Citation: *NS v Canada Employment Insurance Commission*, 2024 SST 133

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

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

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (0) dated November 8, 2023 (issued by Service Canada)

Tribunal member:	Raelene R. Thomas
Type of hearing:	Teleconference
Hearing date:	January 18, 2024
Hearing participant:	Appellant
Decision date:	February 13, 2024
File number:	GE-23-3165

Decision

[1] The appeal is allowed in part. The Appellant was not available for work for a shorter period of time than the Commission says he was.[1]

[2] The Appellant has not shown he was available for work from April 5, 2021 to October 22, 2021 within the meaning of the law. Because of this, I find the Appellant is disentitled from receiving benefits for that period.

[3] The Appellant has shown he was available for work from October 23, 2021 to December 22, 2021 within the meaning of the law. Because of this, I find the Appellant isn't disentitled from receiving benefits for that period. So, the Appellant may be entitled to benefits.

Overview

[4] The Canada Employment Insurance Commission (Commission) decided the Appellant was disentitled from receiving EI regular benefits from April 4, 2021 to December 22, 2021 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.

[5] I have to decide whether the Appellant has proven he was available for work. The Appellant 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.

[6] The Commission says the Appellant was not available because he was taking training full-time.

[7] The Appellant disagrees and says he was receiving EI benefits until a mistake was made on a bi-weekly claim report and his file was flagged. He said that the first time he was contacted by a Service Canada officer he was told all claims were being

[1] A person who applies for and receives EI benefits is called a "claimant." A person who appeals to the Tribunal is called an "Appellant."

pushed through due to COVID. The officer told him all his claim reports were truthful and that he would not have to pay any money back. The Appellant said after this conversation he started getting notices of debt. The Appellant said he was available to work while he was in school. His claim was reactivated when his training stopped, and he was unable to find work. He is now working.

Matters I considered first

The appeal was returned to the General Division

[8] The Commission initially notified the Appellant on November 18, 2021 that it could not pay him EI benefits because he was not available for work. The Appellant first appealed the Commission's decision to the Tribunal's General Division in February 2022.

[9] The General Division member assigned to the appeal wrote the Appellant to find out why his appeal was filed after the deadline to appeal.[2] The letter did not reach the Appellant because his email address ending in "hotmail.ca" had been entered into the Tribunal's system as ending in "hotmail.com." In the absence of a response from the Appellant, the General Division member, not aware of the error, dismissed his appeal because it was filed late, and no reasonable explanation was given for the delay.

[10] The Appellant found out his appeal was dismissed several months later. He appealed to the Tribunal's Appeal Division. The Appeal Division found the Appellant was not given a fair process, because, due to the error in recording his email address, he did not know he had to provide information about why his February 2022 appeal was late. The Appeal Division ordered the appeal to be returned to the General Division for a hearing. This decision is a result of that hearing.

The hearing was adjourned twice

[11] The hearing was originally scheduled to take place on January 4, 2024. At that hearing it was determined the Appellant had not received the Reconsideration File

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[2] Section 52 of the Department of *Employment and Social Development Act* says a and appeal of a decision of the Commission must be made within 30 days of the decision being communicated to them.

(marked GD3) or the Representations of the Commission to the Tribunal (marked GD4) in time to prepare for the hearing. I adjourned the hearing to January 12, 2024 to give the Appellant an opportunity to review the documents and to prepare for the hearing.

[12] The hearing on January 12, 2024 had to be rescheduled because the Appellant was not able to get time off work. The hearing was rescheduled to January 18, 2024 and went ahead as scheduled.

Issue

[13] Was the Appellant available for work while taking training?

Analysis

[14] Two different sections of the law require claimants to show they are available for work.

[15] First, the *Employment Insurance Act* (EI Act) says the Commission may ask a claimant to prove they are making "reasonable and customary efforts" to find a suitable job.[3] The *Employment Insurance Regulations* (EI Regulations) give criteria that help explain what "reasonable and customary efforts" mean.[4]

[16] 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.[5] Case law (decisions from the courts) gives three things a claimant has to prove to show they are "available" in this sense.[6]

[17] The Commission decided the Appellant was disentitled under both these sections. So, it says he must meet the criteria of both sections to get benefits.

