Citation: *VS v Canada Employment Insurance Commission*, 2022 SST 1528

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	V. S.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (459868) dated March 11, 2022 (issued by Service Canada)

Tribunal member:	Raelene R. Thomas
Type of hearing:	Videoconference
Hearing date:	July 5, 2022
Hearing participant:	Appellant
Decision date:	August 1, 2022
File number:	GE-22-1264

Decision

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

[2] The Claimant has shown that he was available for work while attending college. This means that he is not disentitled from receiving Employment Insurance (EI) benefits he received.

Overview

[3] The Canada Employment Insurance Commission (Commission) decided the Claimant was disentitled from receiving EI regular benefits from September 28, 2020 to April 23, 2021 because it said he wasn't available for work. A claimant has to be available for work to get EI regular benefits. Availability is an ongoing requirement. This means that a claimant has to be searching for a job.

[4] I have to decide whether the Claimant has proven that he was available for work. The Claimant has to prove this on a balance of probabilities. This means he has to show it is more likely than not he was available for work.

[5] The Commission says the Claimant wasn't available because he was taking a training course on his own initiative.

[6] The Claimant disagrees and says he explained many times to Service Canada officers that he was full time student able to work up to 20 hours a week according to his study permit. He completed a training questionnaire that showed his class hours shortly after he applied for EI benefits. He was approved for EI benefits. The Commission had many opportunities to decide not pay him EI benefits and did not do so.

Issue

[7] Was the Claimant available for work while in college from September 28, 2020 to April 23, 2021?

Analysis

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

[9] First, the *Employment Insurance Act* (EI Act) says a claimant has to prove they are making "reasonable and customary efforts" to find a suitable job.[1] The *Employment Insurance Regulations* (EI Regulations) give criteria that help explain what "reasonable and customary efforts" mean.[2]

[10] Second, the EI Act says a claimant has to prove 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.

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

[12] In looking through the evidence in the appeal file, I did not see any requests from the Commission to the Claimant to prove he made reasonable and customary efforts to find a suitable job, or any claims from the Commission that if it did ask the Claimant, his proof was insufficient.

[13] I note the Commission did not make any submissions on how the Claimant failed to prove to it that he was making reasonable and customary efforts. The Commission only summarized what the legislation says in regard to section 50(8) of the EI Act and section 9.001 of the EI Regulations.

[14] Based on the lack of evidence that the Commission asked the Claimant to prove his reasonable and customary efforts under section 50(8) of the EI Act, I find the

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[1] See section 50(8) of the *Employment Insurance Act* (EI Act).
[2] See section 9.001 of the *Employment Insurance Regulations* (EI Regulations).
[3] See section 18(1)(a) of the EI Act.
[4] See *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96. This is how I refer to the courts' decisions that apply to the circumstances of this appeal.

Commission did not disentitle the Claimant under section 50(8) of the EI Act. Therefore, I do not need to consider that part of the law when reaching my decision on this issue.

[15] I will only consider whether the Claimant was capable and available for work under the section 18 of the EI Act.

[16] The Claimant was a student during the period he was disentitled from receiving benefits. The Federal Court of Appeal has said claimants who are in school full-time are presumed to be unavailable for work.[5] This is called a “presumption of non-availability.” It means we can suppose that students aren’t available for work when the evidence shows they are in school full-time.

[17] I have to consider the presumption that claimants who are attending school full-time are unavailable for work.[6] I am going to start by looking at whether this presumption applies to the Claimant. Then, I will look at 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.

– **The Claimant was a full-time student**

[19] The Claimant testified he was a full-time student from September 28, 2020 to December 18, 2020 and from January 11 2021 to April 23, 2021. I see no evidence that shows otherwise. This means the presumption applies for these periods of time. 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.

[20] 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.[7] Or, he can show there are exceptional circumstances in his case.[8]

[5] See *Canada (Attorney General) v Cyrenne*, 2010 FCA 349.
[6] This presumption is set out in *Canada (Attorney General) v. Gagnon*, 2005 FCA 321.
[7] See *Canada (Attorney General) v Rideout*, 2004 FCA 304.
[8] See *Canada (Attorney General) v Cyrenne*, 2010 FCA 349.

