analysis

[12] 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 only one of those sections: section 18(1) of the Act. In addition, the Appeal Division ruled that the General Division only had jurisdiction to consider section 18(1) of the Act. So, the Appellant has to meet the criteria of that section to get benefits.

[13] Section 18(1) of 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.[1] Case law gives three things an appellant has to prove to show that they are "available" in this sense.[2] I will look at those factors below.

[14] In addition, the Federal Court of Appeal has said that appellants who are in school full-time are presumed to be unavailable for work.[3] This is called "presumption of

[1] See section 18(1)(a) of the Act.
[2] See *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96.
[3] See *Canada (Attorney General) v Cyrenne*, 2010 FCA 349.

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.

[15] 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 section 18(1) of the Act.

Presuming full-time students aren’t available for work

[16] The presumption that students aren’t available for work applies only to full-time students.

[17] The Appellant was 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.

[18] The Appellant can rebut the presumption that he was not available. For example, he can show that he has a history of working full-time while also in school.[4] Or, he can show that there are exceptional circumstances in his case.[5]

– The Appellant says exceptional circumstances exist

[19] The Appellant says that exceptional circumstances exist. The Appellant testified that he was always willing to quit the program if he found a suitable job. He said that he continued to apply for jobs within the ship building and marine sectors throughout the relevant time period. He was adamant that he would have accepted work and quit his job if he had been offered a suitable position.

[20] The Appellant also testified that he provided incorrect answers in his EI application. He said that he made a mistake when he answered that he was not willing to leave his college program for work. He said he always would have picked suitable work over his schooling because he had to support his family.

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

[21] The Appellant also testified that he could have worked anytime during the first term from May 2021 to August 2021 as all the courses were online. Progress through the course depended on the commitment of the student. For the rest of the semesters, although the courses changed every term, most of the time the courses only occupied 2.5 hours of class time a day. The Appellant said it was possible to work around that schedule.

[22] The Appellant also talked about his previous work experience during school. He said that he first worked in China and then emigrated to Canada. He then attended university in Newfoundland in naval architecture. There he took part in a work term arranged through the engineering department. He said even when he was on a work term, he took part-time courses.

– **The Commission says the Appellant has not rebutted the presumption**

[23] The Commission says that the Appellant has failed to rebut the presumption of non-availability. The Commission says that the Appellant stated in his EI application that he could not work while studying full-time and because he said he had not previously worked while in school. The Commission also relied on later statements to the Commission where the Appellant said that he would rather finish his training then accept a job. The Commission also submits that the Appellant said he would limit his search to part-time work that fit around his school schedule. The Commission said that the Appellant asked what answer he should provide so that he wouldn't owe any money.

– **The Appellant has rebutted the presumption**

[24] I find that Appellant has rebutted the presumption that he was unavailable by showing that exceptional circumstances existed.[6] This is because he convinced me that he was willing to accept suitable employment at any time and would have withdrawn from his college program in order to accept such a job.

[6] See 2023 FCA 169 (CanLII) at paras 32, 50, 54, 55, 56, 57, 63, 67-69.

[25] The Appellant supported his testimony with evidence of job applications he made throughout his studies. These applications were mainly at ship building or marine companies across Canada. The positions he was applying for were full-time. It is clear to me that he was looking for work in his area of expertise and that he not only would have left his studies but also moved his family in order to obtain suitable work.

[26] The Appellant also explained how it would be possible to have a job and continue his studies if an employer was flexible. He reiterated that he would comply with the employer's policy regarding hours of work, but that it was possible to work around his school schedule given that some classes were on-line, and the rest only required on average 2.5 hours of class a day.

[27] Finally, I believe that the Appellant may have had difficulty communicating with the Commission. This hearing proceeded with the assistance of a Mandarin interpreter. Although the Appellant was mostly able to communicate in English, he used the assistance of the interpreter when the questions I asked were more complicated. I saw no record in the Commission's files that they used an interpreter to assist in communicating with the Appellant. The Appellant may not have fully understood the questions in the EI application or the questions he was asked on the phone with the Commission's representative. This explains why the Appellant may have provided different answers to the Commission then he provided to me.