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[3] See section 50(8), EI Act. This is how I refer to the law that applies to this appeal.
[4] See section 9.001, EI Regulations.
[5] See section 18(1)(a) of the EI Act.
[6] 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.

[18] There are additional rules that apply to decide whether students are available for work.

[19] Case law, that is decisions of the courts, says that claimants who are in school taking training full-time are presumed to be unavailable for work.[7] This is called the "presumption of non-availability." It means we can suppose students aren't available for work when the evidence shows they are in school taking training full-time.

[20] The Appellant can rebut the presumption in a number of ways. He can show he has a history of working full-time while also in school taking training [8] or, he can show there are exceptional circumstances in his case.[9]

[21] I will start by deciding whether the presumption applies to the Appellant and, if so, whether he has rebutted it. Then, I will look at whether he was available based on the two sections of the law on availability.

The presumption does not apply

[22] The presumption that full-time students aren't available for work does not apply the Appellant. My reasons for this finding follow.

[23] In response to the COVID-19 pandemic, the government made temporary changes to the law to help people access benefits. This included new temporary rules about the availability of students.[10] These temporary rules applied to claimants whose benefit periods began during the period from September 27, 2020 to September 25, 2021.[11]

[24] The temporary rules allowed the Commission to pay a full-time student EI benefits as long as they could show they were available for work.[12] In other words, the

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[7] See *Canada (Attorney General) v Cyrenne*, 2010 FCA 349.
[8] See *Canada (Attorney General) v Rideout*, 2004 FCA 304.
[9] See *Canada (Attorney General) v Cyrenne*, 2010 FCA 349.
[10] See section 153.16(1) of the EI Act.
[11] See section 333 of the Budget Implementation Act, 2021, SC 2021, c. 23.
[12] See section 153.161(1) of the EI Act, which says that a claimant who attends a course, a program of instruction or training to which he was not referred, is only disentitled from being paid benefits for working

law said the Commission was able to presume that a student was available for work rather than unavailable, provided they could meet the sole requirement to prove their availability for each working day in their benefit period. This means under the temporary rules the presumption of non-availability of full-time students was not a consideration when determining the availability of full-time students.

[25] The Appellant's benefit period began on April 4, 2021, which falls in the period when the temporary rules were in place. So, the presumption of non-availability is not a consideration and does not apply to him.

[26] The temporary rules also allowed the Commission to delay verifying whether a claimant was entitled to benefits. Rather than making that decision when a person applied for EI benefits and before it paid out any EI benefits, the temporary rules said the Commission could wait until after the EI benefits were paid to verify whether a claimant was entitled to EI benefits.[13] This what the Commission did in the Appellant's case when it paid him EI benefits from April 4, 2022 to October 9, 2021 and decided on October 22, 2021 that he was not entitled to those EI benefits.

Reasonable and customary efforts to find a job

[27] In looking through the evidence in the appeal file, I did not see any requests from the Commission to the Appellant 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 Appellant, her proof was insufficient.

[28] I note the Commission did not make any submissions on how the Appellant failed to prove to it he was making reasonable and customary efforts. The Commission only summarized section 50(8) of the EI Act and section 9.001 of the EI Regulations.

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days in their benefit period for which they are unable to prove that they are capable of and available for work.

[13] See section 153.161(2) of the EI Act, which says the Commission may, at any point after benefits are paid to a claimant who is attending or has attended unreferred training, verify that he or she is entitled to those benefits by requiring proof they were capable and available for work on any working day of their benefit period.

[29] Based on the lack of evidence the Commission asked the Appellant to prove his reasonable and customary efforts under section 50(8) of the EI Act, I find the Commission did not disentitle the Appellant 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.

