Citation: *TB v Canada Employment Insurance Commission*, 2023 SST 1816

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	T. B.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (555959) dated November 24, 2022 (issued by Service Canada)

Tribunal member:	Jean Yves Bastien
Type of hearing:	Videoconference
Hearing date:	March 31, 2023
Hearing participants:	Appellant
Decision date:	June 7, 2023
File number:	GE-22-4278

Decision

[1] The appeal is dismissed. The Tribunal disagrees, in part, with the Appellant.

[2] The Appellant did not voluntarily leave her job.

[3] But the Appellant hasn't shown that she was available for suitable employment while in school. This means that she can't receive Employment Insurance (EI) benefits.

Overview

[4] The Appellant was a full-time student in a two-year program at the X (X).

[5] After a year of schooling, and also working .8 full-time-equivalent (FTE) hours, the Appellant chose to concentrate on her studies and reduced her availability to .2 FTE on September 9, 2022, and applied for EI benefits.

[6] The Canada Employment Insurance Commission (the Commission) looked at the Appellant's reasons for reducing her hours. The Commission decided that the Appellant voluntarily left her job without just cause, so it wasn't able to pay her benefits.[1]

[7] The Commission also said they were unable to pay the Appellant benefits because she was "taking a training course on her own initiative" and that she had "not proven [her] availability for work."

[8] The Appellant said that she did not voluntarily leave her job. She remained employed with the same employer. She was just working fewer hours.

[9] The Canada Employment Insurance Commission (Commission) decided that the Appellant was disentitled from receiving EI regular benefits from September 9, 2022, to June 23, 2023, because she wasn't available for suitable work. A claimant has to be

[1] See the Commission's letter of October 31, 2022, at page GD3-23.

available for suitable work to get EI regular benefits. Availability is an ongoing requirement. This means that a claimant has to be searching for a job.

[10] The Appellant asked the Commission to reconsider their decision, which they did. In their reconsideration decision of November 24, 2022, the Commission did not address the issue of voluntary leaving. They just maintained their decision on the Appellant's availability for work. This is discussed below.

[11] I have to decide whether the Appellant has proven that she was available for suitable 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 suitable work.

[12] The Appellant disagrees and says that she had been going to school and working .8 FTE hours for a year. After a year of schooling, she decided to reduce her hours to .2 FTE so that she could complete the remaining year of her school program. She says that she was always available after school and on weekends and she often picked up extra shifts.

Issues

[13] Did the Appellant voluntarily leave her job?

[14] Was the Appellant available for suitable employment while in school?

Analysis

The parties don't agree that the Appellant voluntarily left

[15] The Commission said the Appellant voluntarily left her job. She disagrees. She says she never left her job. She remained employed, with her employer of nine years. She only reduced her hours.

[16] The Appellant agrees that she reduced her hours on September 22, 2022, to attend the Practical Nursing Program at X. I see no evidence to contradict this.

[17] The Appellant had a regular job .8 FTE (considered "part-time" by her employer) at the Nova Scotia Health Authority as a Care Team Assistant. She had been working there since 2013. In September 2021 she started the two-year Practical Nursing Program at the X (X).

[18] For the first year of her program the Appellant was able to go to school and continue with the same hours she had been working at her job. In September of 2022 the Appellant realized she couldn't continue working her job while also going to school. She chose to prioritize her education over her work and, in partnership with her employer, reduced her hours to that of a casual worker (.2 FTE). A letter from her employer confirms this.[2]

[19] Although the Appellant was still working the same job, she was doing so as a casual worker, with less hours. Because of this, she applied for EI benefits. The Commission decided to treat her case as if she had voluntarily left her job without just cause. As a result, the Commission wasn't able to pay her benefits.

[20] The Appellant asked the Commission to reconsider their initial decision. In the reconsideration decision, the Commission was silent about voluntary leaving and only addressed availability.

[21] Since the Commission doesn't address the issue of voluntary leaving in the reconsideration decisions or in their representations to the Tribunal, I will.

[22] I disagree with the Commission. Section 29 of the EI Act provides definitions of employment and voluntary leaving.[3] While the Appellant reduced her hours, she never severed the employment relation with her employer. She continued receiving a paycheck from the same employer.

[23] Therefore, I find that the Appellant did not voluntarily leave her employment. Having found that the Appellant did not leave her employment, it is not necessary for me to decide whether she had just cause. The first part of the test has not been met, so

[2] See page GD2-9 of the appeal record.
[3] See sections 29. (b), (b1) of the Employment Insurance Act.

the Appellant is not disqualified from being paid benefits for voluntarily leaving her job without just cause.

Availability

[24] 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 sections. So, she has to meet the criteria of both sections to get benefits.

[25] First, the *Employment Insurance Act* (Act) says that a claimant must prove that they are making "reasonable and customary efforts" to find a suitable job.[4] The *Employment Insurance Regulations* (Regulations) give criteria that help explain what "reasonable and customary efforts" mean.[5] I will look at those criteria below.

[26] Second, the Act says that a claimant must prove that they are "capable of and available for suitable employment but aren't able to find a suitable job.[6] Case law gives three things a claimant has to prove to show that they are "available" in this sense.[7] I will look at those factors below.

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

[28] In addition, the Federal Court of Appeal has said that Appellants who are in school full-time are presumed to be unavailable for work.[8] 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 school full-time.

