[TRANSLATION]

Citation: *LK v Canada Employment Insurance Commission*, 2023 SST 1722

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	L. K.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (0) dated July 6, 2023 (issued by Service Canada)

Tribunal member:	Manon Sauvé
Type of hearing:	Videoconference
Hearing date:	October 24, 2023
Hearing participant:	Appellant
Decision date:	November 15, 2023
File number:	GE-23-1917

Decision

[1] The appeal is allowed.

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

Overview

[3] The Appellant is a student who works in restaurants while in school. She lost her job because of the COVID-19 pandemic. She received the Canada Emergency Response Benefit (CERB) in the spring of 2020. In September 2020, the CERB was converted to the Employment Insurance Emergency Response Benefit (EI ERB).

[4] The Appellant completed her application for benefits, indicating that she was a full-time student. She was looking for a job in her field that allowed her to attend university like she did before the pandemic.

[5] The Government of Canada changed the EI rules during the pandemic. The Commission relaxed the EI eligibility process to allow Canadians to get EI benefits quickly. However, it retained the right to reconsider its decisions.

[6] This is what happened in the Appellant's case. The Commission paid her benefits, even though it knew that the Appellant was attending university. In February 2022, the Commission decided that the Appellant wasn't available from September 27, 2020, because she was a full-time student. The Commission upheld its decision on reconsideration.

[7] The Appellant disagrees with the Commission's decision. She could have worked if it hadn't been for the pandemic. She also made efforts to find a job in her field or in a retail store, but employers favoured their employees.

Matter I have to consider first

[8] This appeal was the subject of an initial decision by the General Division. The Tribunal member found that the Commission didn't exercise its discretion judicially when it decided to reconsider its decision to grant benefits to the Appellant while she was a full-time student.

[9] The Commission filed a notice of appeal with the Tribunal's Appeal Division. The Commission argued that it exercised its discretion judicially. The Appeal Division decided in the Commission's favour. This meant that the Commission could reconsider the decision to grant benefits to the Appellant, and it did so correctly.

[10] However, the main question remained: Was the Appellant available for work while she was a full-time student? The Appeal Division returned the file to the General Division to answer this question. Hence this decision.

Issue

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

Analysis

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

[13] First, the *Employment Insurance Act* (Act) says that you have to prove that you are making "reasonable and customary efforts" to find a suitable job.[1] The *Employment Insurance Regulations* (Regulations) give criteria that help explain what "reasonable and customary efforts" mean.[2] I will look at those criteria below.

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[1] See section 50(8) of *the Employment Insurance Act* (Act).
[2] See section 9.001 of *the Employment Insurance Regulations* (Regulations).

[14] 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.[3] Case law gives three things a claimant has to prove to show that they are "available" in this sense.[4] I will look at those factors below.

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

[16] In addition, the Federal Court of Appeal has said that claimants who are in school full-time are presumed to be unavailable for work.[5] 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.

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

Presuming full-time students aren't available for work

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

[19] The Appellant agrees that she is a full-time student, and I see no evidence that shows otherwise. So, I accept that the Appellant is in school full-time. The presumption applies to the Appellant.

[20] 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.

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

[21] There are two ways the Appellant can rebut the presumption. She can show that she has a history of working while also in school.[6] Or, she can show that there are exceptional circumstances in her case.[7]

[22] I note that the Appellant was attending university for 15 hours of classes per term while also working part-time. She has always worked in restaurants while in school.

[23] In the summer of 2020, restaurants closed due to the COVID-19 pandemic. She lost her job and applied for the CERB. In the fall of 2020, the CERB was converted to the EI ERB.

[24] So, the Appellant completed her claims for the EI ERB indicating that she was attending university full-time, that she was available for work, that she intended to go back to her employer, and that she would accept a job if she could delay the date for completing her courses. She also indicated that she was making efforts to find a job.

[25] Concerning her course attendance, the Appellant explained that the situation changed during the pandemic. There was an initial break in classes. Later, in the fall of 2020 and winter of 2020, classes were held by videoconference and asynchronously.[8] She was available for work.

[26] Also, the Appellant has always worked in restaurants while studying full-time.

[27] She argues that she would have been available for a suitable job—that is, a job like the one she normally does.

[28] For its part, the Commission finds that the Appellant hasn't rebutted the presumption that she is unavailable for work. It considered the following criteria that case law has determined:[9]

- the attendance requirements of the course

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[6] See *Canada (Attorney General) v Rideout*, 2004 FCA 304.
[7] See *Canada (Attorney General) v Cyrenne*, 2010 FCA 349.
[8] The student has access to their training on a deferred basis.
[9] See *Canada (Attorney General) v Lamonde*, 2006 FCA 44; *Canada (Attorney General) v Loder*, 2004 FCA 18; and *Page v Canada (Attorney General)*, 2023 FCA 169 at para 32.

- the Appellant's willingness to give up her studies to accept a job
- whether the Appellant has a history of working irregular hours
- the existence of exceptional circumstances that would allow the Appellant to work while taking her course

[29] This meant that the Appellant was taking training full-time on her own initiative, she was required to attend her classes, she was limiting her available hours to attend her classes, and she would not have dropped her studies to accept a job.

