Citation: *RM v Canada Employment Insurance Commission*, 2023 SST 1479

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

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

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (543899) dated November 28, 2022 (issued by Service Canada)

Tribunal member:	Ambrosia Varaschin
Type of hearing:	In person
Hearing date:	May 4, 2023
Hearing participant:	Appellant
Decision date:	May 10, 2023
File number:	GE-22-4142

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 is a foreign doctoral candidate studying on a student permit that restricted his work to 20 hours per week while in school. He established a claim for benefits on March 28, 2021, after being laid off from his part-time construction job.

[4] The Appellant provided the Canada Employment Insurance Commission (Commission) a copy of his student permit with his application for benefits, but indicated he was not attending school.[1] He also answered "no" on each of his reports when asked if was attending school or training during the period of the report. He says he didn't understand the question, and thought the Commission knew he was a student because he sent them his study permit.

[5] The Commission decided that the Appellant was disentitled from receiving EI regular benefits from March 29 through April 9, 2021, September 3 through December 3, 2021, and from January 22 forward, 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 and able to go to work.

[6] This created an overpayment of $12,652.00.

[7] 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.

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[1] See GD03-8.

[8] The Commission says that the Appellant wasn't available because he didn't do enough to find work.

[9] The Appellant disagrees and says that he was trying to find work within the requirements of his student permit.

Issue

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

Analysis

[11] Two different sections of the law require claimants to show that they are available for work. The Appellant has to meet the criteria of both sections to get benefits.

[12] 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.

[13] 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.

[14] 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.

[15] 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-

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

[16] 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

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

– The Appellant isn't a full-time student

[18] The Appellant isn't a full-time student. So, the presumption doesn't apply to him.

[19] The Appellant is a foreign student who was in a master's program before becoming a PhD candidate. Post-graduate programs don't necessarily have strict class schedules, and in this case the Appellant was only required to attend class for once or twice a week for two to three hours at a time. So, the Appellant isn't a full-time student under the Act.

[20] This only means that the Appellant isn't presumed to be unavailable for work. 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

[21] 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.[7]

[22] The law sets out criteria for me to consider when deciding whether the Appellant's efforts were reasonable and customary.[8] I have to look at whether his efforts

[7] See section 50(8) of the Act.
[8] See section 9.001 of the Regulations.

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.

[23] 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:[9]

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

[24] The Commission argues the Appellant's work permit allowed him to apply for full-time jobs on campus, and full-time jobs between semesters, but he didn't do this. It also says he could have applied for a work permit to allow him to work off campus, but he didn't do this either.

[25] The Commission says that the Appellant didn't do enough to try to find a job. It points out he only applied to six jobs in eighteen months, which doesn't show a reasonable effort to find work.

[26] The Appellant disagrees. He says he was actively looking for work, but couldn't find anything that met his student permit's restrictions. He argues that his permit says he can only work off-campus for 20 hours a week, at any time, and that he wasn't eligible for a work permit.

[27] The Appellant says that his efforts were enough to prove that he was available for work.

[28] I find that the Appellant could have worked more than 20 hours per week between semesters. The Commission provided the section of the *Immigration and Refugee Protection Regulations* that apply to the Appellant's student permit, which

[9] See section 9.001 of the Regulations.

states “they are permitted to engage in full-time work during a regularly scheduled break between academic sessions.”[10]

[29] I find the Appellant was able to work full-time on campus. The regulations state “[a] foreign national may work in Canada without a work permit…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 to study at that university or college.”[11]

[30] I don’t have enough evidence to make a finding about the Appellant’s eligibility for a work permit. But, he didn’t apply for one, and he didn’t provide any evidence why he couldn’t do so.

[31] I find the Appellant didn’t apply to enough jobs to meet the requirements of section 50(8) of the Act. The Appellant only applied to six jobs in a year and a half. He testified this is because these were the only jobs he found that met all his requirements, and that during school he had “lots of lab work and couldn’t go to work or apply for jobs.” So, his efforts weren’t sustained or directed to finding employment.

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

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.[12] Case law sets out three factors for me to consider when deciding this. The Appellant has to prove the following three things:[13]

1) He wanted to go back to work as soon as a suitable job was available.
2) He has made efforts to find a suitable job.
3) 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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[10] See GD04-9.
[11] See *Immigration and Refugee Protection Regulations*, section 186(f).
[12] See section 18(1)(a) of the Act.
[13] 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.

[34] When I consider each of these factors, I have to look at the Appellant's attitude and conduct.[14]

– **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 because he didn't actively look for work. He also testified that his wife had a difficult pregnancy before his child was born in August 2021, so he was overwhelmed caring for her, getting her mother to Canada to help, and completing his education. He said he didn't look for work during this time, which means he didn't want to go back to work.

[36] So, the Appellant didn't want to go back to work as soon as a suitable job was available.

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

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

[38] 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.[15]

[39] The Appellant's efforts to find a new job included applying to postings through online job boards and handing out resumes in person. He said he only applied to jobs he found that said they were part-time and were things he wanted to do, which is why he only applied six times.

[40] The Appellant says he didn't understand how job searches worked in Canada. He testified that he would hand out resumes at places like Walmart, and the manager would say "we'll call you if something comes up," so he would stop looking for work,

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[14] 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.
[15] 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.

waiting for their call. After several months went by, he realized no one was going to call him, so he'd start looking for work again.

[41] Those efforts weren't enough to meet the requirements of this second factor because:

- He should have expanded his job search to include different kinds of work when there weren't any positions available.
- He should have followed up with employers instead of waiting for their calls.

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

[42] The Appellant had personal conditions that might have unduly limited his chances of going back to work.

[43] The Appellant argues that the Act says suitable employment is his usual occupation at the same pay and the same conditions as his previous job. So, the Commission can't expect him to apply to all kinds of jobs.

[44] The Act doesn't state that suitable employment must be in the claimant's usual occupation. Instead, it says that suitable employment should have similar earnings and conditions as his previous job.[16]

[45] While claimants are allowed a reasonable time to find a job within their normal occupations, after a few months they are expected to expand their search to other types of work. EI benefits aren't supposed to provide income until a claimant finds the perfect job, they're to provide income until a claimant finds a **suitable** job. When a claimant doesn't expand his job search to include all kinds of occupations, he is generally considered to have an unreasonable restriction, and is unavailable.[17]

[46] So, I find the Appellant's restrictions on the type of work he applied for unduly limited his chances of finding a job.

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[16] Section 6(4)(b) and (c) of the Act sets this out.
[17] See *Bergeron v Canada (Attorney General),* 2016 FC 220; and *Canada (Attorney General) v Whiffen,* A-1472-92.

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

[47] 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

[48] 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.

[49] This means that the appeal is dismissed.

Ambrosia Varaschin

Member, General Division – Employment Insurance Section