[29] I will start by looking at whether I can presume that the Appellant wasn't available for suitable employment. Then, I will look at whether she was available based on the two sections of the law on availability.

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

Presuming full-time students aren't available for work

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

– The Appellant doesn't dispute that she is a full-time student

[31] The Appellant agrees that she was a full-time student, and I see no evidence that shows otherwise. So, I accept that the Appellant was in school full-time.

[32] As a result, the presumption applies to the Appellant.

– The Appellant is a full-time student

[33] The Appellant was a full-time student. But 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.

[34] 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.[9] Or, she can show that there are exceptional circumstances in her case.[10]

[35] The Appellant says she does have a history of working near full-time while going to school. But it didn't work out. The Appellant inadvertently proved that the presumption of non-availability (for full-time work) applies in her own case. After an entire year of trying very had to balance school with a regular work schedule, she felt compelled to reduce her hours to .2 FTE and became a casual worker. The Appellant decided to prioritize her schooling over her work.

[36] The Appellant didn't claim that any exceptional circumstances applied to her situation.

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

[37] The Commission says that the Appellant has failed to rebut the presumption of non-availability while attending a full-time course because the claimant made the decision to leave her full-time job for a casual position, in order to focus on her studies and advised that she was no longer available to full time employment.[11]

[38] The Appellant also said that she would not stop her studies to take on a full-time job.

– The presumption isn't rebutted

[39] The Federal Court of Appeal hasn't yet told us how the presumption and the sections of the law dealing with availability relate to each other. Because this is unclear, I am going to continue and decide the sections of the law dealing with availability, even though I have already found that the Appellant is presumed to be unavailable.

Reasonable and customary efforts to find a job

[40] 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 are reasonable and customary.[12]

[41] The law sets out criteria for me to consider when deciding whether the Appellant's efforts are reasonable and customary.[13] I must look at whether her efforts are sustained and whether they are directed toward finding a suitable job. In other words, the Appellant must have kept trying to find suitable employment.

[42] I also have to consider the Appellant's efforts to find a job. The Regulations list nine job-search activities I must consider. Some examples of those are the following:[14]

- assessing employment opportunities
- preparing a résumé or cover letter

[11] See page GD4-4.
[12] See section 50(8) of the Act.
[13] See section 9.001 of the Regulations.
[14] See section 9.001 of the Regulations.

- registering for job-search tools or with online job banks

[43] The Commission says that the Appellant wasn't doing enough to try to find a job. They said:

- The Appellant advised she was available for shifts with her employer after school hours, on Friday, and weekends. She clearly advised she was no longer available for full time employment and the fact that she left her full time job supports this statement.

- When asked about her job search, she advised she would be willing to accept another casual health care position if one was available.

[44] The Appellant disagrees. She testified that she was always looking for extra shifts. She said that she could work evenings and that on weekends she could work twelve to fifteen hours.

[45] I find that the Appellant wasn't available for suitable employment when she was going to school. She decided to reduce her hours from what she had been working, to picking up hours as a casual employee.

[46] I find that the Appellant hasn't proven that her efforts to find suitable employment were reasonable or customary. While the Appellant was looking to add shifts to the casual work she already had, she was not making a sustained effort to obtain suitable employment. She did not engage in any of the job-hunting activities that Regulation 9.001 sets out as examples.

Capable of and available for work

[47] I must also consider whether the Appellant was capable of and available for work but unable to find a suitable job.[15] Case law sets out three factors for me to consider when deciding this. The Appellant has to prove the following three things:[16]

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

b) She made efforts to find a suitable job

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

[48] When I consider each of these factors, I must look at the Appellant's attitude and conduct.[17]

– Wanting to go back to work

[49] The Appellant hasn't shown that she wanted to go back to work as soon as suitable employment is available.

[50] The Appellant has repeatedly said, and testified, that she would not return to her previous number of hours of employment while she was in school, and that school was her priority.

– Making efforts to find a suitable job

[51] The Appellant didn't make any effort to find suitable employment while attending school. She chose instead to continue with her studies and to continue working on a casual basis, picking up extra shifts when they became available.

[52] So, the Appellant's efforts weren't enough to meet the requirements of the second factor.

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[15] See section 18(1)(a) of the Act.
[16] 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.
[17] 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.

– Unduly limiting chances of going back to work

[53] The Commission says that the Appellant set personal conditions that might have unduly limited her chances of going back to suitable employment.

[54] The Appellant says she didn't do this because she was still with the same employer doing the same job.

[55] But she also said school was her priority and that she could not work during the day while going to school.

[56] The Commission says that to be entitled to regular benefits, a claimant has to show that they are actively searching for employment, without restriction. In this case, the Appellant's intention was continuing her course. She was only looking for casual shifts around her course schedule.

[57] I find that by saying that she couldn't work during school hours, the Appellant set a personal condition that unduly limited her chances of gaining suitable employment.

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

[58] Based on my findings on the three factors, I find that the Appellant hasn't shown that she was capable of, and available for, suitable employment, and also unable to find a suitable job.

Conclusion

[59] As discussed above, I find that the Appellant did not voluntarily leave her employment.

[60] The Appellant hasn't shown that she was available for suitable employment with the meaning of the law. Because of this, I find that the Appellant can't receive EI benefits.

[61] This means the appeal is dismissed.

Jean Yves Bastien
Member, General Division – Employment Insurance Section