[TRANSLATION]

Citation: *CC v Canada Employment Insurance Commission*, 2023 SST 1723

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	C. C.
Representative:	Jérémie Dhavernas
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (485469) dated May 20, 2022 (issued by Service Canada)

Tribunal member:	Guillaume Brien
Type of hearing:	Videoconference
Hearing date:	November 9, 2023
Hearing participants:	Appellant Appellant's representative
Decision date:	November 20, 2023
File number:	GE-23-1826

Decision

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

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

Overview

[3] The file before me is a referral from the Appeal Division (AD) of the Social Security Tribunal of Canada (Tribunal) to the General Division (GD) of the Tribunal.

[4] In a June 30, 2023, decision, the AD returned this file to the GD so that it could decide the following issue: Has the Appellant shown his availability for work during the relevant periods?

[5] The Canada Employment Insurance Commission (Commission) decided that the Appellant is disentitled from receiving EI regular benefits for the period from **January 18, 2021, to April 30**, **2021** (winter 2021 university term), and for the period from **September 01, 2021, to January 14, 2022** (fall 2021 university term), because he wasn't available for work. The Appellant had to be available for work to get EI regular benefits. Availability is an ongoing requirement. This means that the Appellant has to be searching for a job.

[6] 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.

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

[8] The Appellant disagrees. In his request for reconsideration, he says that he lost his job when his contract ended on January 17, 2021. He says that he then looked at the Service Canada website to verify his EI eligibility. He says he contacted a Service Canada agent by phone in mid-January 2021 and the agent never told him he wasn't

entitled to EI. The Appellant then went back to work in the summer of 2021. He says he contacted another Service Canada agent around August 2021. The Appellant says that this was clearly an error made by Service Canada agents. He says that he answered all the questions correctly, so it is clearly unfair that he has an amount to pay back.

Issue

[9] Was the Appellant available for work while in school full-time?

Analysis

[10] Two different sections of the law require the Appellant to show that he was 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.

[11] First, the *Employment Insurance Act* (Act) says that a claimant has to prove that they 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.

[12] Second, the Act also says that the Appellant has to prove that he is "capable of and available for work" but isn't able to find a suitable job.[3] Case law gives three things the Appellant has to prove to show that he is "available" in this sense.[4] I will look at those factors below.

[13] 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.

[14] 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

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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).
[3] See section 18(1)(a) of 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.

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 the two sections of the law on availability.

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.

– The Appellant doesn’t dispute that he is a full-time student

[17] The Appellant acknowledges that he was a full-time student during the winter 2021 and fall 2021 university terms, and I see no evidence that shows otherwise. So, I accept that the Appellant was in school full-time.

[18] So, the presumption applies to the Appellant.

- The Appellant was a full-time student

[19] The Appellant was a full-time student. But the presumption that full-time students aren’t available for work can be rebutted. If the presumption were rebutted, it would not apply.

– The Appellant has never worked full-time while in school

[20] At the hearing, the Appellant confirmed to me that he had never worked full-time when he was in school full-time. I see no evidence that shows otherwise.

[21] So, I accept that the Appellant never worked full-time while in school.

[22] But at the hearing, the representative explained that the presumption of non-availability can be rebutted when a student has a long history of working part-time during full-time studies.

[23] Recent case law from the Federal Court of Appeal[6] (*Page*) says that full-time students aren't systematically disentitled from receiving EI benefits. According to that judgment:

- A claimant can rebut the presumption that full-time students aren't available for work. It is a question of fact.
- A contextual analysis is required to ascertain whether the presumption is rebutted. For example, the presumption was rebutted in the case of a claimant who was willing to give up their studies to accept a job, or who had shown that they had regularly held a job while studying full-time and was looking for one that offered the possibility of working a schedule like their previous job. The FCA says that other considerations may be relevant, including the possibility that a claimant could attend their classes online at times convenient to them.

– **The Appellant wasn't willing to give up his classes**

[24] At the hearing, the Appellant testified that he would not have been willing to give up his studies to accept a job.

[25] But he says that he regularly worked while in school full-time, and that he was looking for a job that offered the possibility of working a schedule like his previous job.

– **Employment history while in school full-time**

[26] The Records of Employment (ROEs) the Appellant submitted show the following employment history:

i. August 20, 2016, to December 31, 2018: Service clerk, 917 insurable hours of employment[7]

[6] *Page v Canada (Attorney General)*, 2023 FCA 169.
[7] See GD10-24.

ii. June 3, 2019, to August 23, 2019: Summer job (college student), 418 insurable hours[8]

iii. August 26, 2019, to March 14, 2020: Clerk, 290 insurable hours[9]

iv. June 17, 2020, to January 22, 2021: Moderator, 667 insurable hours[10]

v. June 7, 2021, to August 13, 2021: Summer job, 300 insurable hours[11]

vi. April 25, 2022, to July 20, 2022: Summer job, Clerk, 433 insurable hours[12]

vii. June 26, 2022, to July 9, 2022: Summer job, restaurant, 7 insurable hours[13]

[27] So, the evidence on file shows that the Appellant worked the following number of hours while in school full-time:[14]

- Job **(i)**: 917 insurable hours in 123 weeks, which is an average of **7.45 hours per week**. I also note that this average includes summers when the Appellant wasn't a full-time student.