[21] The Claimant testified he first applied for EI benefits in September 2020. He had been working while attending school but was laid off in March 2020. He applied for and received Canada Emergency Response Benefits (CERB).

[22] The Claimant testified he looked for work from March 2020 onward. After he applied for EI benefits he looked for work using the job bank and other internet job sites, he also applied for jobs and handed out his resume to prospective employers. The Claimant was successful getting a full time job that began after his studies ended.

[23] The Commission says the Claimant has not rebutted the presumption of non-availability while attending a full-time course because he was not willing to leave his course in order to accept employment. Additionally, it says the Claimant was only available to work outside his class schedule.

[24] The Commission says to rebut the presumption, the Claimant has to show that his main intention is to immediately accept suitable employment as evidenced by job search efforts, that he is prepared to make whatever arrangements may be required or that he is prepared to abandon the course. It says the Claimant must demonstrate by his actions that the course is of secondary importance and does not constitute an obstacle to seeking and accepting suitable employment.

[25] I do not agree with the Commission the Claimant had to show he was available for full-time work while studying; there is no such requirement in the legislation. His obligation was to show he was available for work consistent with his past work history.

[26] I find that the Claimant has rebutted the presumption that he was not available for work because he was a full-time student. The reasons for my finding follow.

[27] The Claimant indicated on the training questionnaire he completed on October 5, 2020 that he was available for work and capable of working under the same or better conditions as he was before he started his course. At the hearing, the Claimant explained that from January 19, 2020 to April 14, 2020 he was required to attend his classes in person Monday to Friday. He worked part-time every day at a store. The employer would schedule his hours around his class times.

[28] In September 2020 when the Claimant returned to school, his classes were mostly on-line. He attended one class in person from 9:00 a.m. to 12:00 p.m. on Tuesday twice during the semester. He had one class from 8:00 a.m. to 10:00 a.m. on Fridays that he attended in person. The remainder of his classes were recorded and he could do those on-line at a time of his choosing.

[29] From January 11, 2021 to April 23, 2021, the Claimant's classes were all recorded and he could do them on-line at a time of his choosing. He attended one class in person from 1:00 p.m. to 3:00 p.m. on Wednesday twice to write an exam. The program required that he complete an internship but due to COVID-19 restrictions the internship was cancelled and he was required to submit a paper instead.

[30] The Claimant testified he was looking for work while he was in school. He signed up for the Job Bank, he looked every day at the Job Bank site and other recruitment websites. He regularly looked at the subway bulletin boards for job ads. He applied for jobs in his area of education and expertise, health care, fast food, retail stores, on-line retail, and he submitted his resume to prospective employers. The Claimant also talked to friends to see if they knew of available work. The Claimant was successful getting full-time employment in September 2021.

[31] The Claimant testified that when he completed the training questionnaire he indicated that he would accept a full time job as long as he could delay the start date to allow him to finish the course/program. The Claimant said he answered this way because he had been working while attending school and would be able to work and continue with his studies. This was because he was not required to attend his classes in person except for four times during the semester. He testified that he did not restrict his availability and he did not tell any potential employers that he had limited availability.

[32] As noted above, case law says the presumption is rebutted when a claimant can show he worked full-time while studying full-time or there are exceptional circumstances. The Claimant has a history of working part-time while studying and attending classes full-time. Previously when he worked he was required to attend all his classes in person. Once he returned to school in September 2020 his in person

attendance was limited to 2 hours a week during the fall semester, no attendance during the winter semester and to write 4 exams in both semseters. The remainder of his studies could be completed at a time of his choosing because they were recorded and on-line. In my opinion, the flexibility of on-line learning is an exceptional circumstance that would allow the Claimant to be available for work under the same or better terms and conditions as he previously worked. He was successful in getting full-time employment in September 2021. Considering this evidence, I find that the Claimant has rebutted the presumption that he is not available for work due to attending school full-time.

