Citation: *AM v Canada Employment Insurance Commission*, 2023 SST 1746

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	A. M.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (541067) dated October 26, 2022 (issued by Service Canada)

Tribunal member:	Ambrosia Varaschin
Type of hearing:	Teleconference
Hearing date:	May 3, 2023
Hearing participant:	Appellant
Decision date:	May 10, 2023
File number:	GE-22-3766

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 Canada Employment Insurance Commission (Commission) decided that the Appellant was disentitled from receiving EI regular benefits from May 5 to July 25, 2022, because 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] The Appellant was in a full-time cyber security operator program from April 6, 2021, to April 25, 2022. This was an approved referred training program, which means he didn't need to prove his availability for work while he was in school.[1]

[5] The Appellant decided to continue his courses so he could upgrade his certificate to a cyber security analyst, but he wasn't eligible for another referred training program. So, the Appellant has to prove he was available for work during his second program, which was from May 5 to July 25, 2022.

[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.

---

[1] See the *Employment Insurance Act* (EI Act), section 25.

[8] The Appellant disagrees and says that he was available and looking for work. But, all the cyber security and IT positions he found were looking for experienced people and not new graduates.

Issue

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

Analysis

[10] 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.

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

[12] 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.[4] Case law gives three things a claimant has to prove to show that they are "available" in this sense.[5] 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.[6] This is called "presumption of non-

---

[2] See section 50(8) of the Act.
[3] See section 9.001 of the *Employment Insurance Regulations* (Regulations).
[4] See section 18(1)(a) of the Act.
[5] See *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96.
[6] See *Canada (Attorney General) v Cyrenne*, 2010 FCA 349.

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 agrees that he is a full-time student, and I see no evidence that shows otherwise. So, I accept that the Appellant is in school full-time.

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

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

[20] There are two ways the Appellant 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 that there are exceptional circumstances in his case.[8]

[21] The Appellant says that he has a history of working while being in school. He had a job with the Department of Fisheries and Oceans for three months and was able to work while attending classes. He testified that, before the pandemic, he had a career as a travel agent organizing flights and accommodations for the federal government and large corporations. So, he hasn’t been in school for decades and can’t provide any other examples.

---

[7] See *Canada (Attorney General) v Rideout*, 2004 FCA 304.
[8] See *Canada (Attorney General) v Cyrenne*, 2010 FCA 349.

[22] The Commission says that this isn't enough to show a history of working while attending school. It says the Appellant got lucky and found a job that allowed him to listen to his lectures while working, but other employers were unlikely to allow the same level of flexibility.

[23] I find that the Appellant hasn't shown a history of working while attending classes full-time. Three months isn't a significant length of time, and the Courts have established that claimants should be able to establish a pattern of working while in school for at least a year in order to rebut the presumption of non-availability.[9]

– **The presumption isn't rebutted**

[24] The Appellant hasn't rebutted the presumption that he is unavailable for work.

Reasonable and customary efforts to find a job

[25] 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]

[26] The law sets out criteria for me to consider when deciding whether the Appellant's efforts were reasonable and customary.[11] 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.

---

[9] See *Graveline v Canada (Attorney General)*, 1995 FCA A-177-94; *Canada (Attorney General) v Rideout,* 2004 FCA 304; *Canada (Attorney General) v Lamonde,* 2006 FCA 44; and *Landry v Canada (Deputy Attorney General)*, 1992 FCA A-719-91.
[10] See section 50(8) of the Act.
[11] See section 9.001 of the Regulations.

[27] 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]

- registering for job search tools or with online job banks or employment agencies
- contacting employers who may be hiring
- applying for jobs

[28] The Commission says that the Appellant didn't do enough to try to find a job.

[29] The Appellant disagrees. He was applying for jobs in IT and administration, but all the positions required experience. The Appellant provided evidence that he applied to one job at the end of May, and five jobs at the end of June.[13] The Appellant says that this shows that his efforts were enough to prove that he was available for work.

[30] The Regulations say that a claimant's efforts must be sustained,[14] and the evidence the Appellant provided shows that he applied to most of his jobs within a 30-hour period.[15] He also didn't apply for jobs for the first three weeks of his program or during the last month.

[31] So, I find that the Appellant hasn't shown that he made reasonable and customary efforts to find a job while he was in school.

[32] The Appellant hasn't proven that his efforts to find a job were reasonable and customary.

---

[12] See section 9.001 of the Regulations.
[13] See GD05.
[14] See section 9.001(a) of the Regulations.
[15] See GD05.

Capable of and available for work

[33] I also have to consider whether the Appellant was capable of and available for work but unable to find a suitable job.[16] Case law sets out three factors for me to consider when deciding this. The Appellant has to prove the following three things:[17]

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.