[28] The Appellant has rebutted the presumption that he was unavailable for work.

[29] Rebutting the presumption only means that the Appellant isn't presumed to be unavailable. I still have to look at the section 18(1) of the Act and decide whether the Appellant is actually available.

Capable of and available for work

[30] I must now consider whether the Appellant was capable of and available for work but unable to find a suitable job.[7] Case law sets out three factors for me to consider when deciding this. The Appellant has to prove the following three things:[8]

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.

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

[31] When I consider each of these factors, I have to look at the Appellant's attitude and conduct.[9]

– Wanting to go back to work

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

[33] The evidence discussed above with regard to rebutting the presumption of non-availability is also relevant here. The Appellant made it clear that his priority was a suitable job and that he wanted to go back to work as soon as possible. He showed this by applying for suitable jobs across the country throughout the relevant period. I also note that these were full-time jobs. He also explained that he needed a job to support his family.

[34] The Appellant has shown that he wanted to back to work as soon as a suitable job was available.

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[7] See section 18(1)(a) of the Act.
[8] 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.
[9] 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**

[35] The Appellant has made enough effort to find a suitable job.

[36] The Appellant testified that he applied for 16 jobs within the ship building and marine sectors. The Appellant also provided a screen shot of his computer files showing other job applications during the relevant time period. The Respondent says that the Appellant only applied for 3 suitable jobs within the relevant time period. The Appellant disputed this.

[37] I find the Appellant's evidence convincing. He explained his job applications. He also explained that some government jobs had lengthy hiring processes. He also applied for jobs in different sectors including ship building jobs and IT related jobs during the relevant time period.[10] In addition to the suitable jobs, he also explained that he applied for entry-level jobs at Walmart and Winners.

[38] In addition to job applications, I have also considered the list of job-search activities listed in the Regulations. This list is for guidance only.[11] It provides nine job-search activities. Some examples of those are the following:[12]

- assessing employment opportunities
- preparing a résumé or cover letter
- registering for job-search tools or with online job banks or employment agencies
- networking
- contacting employers who may be hiring
- applying for jobs
- attending interviews

[10] I have not considered job applications and co-op placement applications outside of the relevant time period.
[11] 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.
[12] See section 9.001 of the Regulations.

[39] The Appellant's efforts to find a new job included updating his resume and creating a job alert. He testified that he checked job search sites every day. He also networked with a previous supervisor and a colleague to find out about job possibilities and wrote to companies about possible future positions. He said he kept his online profile up to date and responded to LinkedIn requests. Finally, he took part in job interviews he was invited to.

[40] Those efforts were enough to meet the requirements of this second factor because they show that he was engaging in continuous job search efforts. He was making an effort to find a job throughout the relevant time period.

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

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

[42] The Appellant says he didn't set unduly limiting conditions because he looked for full-time and part-time jobs, he did not limit his job search to his geographic area, he applied for suitable jobs in the shipbuilding and IT sectors as well as jobs that were well below his training and abilities. He said that he did not restrict his job search based on salary, religion or family obligations. Finally, he said he would have considered any working hours and would have adapted to whatever the company required.

[43] The Commission says that it did not originally consider a reasonable time period for the Appellant to restrict his job search to only jobs in his field. It says that restrictions should be weighed against the likelihood of finding suitable employment to determine the length of the reasonable period of restrictions.

[44] I find that the Appellant didn't set personal conditions and did not have significant restrictions. The Appellant applied for suitable jobs that he was qualified for. At first that included only ship-building companies. However, he did not place any geographical restrictions and was able to apply for positions across the country. As time went on, he included IT related jobs. Finally, he considered entry-level jobs at Walmart and Winners

jobs that did not require his level of experience and training. As previously found, the Appellant was willing to drop his studies for a suitable full-time job.

[45] The Appellant has not shown any personal restrictions that unduly limited his chances of going back to work.

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

[46] 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.

Conclusion

[47] The Appellant has shown that he was available for work within the meaning of the law. Because of this, I find that the Appellant isn't disentitled from receiving benefits. So, the Appellant may be entitled to benefits.

[48] This means that the appeal is allowed.

Marisa Victor
Member, General Division – Employment Insurance Section

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