[33] 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.

[34] Rebutting the presumption means only that the Claimant isn't presumed to be unavailable. I still have to look at the section of the law that applies in this case and decide whether the Claimant is actually available.

Capable of and available for work

[35] As noted above, I only need to consider whether the Claimant was capable of and available for work under paragraph 18(1)(a) of the EI Act.

[36] Case law sets out three factors for me to consider when deciding this. The Claimant has to prove the following three things:[9]

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

b) He has 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.

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[9] 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.

[37] When I consider each of these factors, I have to look at the Claimant's attitude and conduct.[10]

– **Wanting to go back to work**

[38] The Claimant has shown that he wanted to go back to work as soon as a suitable job was available. The Claimant testified that he needs to work to pay his bills. He is an international student and does not want to depend on his family for support. He likes to work to learn how things work and for the social environment that work provides. He has a degree in a healthcare field from a university in his home country. The degree is credentialed in Canada and he has written the necessary exams to practice in his current province of residence. The Claimant has worked full-time and part-time in the past and is currently working full-time. This evidence tells me the Claimant wanted to go back to work as soon as a suitable job was offered.

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

[39] The Claimant has made enough effort to find a suitable job.

[40] There is a list of job search activities to look at when deciding availability under a different section of the law.[11] This other section does not apply in the Claimant's appeal. But, I am choosing look at that list for guidance to help me decide whether the Claimant made efforts to find a suitable job.[12]

[41] There are nine job search activities in the list of job search activities: assessing employment opportunities, preparing a resume or cover letter, registering for job search tools or with online job banks or employment agencies, attending job search workshops or job fairs, networking, contacting employers who may be hiring, submitting job applications, attending interviews and undergoing evaluations of competencies.[13]

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[10] 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.
[11] Section 9.001 of the EI Regulations, which is for the purposes of subsection 50(8) of the EI Act.
[12] 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.
[13] Section 9.001 of the EI Regulations.

[42] The Claimant's efforts to find a new job included signing up for the job bank to get emails about jobs, applying for jobs through online websites like InDeed, LinkedIn, FaceBook, looking at the college's online job notices and posters in subways, applying for jobs, dropping off his resume to potential employers, applying for jobs at fast food restaurants, retail outlets, on-line outlets, clinics providing health care related to his degree and talking to friends about work opportunities. The Claimant returned to his home country for a period in the spring of 2021. He interviewed for a positon in Canada while he was home and was successful getting full-time work beginning in September 2021.

[43] I am satisfied that the Claimant's job search efforts expressed his desire to return to the labour market as soon as a suitable job was offered.

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

[44] The Claimant has not set personal conditions that might have unduly limited his chances of going back to work.

[45] The Commission says that by prioritising his training over his availability for employment, and restricting his availability for employment to hours outside his class schedule the Claimant placed a personal restriction that could have limited his chances of finding suitable employment.

[46] The Claimant is an international student with a study permit in effect from December 29, 2019 to September 30, 2021. The study permit has one condition: 1) Not valid for employment in businesses related to the sex trade such as strip clubs, massage parlors or escort services. Under the comments section it states: May accept employment on or off campus if meeting eligibility criteria as per R186(F), (V) or (W) Must cease working if no longer meeting these criteria. "R" stands for Immigration and Refugee Protection Regulations (SOR/2002-227).

[47] The Commission has not made any submissions on the Claimant's study permit or his work permit.

[48] Regulation 186 of the Immigration and Refugee Protection Regulations has 26 paragraphs. The use of the word "or" between the second last paragraph and the last paragraph means that a person may be subject to more than one paragraph but those regulations are not applied together to create a broader restriction than that which exists in the individual paragraphs.