- Job **(ii)**: This job was a summer job that doesn't count in the employment history while in school full-time.

- Job **(iii)**: 290 insurable hours of employment in 28 weeks, which is an average of **10.35 hours per week**.

- Job **(iv)**: 667 insurable hours in 31 weeks, which is an average of **21.5 hours per week**.

[8] See GD10-26.
[9] See GD10-22.
[10] See GD10-18.
[11] See GD10-20.
[12] See GD10-16.
[13] See GD10-14.
[14] See GD10-1 to GD10-27.

- Job **(v)**: This job was a summer job that doesn't count in the employment history while in school full-time.

- Jobs **(vi)** and **(vii)** are after the periods in dispute and are summer jobs. This means that they don't count in this calculation.

[28] So, I find that from August 20, 2016, to January 22, 2021, the Appellant was able to show an average work history, during his full-time studies, of only about **13 hours per week** ((7.45 h + 10.35 h + 21.5 h) / 3). Even though some ROEs may be missing (for example, the Appellant told me at the hearing that he worked as a homework helper but wasn't sure he had an ROE for that), the missing ROEs can't fundamentally change this average calculation in a way that could change this decision.

[29] Based on the evidence on file, the Appellant has proven a history of working about 13.5 hours per week during full-time studies.

[30] The Tribunal says it is clear that the Appellant could not have supported himself without the financial support of his family with an average of only 13.5 hours worked per week while in school full-time. EI is insurance for people who hold a suitable job, and it can't be used to subsidize full-time students. There are loan and grant programs for that. There is no reason it would have been **suitable** for the Appellant to work only 13.5 hours per week when he was a young university student. A job of 13.5 hours per week that isn't enough to pay the Appellant's basic costs is simply not enough to be a suitable job for the Appellant under the law.

[31] So, I find that the Appellant's employment history while in school full-time isn't enough to establish that he regularly had a suitable job while in school full-time. The Appellant was clearly a student who was working, not a worker who was studying. The EI program isn't a loan and bursary program and is designed for actual job seekers, among other things.

– **Looking for a job with a schedule like his previous job**

[32] In *Page*, the FCA says that the presumption of non-availability has already been rebutted when it is shown that a student had regularly held a job while studying full-time and was looking for one that offered the possibility of working a schedule like their previous job.

[33] I have already found that the Appellant's employment history was insufficient to establish that he had a suitable job for a significant period while in school full-time.

[34] Even so, I will now look at the Appellant's efforts to look for a job with a schedule like his previous job.

[35] According to the ROE in the file, the job before the Appellant's EI claims was as a facilitator. The Appellant held this job from June 17, 2020, to January 22, 2021, for 667 insurable hours of employment in 31 weeks, which is an average of 21.5 insurable hours per week.

[36] Before the hearing, the Appellant submitted evidence of job search efforts for the periods in dispute, from January 18, 2021, to April 30, 2021, and from September 01, 2021, to January 14, 2022. These documents show that the Appellant:

- applied on October 15, 2021, for a job as a ticket office and boutique attendant[15]
- applied for a job as a bookstore clerk on October 15, 2021[16]
- applied for a part-time job as a reception worker on October 15, 2021[17]

[37] In addition to these three applications, all submitted the same day one minute apart from each other (between 4:56 p.m. and 4:57 p.m.), the Appellant submitted

[15] See RGD3-3.
[16] See RGD3-4.
[17] See RGD3-5.

[translation] “Job Search Record – Winter 2021” and [translation] “Job Search Record – Fall 2021.”[18]

[38] The record for the winter 2021 term (starting in January 2021) shows that it was only during the week of April 18 to April 24, 2021, when the university term was ending, that the Appellant submitted six applications for summer jobs. He then got a summer job from June 7, 2021, to August 13, 2021. [Translation] “Indeed email alerts” and [translation] “newsletter reception” are just passive searches that aren’t enough to demonstrate active and daily job searches.

[39] I find that the Appellant hasn’t proven that he made enough efforts to find a job during the winter 2021 term. He submitted six applications, all in the same week, while the university term was ending. This shows that the Appellant wanted to work during the summer after his university term and not during his university term. Otherwise, the Appellant would have done an actual, frequent, and sustained job search during the winter 2021 university term.

