Citation: *RM v Canada Employment Insurance Commission*, 2024 SST 157

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 Comrermission reconsideration decision (0) dated November 7, 2023 (issued by Service Canada)

Tribunal member:	Catherine Shaw
Type of hearing:	In person
Hearing date:	February 19, 2024
Hearing participant:	Appellant Appellant's representative
Decision date:	February 19, 2024
File number:	GE-23-3166

Decision

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

[2] The Appellant has shown that she was available for work while in school. This means that she isn't disentitled from receiving Employment Insurance (EI) benefits. So, the Appellant may be entitled to benefits.

Overview

[3] The Canada Employment Insurance Commission (Commission) decided that the Appellant was disentitled from receiving EI regular benefits from September 7, 2021, to June 30, 2022, because she 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 Appellant has proven that she was available for work. The Appellant has to prove this on a balance of probabilities. This means that she has to show that it is more likely than not that she was available for work.

[5] The Commission says that the Appellant wasn't available because she was in school full-time and only made limited efforts to find work.

[6] The Appellant disagrees and says that she was actively seeking a full-time job. She was working part-time and kept looking for work. Her school wasn't a restriction on her availability.

Matter I have to consider first

The Appellant's appeal was returned from the Appeal Division

[7] The Appellant first appealed the Commission's decision that she wasn't available for work to the Tribunal's General Division in February 2023. She told the Tribunal about her availability and job search efforts.

[8] The General Division decided the Appellant hadn't shown she was available for work. The Appellant appealed this decision to the Tribunal's Appeal Division.

[9] The Appeal Division decided the General Division had failed to properly consider the Appellant's evidence about her job search and availability for work. By doing so, it had made an important error.

[10] The Appeal Division ordered the appeal to be returned to the General Division for a new hearing. This decision is a result of that hearing.

Issue

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

Analysis

[12] Two different sections of the law require Appellants to show that they are available for work. The Commission decided that the Appellant was disentitled under both of these sections. So, she has to meet the criteria of both sections to get benefits.

[13] 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.[1] The *Employment Insurance Regulations* (Regulations) give criteria that help explain what "reasonable and customary efforts" mean.[2] I will look at those criteria below.

[14] 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.[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.

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

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

[16] In addition, the Federal Court of Appeal has said that Appellants who are in school full-time are presumed to be unavailable for work.[5] This is called "presumption of non-availability." It means we can suppose that students aren't available for work when the evidence shows that they are in schoo full-time.

[17] I will start by looking at whether I can presume that the Appellant wasn't available for work. Then, I will look at whether hehe was available based on the two sections of 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 Appellant was a full-time high school student, so this presumption applies to her.

[19] 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 Appellant can rebut the presumption. She can show that she has a history of working full-time while also in school.[6] Or, she can show that there are exceptional circumstances in her case.[7]

[21] The Appellant has a history of working while in school. She was working part-time at a convenience store since March 2021. She continued working in this job throughout the following school year, too.

[22] The Appellant had a flexible school schedule. Her classes were available online due to COVID-19 measures. She did not have scheduled classes with mandatory

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

attendance. This means she could view the recordings of the classes at any time and do her schoolwork on her own schedule.

[23] The Appellant has shown that there are exceptional circumstances in her case. First, she was able to work while attending school full-time. And second, she could view her recorded class and do her schoolwork at any time. Her ability to maintain her employment while in school and her flexible course schedule are enough to rebut the presumption of non-availability.

[24] Rebutting the presumption means only that the Appellant isn't presumed to be unavailable. 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

[25] The first section of the law that I am going to consider says that Appellants have to prove that their efforts to find a job were reasonable and customary.[8]

[26] The law sets out criteria for me to consider when deciding whether the Appellant's efforts were reasonable and customary.[9] I have to look at whether her 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.

[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:[10]

- assessing employment opportunities
- networking
- contacting employers who may be hiring

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

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

[29] The Appellant disagrees. She was actively seeking work. She testified that she was looking for jobs that she was qualified to do. This meant she was mainly applying at fast food restaurants and retail stores.

[30] She had a resume prepared and dropped it off at six employers that she knew were open and may be hiring. She and her mother checked online for new job postings on a daily basis. She networked with friends and family members to find out about prospective jobs.