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

Capable of and available for work

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

[32] When I consider each of these factors, I have to look at the Appellant's attitude and conduct.[16]

– **Wanting to go back to work**

[33] The Appellant stopped working on April 4, 2021. The Commission wrote to him on October 22, 2021 that he was not entitled to benefits from April 4, 2021. The Appellant testified he began looking for work when he learned that his EI benefits were being stopped and he got a job shortly after he finished his course. This evidence tells

[14] See section 18(1)(a) of the EI 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.

me the Appellant did not have a desire to return to work until after he learned his EI benefits were being stopped on October 22, 2021. As a result, the Appellant has not shown that he wanted to go back to work as soon as a suitable job was offered before October 22, 2021.

[34] The Appellant testified he has worked for the past 6 years. He worked with a relative in seasonal employment and worked for employers when he was in high school and during the summers. He graduated high school in June 2020 and said after high school he worked making masks and then he got a job working nights during the week and on weekends in a grocery store. He usually worked five shifts from 10:00 p.m. to 8:00 a.m. from Sunday to Saturday. The Appellant testified he has bills to pay and needs the money he gets from working. He began a job search, discussed below, after October 22, 2021. As a result, I think the Appellant has shown from October 23, 2021 onward he wanted to go back to work as soon as a suitable job was offered.

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

[35] The Appellant didn't make enough effort to find a suitable job from April 4 to October 22, 2021.

[36] The Appellant did make enough effort to find a suitable job from October 23, 2021 onward.

[37] There is a list of job search activities to look at when deciding availability under a different section of the law.[17] This other section does not apply in the Appellant's appeal. But I am choosing look at that list for guidance to help me decide whether the Appellant made efforts to find a suitable job.[18]

[38] 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

[17] See section 9.001 of the EI Regulations, which is for the purposes of subsection 50(8) of the EI Act.
[18] 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.

or job fairs, networking, contacting employers who may be hiring, submitting job applications, attending interviews and undergoing evaluations of competencies.[19]

[39] The Appellant testified that from the time he stopped working on April 4, 2021 to when he started his course on April 22, 2021 he was busy getting ready for school, purchasing books and attending a two-day orientation. He said he did not look for work during this period.

[40] The Appellant spoke to a Service Canada officer on October 21, 2021.[20] He told the officer he was not looking for a full-time job. The Appellant spoke to another Service Canada officer on November 18, 2021.[21] He told that officer he had not returned to his former employer and he had not applied anywhere else for work.

[41] The Appellant testified he looked at the Job Bank and the InDeed website for jobs while he was in school. He would get notices of jobs on his phone. The Appellant testified he got a call from Service Canada in late October telling him his EI was cancelled. He said that in October 2021 or November 2021, after his EI ran out, he spoke to his employer at the grocery store to let him know he would be able to work from 4:00 p.m. to 10:00 p.m. every day. The Appellant testified he has a resume. In October he gave his resume to some businesses in a nearby community. He also gave out his resume to businesses associated with his trade in his community and nearby communities. His resume said he would be completing his first training block in February 2022. The Appellant testified he spoke to relatives, classmates and friends about places he could look for work. The Appellant was successful getting a job in his trade shortly after he completed his first block.

[42] The Appellant's testimony conflicts with what he told the Service Canada officers about his efforts to look for work. When there is a conflict in evidence, I am required to

[19] See section 9.001 of the EI Regulations.
[20] See page GD3-17 in the appeal file.
[21] See page GD3-23 in the appeal file.

decide which contradictory evidence I prefer. In doing so, I must provide reasons why I prefer that evidence.[22]

[43] I prefer the evidence of the Appellant given at the hearing about his job search efforts. This is because the Appellant's evidence was given directly to me under affirmation, and I was able to ask questions to clarify the evidence, which I find to be more reliable than a Service Canada officer's recounting of what he or she believed the Appellant to have said.

[44] The appeal file shows the Appellant received a payment of EI benefits on October 13, 2021. He was talking to a Service Canada officer on October 21, 2021. Service Canada sent its initial decision to him in a letter on October 22, 2021. He indicated in his request for reconsideration the decision was verbally communicated to him on October 22, 2021. He did not receive a payment for EI benefits on October 24, 2021 which would have been the next date for a payment to be processed. From this I conclude the Appellant started his job search after October 23, 2021.

