Citation: *LS v Canada Employment Insurance Commission*, 2023 SST 476

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

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

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (555260) dated November 24, 2022 (issued by Service Canada)

Tribunal member:	Jillian Evans
Type of hearing:	Teleconference
Hearing date:	April 18, 2023
Hearing participant:	Appellant
Decision date:	May 3, 2023
File number:	GE-22-4107

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 Appellant L. S. lost his job in the airline industry on June 8, 2021. He submitted an application for benefits on August 6, 2021. He advised on his application that he would be enrolled full time in a web development training course between August 23, 2021 and October 22, 2021.

[4] He also indicated on the application that he had been approved to take the course as part of a government-sponsored Employment or Skills Development Program and that he had been approved by a Provincial, Territorial or Aboriginal Government official to participate in the course while receiving EI benefits.

[5] Normally, if a claimant is in full time school, they are presumed to be unavailable for work. Looking for and being available to start a job as soon as one becomes available is an ongoing requirement to receive regular EI benefits.

[6] Sometimes, the Commission (or a program the Commission authorizes) refers (or approves) people to take a training course. Section 25(1) of the Employment Insurance Act (the "Act") says that if a claimant is referred to training by the Commission or by one of these authorized programs, they are considered to be available for work to get EI regular benefits even though they are in full time school.

[7] The Canada Employment Insurance Commission (Commission) decided that the Appellant is disentitled from receiving EI regular benefits. They determined that the Appellant had not been referred to his training program by a proper authority and that while he was taking this non-referred course he wasn't available for work.

[8] The Appellant disagrees and says that his training course was approved of and paid for by his Band Council. He says that this means that he was referred to the course for the purposes of the EI Act. He also says that he never stopped job hunting while he was taking the course and would readily have suspended his course if he had been successful in finding work.

[9] I have to decide whether the Appellant has proven that he was referred by an authorized body to take his course. If not, I must consider whether he has shown that he was available for work while he was taking the course. L. S. has to prove this on a balance of probabilities.

Issues

[10] Was the Appellant's training approved under s. 25 of the Act?

[11] If not, was the Appellant available for work while enrolled in this non-referred training?

Analysis

The Appellant's training program was not a referred course under s. 25(1) of the Employment Insurance Act.

[12] Normally, when someone is enrolled in full time studies there is a presumption that they are not available for work.[1] A worker claiming EI has to be available for work to get benefits. They must be actively looking for work and ready to accept employment if they receive a job offer to be entitled to benefits. So, claimants enrolled in full time schooling are generally presumed to be unavailable.

[13] Section 25(1) of the EI Act provides an exemption to this presumption. It provides that a claimant can still receive EI benefits while undertaking full time studies or training, but only if they were referred to a particular course by "the Commission, or an authority that the Commission designates."

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[1] See *Canada (Attorney General) v. Gagnon, 2005 FCA 321*

[14] Certain “aboriginal governments” or bands have been designated as authorities by the Commission for this purpose.[2] However, this does not mean that any course funded by any aboriginal government satisfies the requirements of s. 25. Only certain courses qualify for this exception.

[15] Claimants that are referred to approved courses are provided with 16 digit reference codes that confirm that the course falls under the exemption provided by s. 25(1).

[16] The Appellant says that when he decided that he wanted to move out of the airline industry and retrain in web development, he researched possible courses. He prepared a package with details about his chosen course for his Band, the X First Nation. The Band review the package and the description of the course and agreed to pay for his tuition.

[17] The Appellant confirmed at his hearing that he did not ever discuss with his Band whether their funding of his tuition was the same thing as being referred to a course under s. 25(1) of the EI Act. He confirms that he did not receive any documentation from his Band that advised that he could still receive EI benefits while taking the course, nor any information from his Band about the impact that his course would have on his EI claim.

[18] When asked, the Appellant was unable to provide the Commission with a reference code to confirm that his course qualified as approved skills or apprenticeship training by a provincial or Aboriginal designated authority. The Appellant did not provide the Commission or the Tribunal with any documentation that shows that he was referred to the course under s. 25(1) of the Act.

[19] The Commission says that this means that his course does not satisfy the exemption under s. 25(1) of the Act. I agree.