[34] When I consider each of these factors, I have to look at the Appellant's attitude and conduct.[18]

– **Wanting to go back to work**

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

[36] The Appellant has provided inconsistent responses when asked about leaving his course for a job. He told the Commission he **wasn't** willing to leave his program for a job if it conflicted with his training several times.[19] He also told the Commission he **would** leave his program for a full-time job.[20]

[37] The Appellant didn't directly state whether he would or would not leave his program for a job during the hearing. He testified that he was looking for jobs that would work with his school schedule and were in the field that he was studying.

---

[16] See section 18(1)(a) of the Act.
[17] 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.
[18] 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.
[19] See GD03-21 to GD03-22, GD03-25 to GD03-26, GD03-31, and GD03-40.
[20] See GD03-23.

[38] I find, on the balance of probabilities, that the Appellant would not have left his program for a job.

[39] In general, the law requires students be willing to leave a course if suitable employment is offered to meet the condition of wanting to return to work as soon as reasonably possible.[21] Choosing to finish his program rather than accept a job may be an excellent personal decision, but it doesn't remove his obligations under the Act, including proving his availability.[22]

[40] So, the Appellant didn't want to return to the workforce as soon as a suitable job was offered.

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

[41] The Appellant hasn't made enough effort to find a suitable job.

[42] 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.[23]

[43] The Appellant's efforts to find a new job included applying for jobs using online databases and job boards. I explained these reasons above when looking at whether the Appellant has made reasonable and customary efforts to find a job.

[44] Those efforts weren't enough to meet the requirements of this second factor because he was restricting his job search to specific industries, and wasn't applying for jobs often enough.[24] The Appellant was only applying to jobs in the IT and administration sectors, which wasn't reasonable because he had a restricted schedule. Those industries typically work Monday to Friday, 9 a.m. to 5 p.m., and the Appellant wasn't available during those hours because of his program. The Appellant should have been looking for jobs in industries that often accommodate student schedules, like retail,

---

[21] See *Canada (Attorney General) v Floyd*, 1994 FCA A-168-93; and *Landry v Canada (Deputy Attorney General)*, 1992 FCA A-719-91.
[22] See *Canada (Attorney General) v Martel*, 1994 FCA A-1691-92.
[23] 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.
[24] See *Cutts v Canada (Attorney General),* 1990 FCA A-239-90.

service, and security sectors. He should have been looking for any kind of job that had flexible or non-standard schedules, like evenings, nights, and weekends.

[45] So, the Appellant didn't conduct an adequate search for suitable employment while he was in school.

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

[46] The Appellant set personal conditions that unduly limited his chances of finding a job.

[47] The Appellant says that he had mandatory virtual classes weekday mornings from 8 a.m. to 12 p.m., and 2 to 3 hours of homework every afternoon. He says that his classes took up 30 to 40 hours of his time every week.

[48] The Appellant argues that his courses were recorded, so he didn't need to be present for all four hours. He also says that he could do his homework at any time. He says that he could have adjusted his class schedule to work with a job schedule.

[49] The Commission argues that the Appellant admitted that he was unable to find work because of his class schedule.[25] It says he was restricting his availability for work to times outside of his class schedule. The Commission says this means his program was a restriction on his availability for work. So, the Appellant didn't meet the legal test for availability.

[50] I find the Appellant's class schedule restricted his availability for work. He admitted that his schedule limited his job opportunities and that he would not leave his program for work. A claimant's availability for work can't be limited to irregular hours resulting from a training program that significantly limits his schedule.[26]

[51] So, the Appellant's class schedule was a personal condition that unduly restricted his chances of finding employment.

---

[25] See GD03-37 to GD03-40.
[26] See *Duquet v Canada (Employment and Immigration Commission)*, 2008 FCA 313; and *Canada (Attorney General) v Primard*, 2003 FCA 349.

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

[52] 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.

[53] Students need to show convincing evidence of availability, which includes a serious job search, and a willingness to accept any suitable job available.[27]

[54] The Appellant wasn't available for work because he decided to complete his second program on a full-time basis, without a referral from the Commission. Not being approved for a course, and not proving he was available for work, means he didn't meet the requirements of the Act to receive benefits.[28]

Conclusion

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

[56] This means that the appeal is dismissed.

Ambrosia Varaschin
Member, General Division – Employment Insurance Section

[27] See *Landry v Canada (Deputy Attorney General),* 1992 FCA A-719-91.
[28] See *Paxton v Canada (Attorney General),* 2002 FCA 360; and *Canada (Attorney General) v Mercier*, FCA A-690-75.