[45] The period under review is from April 4, 2021 to December 22, 2021.

[46] There is no evidence the Appellant made any effort to look for work before his EI benefits stopped on October 22, 2021. As a result, I find the Appellant does not meet the requirements for this factor from April 4 to October 22, 2021.

[47] The evidence tells me the Appellant started his job search on October 23, 2021. As part of his job search, the Appellant got in touch with his former employer about returning to work, he handed out his resume to potential employers and talked to relatives, friends, and classmates about where he could find work. As a result, I find the Appellant did make enough efforts from October 25, 2021 onward to satisfy this factor.

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[22] *Bellefleur v. Canada (Attorney General)*, 2008 FCA 13

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

[48] The Appellant did not set personal conditions that might have unduly limited his chances of going back to work.

[49] A recent decision of the Federal Court of Appeal (FCA), called *Page*, has said case law, that is decisions of the courts have not established "a bright line rule that full-time students are disentitled to employment insurance benefits if they are required to attend classes full time during weekday hours, Monday to Friday."[23] In *Page*, the FCA also said it is not an error of law to conclude that a claimant is available for work if they are available for employment in accordance with their previous work schedule.[24]

[50] The Appellant indicated on his application for EI benefits that if he found full-time work, he would accept the job as long as he could delay the start date to allow him to finish his course. He told a Service Canada officer he would not abandon the course if he received a job offer that conflicted with his course schedule.[25] At the hearing the Appellant said he meant he would take full-time work in the evenings if he could stay in school.

[51] The Appellant testified his training took place about an hour's drive from his home and he was in class until 2:00 p.m. He said he would be able to work from 3:00 p.m. to 10:00 p.m. or 11:00 p.m. on weekdays and said he would also be available on weekends. He had worked the night shift from 10:00 p.m. to 8:00 a.m. on weekdays and Saturday nights before he started his course.

[52] In my view the Appellant's attendance at class until 2:00 p.m. Monday to Friday was not a personal condition that unduly limited his availability for work. This is because he would be available for work after 2:00 p.m. and on weekends which is consistent with his work history of working part-time while in high school and also

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[23] *Page v Canada (Attorney General),* 2023 FCA 169.
[24] *Page v Canada (Attorney General),* 2023 FCA 169.
[25] This conversation took place on October 21, 2021. See page GD3-17 in the appeal file.

working nights on weekdays and the weekend after he completed high school in June 2020.

[53] The Appellant testified that he approached his former employer at the grocery store for work once his EI benefits stopped in October. He looked for work through InDeed and the Job Bank. He also looked for work in local businesses related to his trade by handing out resumes. His resume indicated he would be graduating from his first block in February 2022. The Appellant was engaged in an apprenticeship program requiring blocks of study and blocks of work. There is no evidence to suggest that stating when he would be finished his first block of study on his resume meant that he was only able to work after that date. So, I do not think he set a personal condition when setting out his academic qualifications would change with the completion of his first block of study.

[54] As a result, I find the Appellant has not set any personal conditions on the hours he would and could work that might have unduly limited his chances of returning to the labour market.

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

[55] The Appellant must meet all three of the *Faucher* factors to demonstrate his availability.

[56] Based on my findings on the three factors, the Appellant did not prove that, on a balance of probabilities, he met all of the three of the *Faucher* factors from April 5 to October 22, 2021.

[57] Based on my findings on the three factors, I find the Appellant has proven, on a balance of probabilities, he was capable of and available for work but unable to find a suitable job from October 23 to December 22, 2021.

Conclusion

[58] The Appellant has not shown he was available for work from April 5, 2021 to October 22, 2021 within the meaning of the law. Because of this, I find the Appellant is disentitled from receiving benefits for that period.

[59] The Appellant has shown he was available for work from October 23, 2021 to December 22, 2021 within the meaning of the law. Because of this, I find the Appellant isn't disentitled from receiving benefits for that period. So, the Appellant may be entitled to benefits.

[60] This means the appeal is allowed in part.

Raelene R. Thomas
Member, General Division – Employment Insurance