[31] The Commission argued the Appellant's job search efforts were insufficient because she only applied at six employers during this time.

[32] I recognize that applying for six jobs over a period of ten months may seem like a limited job search. However, I consider that the Appellant was applying for jobs during a time of extraordinary restrictions on businesses.

[33] The Appellant's mother testified that there were few businesses that many employers were closed or weren't hiring during this time due to COVID-19 restrictions. She also pointed out that the Appellant was still a high school student and had few qualifications for jobs outside of the restaurant and retail industries. She said the Appellant was applying for every job that she could. Not only that, but the Appellant was also re-visiting each of the employers that she had applied with and asking if there were any new openings.

[34] The Appellant's mother's testimony was credible. She gave a detailed account of the Appellant's job search efforts and availability for work. She was able to answer questions about the Appellant's job search in an open and direct manner.

[35] I put weight on the Appellant and her mother's testimony at the hearing about what job search efforts she made and the limitations on the jobs that were available at the time.

[36] I find the Appellant made reasonable and customary efforts to find work. She made a number of job search efforts and was seeking suitable employment by applying

for jobs that she was qualified for. The evidence supports that her efforts were sustained throughout the period in question.

Capable of and available for work

[37] I also have to consider whether the Appellant was capable of and available for work but unable to find a suitable job.[11] Case law sets out three factors for me to consider when deciding this. The Appellant has to prove the following three things:[12]

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

b) She has made efforts to find a suitable job.

c) She didn't set personal conditions that might have unduly (in other words, overly) limited her chances of going back to work.

[38] When I consider each of these factors, I have to look at the Appellant's attitude and conduct.[13]

Wanting to go back to work

[39] The Appellant has shown that she wanted to go back to work as soon as a suitable job was available.

[40] She was actively seeking work on a regular basis. She contacted prospective employers and applied for jobs. She testified that work was her priority. So, even though she was working part-time, she kept looking for another part-time or full-time job.

[41] The Appellant's efforts to find work show that's he wanted to go back to work as soon as a suitable job was available.

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[11] See section 18(1)(a) of the Act.
[12] 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.
[13] 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.

Making efforts to find a suitable job

[42] The Appellant has made enough effort to find a suitable job.

[43] 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.[14]

[44] The Appellant's efforts to find a new job included having a resume prepared, assessing employment opportunities on a regular basis, networking, contacting prospective employers, as well as applying for jobs. I explained these reasons above when looking at whether the Appellant has made reasonable and customary efforts to find a job.

[45] I believe the Appellant was looking for work. She made reasonable efforts to find suitable employment. She has met this factor.

Unduly limiting chances of going back to work

[46] The Appellant didn't set personal conditions that might have unduly limited her chances of going back to work.

[47] The Commission says the Appellant's school attendance was a personal condition that limited her chances of finding work:

[48] When the Appellant first applied for benefits, she filled out a training questionnaire. The questionnaire asked what she would do if she found a full-time job that conflicted with her school obligations. The Appellant answered that she would leave school to accept the job.

[49] The Appellant said the same thing when asked this question by the Commission. She told both the Commission and the Tribunal that work was her priority. She pointed out that she had over 200 absences from school during this year because she chose to

[14] 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.

work rather than attend school. When she was offered shifts that conflicted with her school, she chose to work the shifts.

[50] Further, the Appellant explained that her school obligations were very flexible and would not have limited her ability to accept a full-time job. Her courses were available online; these could be viewed and the classwork completed at any time.

[51] I believe the Appellant. She provided credible testimony of the nature of her courses and her ability to balance full-time work with her school obligations. Her testimony is supported by the Appellant applying for both full-time and part-time jobs while she was in school.

[52] For these reasons, I find the Appellant's school attendance was not a personal condition that might have unduly limited her chances of finding work.

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

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

Conclusion

[54] The Appellant has shown that she was available for work within the meaning of the law. Because of this, I find that the Appellant isn't disentitled from receiving benefits. So, the Appellant may be entitled to benefits.

[55] This means that the appeal is allowed.

Catherine Shaw

Member, General Division – Employment Insurance Section