[TRANSLATION]

Citation: *AL v Canada Employment Insurance Commission*, 2023 SST 1704

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	A. L.
Representative:	Jérémie Dhavernas
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (462622) dated April 5, 2022 (issued by Service Canada)

Tribunal member:	Guillaume Brien
Type of hearing:	Videoconference
Hearing date:	September 14, 2023
Hearing participants:	Appellant Appellant's representative
Decision date:	September 27, 2023
File number:	GE-23-796

Decision

[1] The appeal is dismissed. The Tribunal disagrees with the Appellant.

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

Overview

[3] On March 7, 2023, the Appeal Division of the Social Security Tribunal of Canada (Tribunal) returned this file to the Tribunal's General Division to determine whether the Appellant was entitled to EI benefits for the periods from October 5, 2020, to December 21, 2020 (fall 2020 term), and from January 7, 2021, to April 28, 2021 (winter 2021 term), when she was in school full-time.

[4] Before, on April 5, 2022, the Canada Employment Insurance Commission (Commission) decided upon reconsideration that the Appellant was disentitled from receiving EI regular benefits from October 20, 2020, to December 21, 2020, and from January 7, 2021, to April 28, 2021, because she wasn't available for work. An appellant has to be available for work to get EI regular benefits. Availability is an ongoing requirement. This means that an appellant has to be searching for a job.

[5] I have to decide whether the Appellant has proven that she was available for work. The Appellant 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 was available for work.

[6] The Commission says that the Appellant wasn't available because she was in school full-time. She made no effort to find work, since she was just waiting for her employer to call her back. She also placed restrictions that unduly limited her ability to find a suitable job while in non-referred full-time studies.

[7] The Appellant disagrees and says that her training was never an obstacle to her job search, but the COVID-19 lockdown was. She says she has always been honest.

She talks about the financial stress that the Commission's decision has caused her. She says the Commission misinformed her.[1]

Issue

[8] Was the Appellant available for work while taking full-time non-referred training?

Analysis

[9] The *Employment Insurance Act* (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.[2] Case law gives three things a claimant has to prove to show that they are "available" in this sense.[3] I will look at those factors below.

[10] The Commission decided that the Appellant was disentitled from receiving benefits because she wasn't available for work based on this section of the law.

[11] In addition, the Federal Court of Appeal has said that claimants who are in school full-time are presumed to be unavailable for work.[4] 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 full-time.

[12] I will start by looking at whether I can presume that the Appellant wasn't available for work. Then, I will look at section 18(1)(a) of the law on availability.

Presuming full-time students aren't available for work

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

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[1] See GD3-31 to GD3-35.
[2] See section 18(1)(a) of the *Employment Insurance Act*.
[3] See *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96.
[4] See *Canada (Attorney General) v Cyrenne*, 2010 FCA 349.

– The Appellant doesn't dispute that she is a full-time student

[14] The Appellant acknowledges that she was a full-time student during the fall 2020 and winter 2021 university terms, and there is no evidence that this wasn't the case. So, I accept that the Appellant was in school full-time during these two university terms.

[15] So, the presumption of non-availability applies to the Appellant.

– The Appellant is a full-time student

[16] 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 is rebutted, it doesn't apply.

[17] There are two ways the Appellant can rebut the presumption. She can show that she has a history of working full-time while also in school.[5] Or, she can show that there are exceptional circumstances in her case.[6]

– The Appellant's work history while in school full-time

[18] To give details about her work history while in school, the Appellant submitted letters that summarize her school history during the period she worked for her former employer since September 2016.[7] Also, at the hearing, the Appellant testified that she had been working about 16 hours per week since the start of that job. The relevant periods for the file are the following:

- Fall 2016: part-time training, about 16 hours of work per week
- Fall 2017 and winter 2018: full-time training, about 16 hours of work per week
- Winter 2019 and fall 2019: part-time training, about 16 hours of work per week

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[5] See *Canada (Attorney General) v Rideout*, 2004 FCA 304.
[6] See *Canada (Attorney General) v Cyrenne*, 2010 FCA 349.
[7] GD11-1 and GD11-2; RGD-1 and RGD-2.

- Periods in dispute: fall 2020 term and winter 2021 term: full-time master's degree in management. During these two terms, the Appellant worked for only two weeks, 8 hours per week, for a total of 16 hours over two full terms.

[19] Based on this information, I find that most of the Appellant's training was part-time (fall 2016, winter 2019, and fall 2019). I can't use the part-time training history to rebut the presumption of non-availability for full-time students.