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[2] See Digest of Benefit Entitlement Principles Chapter 19 - Section 19.1.1

[20] The fact that the Appellant decided to re-train in a new field on his own initiative and applied to his Band for funding for that course work is not the same as being specifically referred to an approved course by a designated authority of the Commission. The absence of any reference number or correspondence from the Band addressing the Appellant's availability status under the EI Act means that this was a non-referred course.

[21] I find that the Appellant enrolled in a non-referred course of his own initiative. This means that he has to prove that he was available for work between August 23, 2021 and October 22, 2021 in order to be entitled to benefits during this time.

The Appellant was not available for work while enrolled in the non-referred training program.

[22] 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, he has to meet the criteria of both sections to get benefits.

[23] 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.[3] The *Employment Insurance Regulations* (Regulations) give criteria that help explain what "reasonable and customary efforts" mean.[4] I will look at those criteria below.

[24] 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.[5] Case law gives three things a claimant has to prove to show that they are "available" in this sense.[6] I will look at those factors below.

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

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[3] See section 50(8) of the *Employment Insurance Act* (Act).
[4] See section 9.001 of the *Employment Insurance Regulations* (Regulations).
[5] See section 18(1)(a) of the Act.
[6] See *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96.

[26] As discussed above, the Federal Court of Appeal has said that claimants who are in school or taking training full-time are presumed to be unavailable for work.[7] This is called "presumption of non-availability." It means we can assume that students aren't available for work when the evidence shows that they are in school full-time. If L. S. disputes this, the burden is on him to disprove this assumption.

[27] 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

[28] The presumption that students aren't available for work applies only to full-time students. The Appellant agrees that while he was taking the web development course he was a full-time student, and I see no evidence that shows otherwise. So, I accept that L. S. was in school full-time between August 23, 2021 and October 22, 2021.

[29] The presumption applies to the Claimant.

[30] But the presumption that full-time students aren't available for work can be rebutted (that is, shown to not apply) if the Appellant can demonstrate "exceptional circumstances," such as a history of working full time while enrolled in full time studies.[8]

[31] The Appellant did not provide any evidence of exceptional circumstances that would rebut the legal presumption that he was unavailable for work while enrolled in his course.

[32] The law also provides that L. S. can rebut the presumption of unavailability if he can show that he was capable of and available for work during his training course but unable to obtain suitable employment.

[33] If he can show that he met the same availability requirements of all claimants who were requesting regular employment insurance benefits and show that course

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[7] See *Canada (Attorney General) v Cyrenne*, 2010 FCA 349.
[8] See *Oh v. Canada (Attorney General),* 2022 FCA 175

requirements did not place restrictions on his availability, he might be able to rebut the "presumption of unavailability."

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.[9]

[35] The law sets out criteria for me to consider when deciding whether L. S.'s efforts were reasonable and customary.[10] 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.

[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:[11]

- 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

[37] The Commission says that the Appellant didn't do enough to try to find a job between August 23, 2021 and October 22, 2021. They argue that L. S. initially told agent from the Commission that he did not look for any jobs while he was in school[12] and did not consider himself available or capable of working during this time.

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[9] See section 50(8) of the Act.
[10] See section 9.001 of the Regulations.
[11] See section 9.001 of the Regulations.
[12] GD3-19

[38] The Commission says that although L. S. changed his statement later and stated that he was looking for jobs during his course,[13] he was not able to provide evidence of the efforts that he says he made.

[39] The Commission says that this shows that he did not do enough to try and find a job.

[40] The Appellant disagrees. He disputes that he ever told an agent that he was not looking for work while training and says that he did apply for many jobs during this time. He does not believe that he would have told the agent that he had not applied for any jobs, as he remembers applying online for many jobs during his 9 week training course, often several jobs a day.

[41] At his hearing he described posting his resume on a large online job bank, connecting with former colleagues to pursue opportunities and applying for a number of jobs on LinkedIn. He described making all of these efforts while he was in the course, but explained that the tracking software he used to keep track of all of his applications is no longer accessible.

[42] The Appellant testified at his hearing that he recalls applying for up to 10 jobs a day during his training (most of them through easy online “one click” applications).

[43] He told me that he wanted to get back to work as soon as possible and would have been prepared to suspend his coursework to start back to work.

[44] I found the Appellant to be honest and transparent at the hearing, and I believe that he was applying for jobs during his web development course. Given the conflicting statements that the Commission has documented in his file, I prefer the Appellant’s testimony at the hearing and find that he was actively applying to jobs August 23, 2021 and October 22, 2021.