[40] The record for the fall 2021 term (early September 2021) lists three applications sent on October 15, 2021, in addition to [translation] “Indeed email alerts” and [translation] “newsletter reception.” A passive subscription to email alerts and a newsletter isn’t enough to show active and daily job searches. I note that the Appellant submitted only three applications during the entire fall 2021 term.

[41] Again, I find that the Appellant hasn’t proven that he made enough efforts to find a job during the fall 2021 term. His brief job search doesn’t show a desire to go back to work as quickly as possible during the fall 2021 academic term.

[42] Finally, I note that, at the hearing, the Appellant told me that classes were asynchronous for the winter 2021 term, and that classes were recorded for the fall 2021 term. He tells me that this would have made it possible for him to find a job and attend classes at home in the evening. In any event, since the Appellant didn’t make enough

[18] See RGD3-21 to RGD3-25.

efforts to find a suitable job during the two university terms in dispute, the fact that he could have worked during school days isn't relevant and doesn't change anything. The Act requires a claimant to show concrete and sustained efforts to find a suitable job to prove their availability, which the Appellant hasn't done.

– The presumption isn't rebutted

[43] After analyzing the Appellant's work history, and after considering his efforts to find a job during the two university terms in dispute, I find that the Appellant has failed to rebut the presumption that full-time students aren't available.

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

Reasonable and customary efforts to find a job

[45] 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.[19]

[46] The law sets out criteria for me to consider when deciding whether the Appellant's efforts were reasonable and customary.[20] 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.

[47] I also have to consider the Appellant's efforts to find a job. The Regulations list nine job search activities I have to consider.[21]

[48] The Commission says that the Appellant didn't do enough to find a job. Subscribing to a newsletter and to Indeed alerts are insufficient passive efforts when there are no concrete job applications to go along with them. The Appellant submitted

[19] See section 50(8) of the Act.
[20] See section 9.001 of the Regulations.
[21] See section 9.001 of the Regulations.

only six applications at the very end of the winter 2021 term to find a summer job. He only applied for three jobs in the fall 2021 term.

[49] The Appellant hasn't proven that he made sustained reasonable and customary efforts to find a suitable job as quickly as possible. He also hasn't proven that working 13.5 hours per week would have been suitable for him.

Capable of and available for work

[50] I also have to consider whether the Claimant was capable of and available for work but unable to find a suitable job.[22] Case law sets out three factors for me to consider when deciding this. The Claimant has to prove the following three things.[23]

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 limited his chances of going back to work.

[51] When I look at each of these factors, I have to consider the Appellant's attitude and conduct.[24]

– Wanting to go back to work

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

[53] During the winter 2021 term, the Appellant waited until the very end of the university term before sending six applications for summer jobs (applications sent from April 19 to April 21, 2021, only).

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

[54] During the fall 2021 term, the Appellant submitted only three applications, all submitted on the same day, October 15, and one minute apart from each other.

[55] So, I find that the Appellant has failed to prove, on a balance of probabilities, that he wanted to go back to work during the winter 2021 and fall 2021 university terms as soon as a suitable job was available.

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

[56] As discussed above, the Appellant hasn't made enough efforts to find a suitable job during the winter 2021 and fall 2021 university terms.

[57] The Appellant's passive efforts—receiving a newsletter and Indeed alerts aren't enough to meet this criterion, which instead requires actual and sustained job search efforts.

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

[58] I also find that the Appellant set personal conditions that might have unduly limited his chances of going back to work.

[59] In addition, the Appellant, who didn't have a university degree at the time, told me that he only wanted to work in the cultural field. But, given the post-pandemic period, there were very few of them, and the Appellant didn't have a diploma that qualified him for these types of jobs. The Appellant had no reason to limit his chances of finding a suitable job by considering only jobs in the cultural field. At the hearing, he told me that he wasn't interested in going back to work in a café. The Appellant's personal choice doesn't have to be covered by Canadian taxpayers.

[60] Also, the Appellant told me that he wanted to find a job, but not for more than 10 to 20 hours, maximum 25 hours per week, given his status as a full-time student during the school year. So, it is clear that the Appellant's studies limited his ability to go back to work and hold a suitable job, which would have been full-time in the case of the Appellant, a healthy young adult. I have already determined that a job of 13.5 hours per

week isn’t a suitable job for the Appellant, since that number of hours isn’t enough for the Appellant to live off that type of job.

[61] I find that the Appellant set personal conditions that might have unduly limited his chances of going back to work during the periods in dispute.

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

[62] Based on my findings on the three factors, I find that the Appellant hasn’t shown that he was capable of and available for work but unable to find a suitable job.

Conclusion

[63] The Appellant hasn’t shown that he was available for work within the meaning of the law. Because of this, I find that he can’t receive EI benefits.

[64] This means that the appeal is dismissed.

Guillaume Brien

Member, General Division – Employment Insurance Section