[20] The Appellant says that she worked 16 hours per week during her full-time studies for the fall 2017 and winter 2018 terms (during her bachelor of physical therapy program). I note that this history of working part-time while studying full-time isn't preponderant, since it is only two terms out of a total of five documented terms (I am not counting the full-time training in the fall 2020 and winter 2021 terms, since they form part of this dispute, a history that has to be proven before the facts in dispute). Also, the Appellant was only studying part-time during the most recent history, for the period just before the facts in dispute during the winter 2019 and fall 2019 terms. Finally, I can't find a period in the history when the Appellant worked full-time while in school full-time.

– **The Appellant wasn't willing to give up her full-time studies**

[21] A recent Federal Court of Appeal decision says that a contextual analysis is needed when determining whether the presumption of non-availability for full-time students is rebutted.[8] A claimant's willingness to give up their studies to accept a suitable job is a relevant consideration in determining whether the presumption applies.

[22] On this point, the file shows the following:

- In her initial claim for benefits, the Appellant indicated that she would only accept a full-time job if she could delay the start date to finish her program.[9]

- On January 18, 2021, the Appellant completed a second training questionnaire, in which she stated, contradictorily, that she was prepared to

[8] *Page v Canada (Attorney General)*, 2023 FCA 169.
[9] See GD3-9.

change her course schedule to accept a full-time job that would not be compatible with her courses.[10] But, she also wrote that she must attend her classes according to a specific schedule. Also, she noted that she can change her courses only during a certain time. After a deadline, she has to drop her courses. So, despite her statement of intent, the university's policy doesn't allow her to change her course hours so that she can accept a full-time job, except within a short period of time after the start of the school term.

- On February 7, 2022, in a telephone conversation with the Commission, the Appellant said that, for the two terms in dispute, she would have refused a job if there had been a conflict between her schedule and her full-time classes.[11]

[23] In an additional document[12] and at the hearing, the Appellant explained to me that, despite her statements above, she simply could have not attended classes, despite the university itself mentioning [translation] "mandatory attendance." She told me that all the materials were online, that class attendance was strongly recommended, but that there were no formal consequences of not attending classes and only taking classes with the materials available online.

[24] I don't accept this explanation. The intention to go back to work to find a suitable job has to be present during the period in dispute—during the fall 2020 and winter 2021 terms. Instead, the Appellant's justification today that she could have not attended classes in person, despite the university itself mentioning attendance, is a *post facto* excuse. Instead, the file shows that the Appellant was unwilling to give up her courses to go back to work and get a suitable full-time job. The argument that she **could have** gone back to work by taking her courses online can't change the Appellant's intention not to drop her courses at the time of the facts in dispute.

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[10] See GD3-21.
[11] See GD3-24.
[12] See RGD-1 to RGD-3.

– **The Appellant didn't look for a job and was passively waiting for her employer to call her back**

[25] In addition, recent case law from the Federal Court of Appeal[13] confirms that a factor for a relevant contextual analysis is a job search.

[26] An analysis of the file shows the following:

- In her initial claim, the Appellant said that she hadn't been looking for a job since the start of her course, since she already had a job.[14]
- On her January 18, 2021, questionnaire, the Appellant also indicated that she wasn't making efforts to find a job because she already had a job but that her employer was temporarily closed because of COVID-19.[15]
- In a conversation with the Commission on February 7, 2022, the Appellant confirmed that, for the two terms in dispute, she wasn't prepared to look for a job elsewhere, since she was simply waiting for her employer to reopen so that it could call her back.[16]
- Upon reconsideration, the Appellant told the Commission that, despite the fact that her employer was closed during COVID-19, she was still available for work while waiting for her employer to call her back.[17]
- As a first reconsideration argument,[18] the Appellant says that it wasn't her training that was a barrier to her job search and to working, but rather COVID-19. She says that she found a job in May 2021. I note that this period isn't in dispute in this case.

[13] *Page v Canada (Attorney General)*, 2023 FCA 169.
[14] See GD3-9.
[15] GD3-19 to GD3-23.
[16] See GD3-24.
[17] See GD3-36.
[18] See GD3-33.

- In her supplementary documentation,[19] the Appellant submitted documents that she says show she made efforts to find a suitable job while attending university full-time. An analysis of the documentation indicates that:

    - For G5-10 and GD5-11: The conversations don't show that a suitable job was available at that time. In fact, the Appellant is talking about an interview for future certified human resource consultants. Also, the Appellant wrote that she didn't really have the skills and experience needed to apply in this field, so she applied for entry-level positions as a compensation intern.[20] These documents don't show that the potential job was supposed to start during her full-time university term. Instead, this document shows that the Appellant applied for an internship during the summer, when she was no longer a full-time student and had to take only one university course.