[49] In my opinion, the Claimant could work on or off campus for any number of hours provided he held a valid study permit. His study permit did not restrict his hours of work on or off campus. The preamble in Regulation 186 says a foreign national may work in Canada without a work permit. Taking the preamble together with Regulation 186(f) which says, if a person is a full-time student, on the campus of the university or college at which they are a full-time student, for the period for which they hold a study permit at that university or college means there is no limit on the number of hours a full-time student who holds a study permit may work on their campus.

[50] As a result, I find that the Claimant's study permit was not a personal restriction that might limit his return to the labour market.

[48] The Claimant testified he has access to transportation to go to work and has a driver's license, and is willing to commute to go to work. He looked for work that was consistent with his experience in retail, fast food restaurants and in healthcare. He expected to earn minimum wage. There are no jobs that he could not do due to moral convictions or religious beliefs. He is willing to accept a job that might require on the job training.

[49] Although I am not bound to follow a Canada Umpire Benefits (CUB) decision, I consider the reasoning in CUB 52365 to be persuasive. In that case, the claimant left her job to take a course that left her with the ability to work from 6:00 to 10:00 each day, six days of the week for a total of 24 hours. The Umpire considered that it was significant that the claimant's current availability while in school was not less than it had been when the claimant had been working. The Umpire stated that the facts supported that the claimant would be available for work as much as she was previously where her

employment consisted of 20 hours. He determined the claimant had proven she was available for work.

[50] The Claimant, in this case, testified that he is able to work for 20 hours a week under the terms of his study permit. He had been working in retail off campus outside of his class hours when he was required to attend classes in person. From September 28, 2020 to April 23, 2021 the amount of time he was required to attend classes in person was negligible due to the fact that all but one of his classes were recorded and available on line he could view the classes and study at times of his choosing. In my opinion, this means the Claimant was as available for work as much as he was previously while attending school. As a result, I find that the Claimant's studies did not limit his chances of going back to work during those periods.

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

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

Other Matters

[52] The Commission established the Claimant's claim for EI benefits effective September 27, 2020. He was paid EI benefits from that date to April 23, 2021. On February 3, 2022 the Commission contacted the Claimant to discuss his availability for work from September 27, 2020 to April 23, 2021. On February 4, 2022 the Commission decided the Claimant was not available for work during this period because he was taking a training course on his own initiative and had not proven his availability for work. The decision meant the Claimant was required to repay $14,969 of EI benefits.

[53] The appeal file shows that on November 4, 2020 the Commission advised the Claimant that it added the dates of the Claimant's training from September 27, 2020 to April 24, 2021 to his claim. It also made a decision "Claim Finalized" on that date. I asked the Commission to provide any records associated with adding the dates of training and the decision making process used to finalized his claim.

[54] The Commission responded that no decision was rendered on November 4, 2020, but an automated decision was rendered on October 5, 2020 regarding the Claimant's training. It noted that at the time the Claimant submitted his on-line Training Questionnaire on October 5, 2020 all decisions regarding training were being automatically rendered and approved, in order to facilitate expedited processing of claims, given the need of the Canadian public during unprecedented circumstances. The Commission said that the automatic processing of claims in no way relieved claimants of their rights and responsibilities agreed to as part of the application process.

[55] The Commission provided a copy of record of a conversation the Claimant had with a Service Canada officer on November 2, 2020 where the Claimant provided his class schedule and his available hours of work.

[56] The Commission provided a Record of Decision (ROD) which is headed with the "Issue: Training" and "Submitted on October 5, 2020."

Rationale: Based on the information on file, the Level 1 criteria to allow non-referred training have been met (National Policy on Levels of Decision).

References EIA 18, National Policy on Levels of Decision.

Decision: Non-referred training from January 6, 2020 to April 23, 2021
Allowed – availability in order

This decision was made in compliance with current legislation and policy

[check mark] I agree

[57] The Tribunal's Appeal Division has said that when a Claimant is retroactively disentitled from receiving EI benefits with no change to their circumstances, as is the case here, I must ask the Commission for submissions on the following:[14]

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[14] See *GP v. Canada Employment Insurance Commission*, 2021 SST 791

i) Does the Commission have the authority to retroactively disentitle a claimant when the facts used to determine their entitlement and pay them benefits have not changed?

ii) If so, is the Commission required to act judicially when deciding to reconsider such claims?

iii) If so, did the Commission act judicially in this case?