[30] After reviewing the record, considering the evidence and the parties' arguments, I am of the view that the Appellant has rebutted the presumption of non-availability while she was in school full-time.

[31] In making my finding, I considered that she had a history of working while in school full-time. The type of job she had was always in restaurants.

[32] Also, the Appellant wasn't required to attend her classes in-person because of the pandemic. She had access to the training by videoconference and recordings. She could have worked at the same time as she was taking her courses without any problem. The Appellant would have returned to work if businesses and restaurants had resumed their operations. She waited for a while for restaurants to reopen.

[33] Rebutting the presumption 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 in this case and decide whether the Appellant is actually available.

Reasonable and customary efforts to find a job

[34] 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.[10]

[10] See section 50(8) of the Act.

[35] The law sets out criteria for me to consider when deciding whether a claimant's efforts were reasonable and customary.[11] I have to look at whether these 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.

[36] 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 are the following:[12]

- assessing employment opportunities
- registering for job-search tools or with online job banks or employment agencies
- attending job-search workshops or job fairs
- contacting employers who may be hiring

[37] The Commission says that the Appellant didn't do enough to try to find a job. The Appellant was waiting for her employer to call her back, she registered on only one job-search website, she preferred to take her courses.

[38] The Commission accepted the Appellant's spontaneous statements rather than later statements when she understood the consequences of her answers.

[39] The Appellant says that she looked for a job. She was met with negative responses from restaurants and retail stores. Employers kept their regular staff and performed their work with a reduced staff.

[40] After considering the Appellant's testimony, the evidence on file, and the arguments, I disagree with the Commission. I find that the Appellant made reasonable and customary efforts to find a suitable job.

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[11] See section 9.001 of the Regulations.
[12] See section 9.001 of the Regulations.

[41] At first, she thought restaurants would reopen. This was a temporary measure, but it was extended. She didn't look for work at that time because she thought the measure would end and she would work for the restaurant again.

[42] I give more weight to the Appellant's testimony at the hearing than to the information the Commission gathered during its investigation.

[43] The Appellant provided a list of employers she contacted to find a job. Given the health measures in place, I am of the view that these efforts were "reasonable and customary" in the circumstances. She also registered with job-search websites. This is one of the factors for determining whether the Appellant made efforts to find a suitable job which, in my view, is a job in a restaurant with variable hours.[13] This isn't negligible or inconsequential for determining her efforts, as the Commission alleges. This is part of the list of factors for showing that you are looking for a job.

[44] The Appellant has proven that her efforts to find a job were reasonable and customary.

Capable of and available for work

[45] Case law sets out three factors for me to consider when deciding whether the Appellant was capable of and available for work but unable to find a suitable job.[14] The Appellant has to prove the following three things:[15]

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

b) She has 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.

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[14] See section 18(1)(a) of the Act.

[15] 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.

[46] When I consider each of these factors, I have to look at the Appellant's attitude and conduct.[16]

– **Wanting to go back to work**

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

[48] The Appellant said that she wanted a job in a restaurant or retail store. She was looking for a job like the one she had before she was laid off. In her case, a job in a restaurant that offered more than 20 hours per week is a suitable job because she has always had this type of job.

[49] The Appellant went back to work in May 2021. She reported her income to the Commission. In my view, this also shows her desire to go back to work, since she got a job.

[50] I disagree with the Commission's argument that the Appellant wasn't available because she works part-time. The law doesn't require a person to work full-time, but to be available for work. The Appellant was not only available, but she started working on May 16, 2021.

[51] In *Page*,[17] the Court recalled that it takes into account what a suitable job means to the Appellant. Based on the characteristics set out in the Act to describe what is meant by not suitable employment, I am of the view that suitable employment includes employment of the same type (for example, nature of the employment, earnings, and conditions of employment) as that performed by the Appellant in her usual occupation.[18]

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[16] See *Canada (Attorney General) v Whiffen*, A-1472-92; and *Carpentier v Canada (Attorney General)*, A-474-97.
[17] See *Page v Canada (Attorney General)*, 2023 FCA 169.
[18] See section 6 of the Act for what isn't suitable employment; and section 9.002 of the Regulations.

– Making efforts to find a suitable job

[52] I have considered the list of job-search activities given above in deciding this second factor. For this factor, that list is for guidance only.[19]

[53] As noted above, the Appellant's efforts to find a job included registering on websites, sending applications to employers, and looking in the restaurant and retail industries.

[54] Those efforts were enough to meet the requirements of this second factor. They are related to a suitable job for the Appellant, they take her abilities into account, and she even expanded her search to retail stores, contrary to the Commission's claims.

– Unduly limiting chances of going back to work

[55] I find that the Appellant didn't set personal conditions that might have unduly limited her chances of going back to work. In coming to this conclusion, I considered the Appellant's credible and plausible explanations for the information she gave the Commission in her claims for benefits. For example, in the fall of 2020 and winter of 2021, the university changed the teaching formula because of the COVID-19 pandemic.

[56] As a result, there were no in-person classes, but videoconference or asynchronous classes. So, she was available to look for a job. She wasn't limited by her studies, as the Commission argues.

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

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

Conclusion

[58] The appeal is allowed.

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[19] 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.

[59] The Appellant has shown that she 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, she may be entitled to benefits.

Manon Sauvé
Member, General Division – Employment Insurance Section