[45] L. S. has proven that his efforts to find a job were reasonable and customary.

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[13] GD3-26

Capable of and available for work

[46] I also have to consider whether the Appellant was capable of and available for work between August 23, 2021 and October 22, 2021 but unable to find a suitable job.[14] Case law sets out three factors for me to consider when deciding this. The Appellant has to prove the following three things:[15]

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 did not set personal conditions that might have unduly (in other words, overly) limited his chances of going back to work.

[47] When I consider each of these factors, I have to look at L. S.'s attitude and conduct.[16]

– **Wanting to go back to a suitable job**

[48] The Appellant has not shown that he wanted to go back to work as soon as a suitable job was available. Although L. S. testified at the hearing that he wanted to get started in his new career as soon as possible and would have paused or deferred his course *if an opportunity in web development* had come up, I do not find that this satisfies the requirement at law.

[49] Section 9.002 of the Regulations lists the criteria for determining what "suitable employment" is. The criteria are:

> **(a)** the claimant's health and physical capabilities allow them to commute to the place of work and to perform the work;
>
> **(b)** the hours of work are not incompatible with the claimant's family obligations or religious beliefs; and

[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.
[16] 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.

> **(c)** the nature of the work is not contrary to the claimant's moral convictions or religious beliefs.

[50] L. S.'s evidence was that at the time that he lost his job, he had worked in the commercial aviation field for approximately 15 years. He advised that during this time he had worked in a broad range of roles within the industry, from quality assurance to warehousing to equipment operator to technical libraries.

[51] I find that for L. S., work in any of these types of roles would be suitable employment for the purposes of returning to work.

[52] L. S. testified that the only jobs he applied to during his training course were jobs in his desired field: web development. He limited his applications to jobs in that field and only wanted to work in that field.

[53] To be available for work, the Appellant needs to show that he wanted to go back to "a suitable job" as soon as one became available. I find that the Appellant's decision to limit the jobs he would consider to those in a field in which he had no experience does not demonstrate a willingness to go back to work as soon as suitable employment was available.

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

[54] The Appellant did not make enough efforts to find a suitable job.

[55] As I discussed above, I believe the Appellant's evidence that he was applying for many jobs in his chosen field of web development while he was in his training course. I accept that his efforts to find a job between August 23, 2021 and October 22, 2021 included posting his resume on a large online job bank, connecting with former colleagues to pursue opportunities, applying for a number of jobs on LinkedIn and applying for up to 10 jobs a day through easy online "one click" applications.

[56] L. S. made efforts to find a job *in web development*.

[57] I do not find, however, that he made enough efforts to find *any* suitable job that might have been available to him.

[58] L. S. is certainly entitled to want to change career paths. He made the decision, for personal reasons, to retrain in a brand new field. He is entitled to pursue new opportunities.

[59] However, the Federal Court has been clear that the intention of Parliament when they created the Employment Insurance regime was to pay employment insurance benefits to individuals who, through no fault of their own, are truly unemployed and are seriously engaged in an earnest effort to find work - suitable work in *any* industry that they are capable of performing, not just work in a particular industry that they hope to enter.

[60] It is commendable that the Appellant sought to further his education. He is entitled to want to change careers. But the Employment Insurance Act is an insurance program and like any other insurance program, you must meet certain requirements to qualify. In this case, L. S. does not meet these requirements because he restricted his ability to find employment by limiting his efforts to jobs for which he was not yet qualified in a specific and narrow field.

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

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

[62] As I discuss above, I find that by

a) limiting his job applications to web development roles, and

b) pursuing full-time studies

L. S. unduly restricted his ability to find employment.[17]

[17] See *Duquet v. Canada (Employment and Immigration Commission)*, 2008 FCA 313

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

[63] Based on my findings on the three factors, I find that L. S. hasn't shown that he was capable of and available for work but unable to find a suitable job during his training course in 2021.

Conclusion

[64] The Appellant hasn't shown that he was enrolled in a referred course between August 23, 2021 and October 22, 2021.

[65] The Appellant hasn't shown that he was available for work within the meaning of the law during this time.

[66] Because of this, I find that L. S. can't receive EI benefits.

[67] This means that the appeal is dismissed.

Jillian Evans
Member, General Division – Employment Insurance Section