[58] The Commission replied that under section 153.161(2) of the EI Act, the Commission has the authority, and the responsibility to verify that a claimant meets the legal test for availability while attending non-referred training, even after benefits have been paid. It says that the requirement of 153.161(2) is not a discretionary power of the Commission, and as such, there is no requirement or responsibility for the Commission to act judicially in its application. Instead, the Commission says, it is obligated, when learning that claimant cannot meet the legal test for availability while attending non-referred training, to impose a retroactive entitlement if necessary.

[59] I note that in response to the COVID-19 pandemic, Parliament made a number of changes to the EI Act to facilitate access to EI benefits. Under Interim Order No. 10, the EI Act was amended by adding a new section. Section 153.161 of the EI Act states:

> **Availability Course, program of instruction or non-referred training**
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> **153.161 (1)** For the purposes of applying paragraph 18(1)(a), a claimant who attends a course, program of instruction or training to which the claimant is not referred under paragraphs 25(1)(a) or (b) is not entitled to be paid benefits for any working day in a benefit period for which the claimant is unable to prove that on that day they were capable of and available for work.
>
> **Verification**
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> **(2)** The Commission may, at any point after benefits are paid to a claimant, verify that the claimant referred to in subsection (1) is entitled to those benefits by

requiring proof that they were capable of and available for work on any working day of their benefit period.

[60] Section 18(1) of the EI Act says:

> **18 (1)** A claimant is not entitled to be paid benefits for a working day in a benefit period for which the claimant fails to prove that on that day the claimant was
>
> **(a)** capable of and available for work and unable to obtain suitable employment;

[61] A plain reading of section 153.161(1) of the EI Act means that a claimant, who is attending training to which they have not been referred, cannot be paid benefits for any day that they are unable to prove they are capable of and available for work.

[62] A plain reading of section 153.161(2) of the EI act allows the Commission to ask a claimant, who has attended training to which they have not been referred, to prove that he or she is capable of and available for work even after benefits have been paid.

[63] While it would have been preferable to have the entitlement decision made when the Claimant applied for benefits, and the Commission was fully aware of his training, I find that section 153.161 of the EI Act as it is written allows for the Commission to retroactively review the Claimant's entitlement to benefits, even after the benefits have been paid.

[64] I do not agree that section 153.161(2) is not a discretionary provision. The use of the word "may" means that the Commission has a choice to verify entitlement under section 153.161(2).[15] Discretionary decisions should not be disturbed unless the Commission failed to act in a judicial way. This means acting in good faith, having regard to all the relevant factors and ignoring any relevant factors.[16]

[65] There is no evidence to suggest that the Commission acted in bad faith. It asked the Claimant about his attendance requirements and the Claimant's study permit. It did not ask about the Claimant's efforts to find work, which is a relevant consideration when

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[15] *Daley v. Canada (AG)*, 2017 FC 297
[16] *Canada (AG) v. Sirois*, A-600-95; *Canada (AG) v. Chartier*, A-42-90

determining whether a claimant is available for work. This means the Commission did not consider relevant information when making its decision. As a result, I find the Commission did not act judicially when it made the decision to disentitle the Claimant from receiving EI benefits.

[66] The Commission has the burden to show it acted in a judicial manner.[17] It has not done so. In this instance, my earlier finding that the Claimant has proven his availability, means that I do not need to make any further findings.

Conclusion

[67] The Claimant has shown he was available for work within the meaning of the law. Because of this, I find that the Claimant isn't disentitled from receiving benefits he was paid.

[68] This means the appeal is allowed.

Raelene R. Thomas
Member, General Division – Employment Insurance Section

[17] *Canada (Attorney General) v. Gagnon*, 2004 FCA 351