    - GD5-12 is an interview for an internship during the summer. The Appellant testified that she only took one course during the summer 2021 term, and that she started that internship on May 17, 2021, after the period in dispute. Again, this document suggests that the Appellant wanted to work full-time only during the summer, when she was no longer a full-time student.

[27] After analyzing the entire file, I find that the Appellant hasn't proven that she made efforts to find a suitable job while in school full-time. Instead, the efforts made confirm the Commission's position that the Appellant was interested in working full-time only during the summer period when she was no longer a full-time student.

[28] So, I find that the Appellant hasn't rebutted the presumption that she was unavailable for work during her full-time non-referred studies.

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[19] See GD5 and GD7.
[20] See GD5-4.

– The presumption isn't rebutted

[29] To date, the Federal Court of Appeal hasn't yet told us how the presumption and the sections of the law dealing with availability relate to each other. Because this is unclear, I am going to continue on to decide the sections of the law dealing with availability, even though I have already found that the Appellant is presumed to be unavailable.

Capable of and available for work

[30] I have to consider whether the Appellant was capable of and available for work but unable to find a suitable job.[21] Case law sets out three factors for me to consider when deciding this. The Appellant has to prove the following three things:[22]

a) She wanted to go back to work as soon as a suitable job was available.

b) She made efforts to find a suitable job.

c) She didn't set personal conditions that might have unduly (in other words, overly) limited her 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.[23]

– Wanting to go back to work

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

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[21] See section 18(1)(a) of the Act.
[22] 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.
[23] See *Canada (Attorney General) v Whiffen*, A-1472-92; and *Carpentier v Canada (Attorney General)*, A-474-97.

[33] During the fall 2020 term, the Appellant made no effort to find a job, she only waited for her employer to call her back. Her own conduct doesn't show that she wanted to go back to work for a suitable job.

[34] During the winter 2021 term, and as already analyzed, the Appellant started looking for a summer internship. During the summer, she had only one course, so she wasn't a full-time student. Again, the Appellant's conduct during the winter 2021 term doesn't show her intention to go back to work for a suitable job.

[35] In addition, the Appellant told the Commission that she was prepared to work a maximum of 20 hours per week during the fall 2020 and winter 2021 terms.[24] Yet, the Appellant had no medical restrictions that prevented her from working full-time during the terms in dispute. This restriction shows that the Appellant didn't want to find a suitable full-time job.

[36] I find that the Appellant hasn't shown that she wanted to go back to work to find any suitable full-time job during the fall 2020 and winter 2021 terms.

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

[37] The Appellant didn't make efforts to find a suitable job while in school full-time.

[38] To be entitled to EI benefits, the Appellant had to be willing to accept any suitable job, including a suitable full-time job. She had to be proactive and take steps to that end. Waiting for her employer to call back isn't enough to meet this requirement.

[39] To help me decide this second factor, I have considered the job search activities listed in section 9.001 of the *Employment Insurance Regulations*. These activities are for guidance only in deciding this factor.[25]

[40] As discussed above, the networking evidence the Appellant submitted shows that she wanted to find a job in her field of study during the summer of 2021, when she

[24] See GD3-24.
[25] 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.

was no longer a full-time student. This evidence is related to a potential suitable job that would have started after the period in dispute.

[41] So, I find that the Appellant's efforts weren't enough to meet the requirements of this second factor.

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

[42] The Appellant set personal conditions that unduly limited her chances of going back to work.

[43] First, she limited her hours of availability to 20 hours per week, without good cause, other than having to study full-time. EI isn't a student support program, and the Appellant had to make daily efforts to find a full-time job as quickly as possible, which she didn't do.

[44] Second, the Appellant imposing restrictions on the type of work she wanted to do. For the fall 2020 and winter 2021 terms, she was limiting herself to waiting for her employer, a gym, to call her back.

[45] I find that the Appellant set personal conditions that unduly limited her 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 hasn't shown that she was capable of and available for work but unable to find a suitable job.

Conclusion

[47] The Appellant hasn't shown that she was available for work within the meaning of the law. Because of this, I find that she can't receive EI benefits from October 5, 2020, to December 21, 2020, or from January 7, 2021, to April 28, 2021.

[48] This means that the appeal is dismissed.

Guillaume Brien

Member, General Division – Employment Insurance Section