Citation: *AE v Canada Employment Insurance Commission*, 2023 SST 1924

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	A. E.
Representative:	S. E.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (543706) dated October 21, 2022 (issued by Service Canada)

Tribunal member:	Katherine Parker
Type of hearing:	Teleconference
Hearing date:	June 15, 2023
Hearing participant:	No Participants
Decision date:	July 4, 2023
File number:	GE-23-110

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 September 7, 2022, to December 2, 2022, because he wasn't available for work. An Appellant has to be available for work to get EI regular benefits. Availability is an ongoing requirement. This means that an Appellant has to be searching for a job.

[4] 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.

[5] The Commission says that the Appellant wasn't available because he was in school full-time.

[6] The Appellant disagrees and says that he has been able to work full-time for a year and a half while taking university courses. He said that it isn`t against the law to receive EI benefits while attending school full-time, he said they are two different issues.

[7] The Appellant was a full-time university student. He applied for benefits on June 9, 2022, and was enrolled in full-time university courses as of September 7, 2022.

[8] He said his focus was on obtaining a degree and not on becoming employed. Although he said he was available to work, he said his availability was restricted and that if offered employment that conflicted with his studies, he was not willing to abandon his courses.

Matter I have to consider first

The Appellant wasn't at the hearing

[9] The Appellant wasn't at the hearing, neither was his Representative. A hearing can go ahead without the Appellant if the Appellant got the notice of hearing.[1] I think that the Appellant got the notice of hearing because a notice of hearing was sent to him on April 28, 2023. On June 15, 2023, I sent the Appellant a letter asking him why he didn't show up. He didn't respond by the deadline of June 21, 2023, so the hearing took place when it was scheduled, but without the Appellant or his Representative.

Issue

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

Analysis

[11] 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, he has to meet the criteria of both sections to get benefits.

[12] First, the *Employment Insurance Act* (Act) says that an Appellant 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 an Appellant 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 an Appellant has to prove to show that they are "available" in this sense.[5] I will look at those factors below.

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[1] Section 58 of the *Social Security Tribunal Rules of Procedures* sets out this rule.
[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.

[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 Appellants who are in school full-time are presumed to be unavailable for work.[6] 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.

[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 doesn't dispute that he is a full-time student

[18] 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.

[19] The presumption applies to the Appellant.

– The Appellant is a full-time student

[20] The Appellant is 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.

[21] 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]

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

[22] The Appellant says his focus was on his studies and that he wasn`t looking for full-time work during this time. He wasn`t prepared to leave his university program for work if he was offered a job. He hasn`t provided any evidence or testimony of an exceptional circumstance that would rebut the presumption of non-availability.

[23] The Commission says that the Appellant failed to rebut the presumption of non-availability because he wasn`t looking for full-time work and he expressed an intention to remain in school.

[24] I find that the Appellant wasn`t looking for work and he didn't have any exceptional circumstances that would apply.

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

– **The presumption isn't rebutted**

[26] 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 on to 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

[27] The first section of the law says that Appellants have to prove that their efforts to find a job were reasonable and customary.[9]

[28] The law sets out criteria for me to consider when deciding whether the Appellant's efforts were reasonable and customary.[10] 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 section 50(8) of the Act.
[10] See section 9.001 of the Regulations.

[29] 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:[11]

- assessing employment opportunities
- preparing a résumé or cover letter
- registering for job-search tools or with online job banks or employment agencies.

[30] However, the Commission didn`t ask the Appellant to provide information about his job search between September 7, 2022, and December 2, 2022.

[31] For this reason, I will not be considering a disentitlement for failing to conduct a reasonable and customary job search.[12] I will only consider the disentitlement that the Commission imposed under the following test for availability.[13]

Capable of and available for work

[32] I have to consider whether the Appellant was capable of and available for work but unable to find a suitable job.[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 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.

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[11] See section 9.001 of the Regulations.
[12] Since the Commission did not ask for a job search during his claim, the Appellant cannot be disentitled under s 50(1) of the EI Act. See *LD v Canada Employment Insurance Commission,* 2020 SST 688.
[13] This test is under sections 18(1)(a) and 153.161 of the EI Act.
[14] See section 18(1)(a) of the 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.

[33] 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**

[34] The Appellant hasn't shown that he wanted to go back to work as soon as a suitable job was available. He wanted to remain in his program and complete his degree. Although he expressed financial difficulty, he made a personal choice to continue.

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

[35] The Appellant didn`t make any effort to find a suitable job.

[36] 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.[17]

[37] Those efforts weren't enough to meet the requirements of this second factor because he had no chance of being employed because he wasn`t looking for work.

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

[38] The Appellant did set personal conditions that might have unduly limited his chances of going back to work.

[39] The Appellant says that he could work in his spare time or in the evening. But he was dedicated to his studies during the day.

[40] The Commission says the Appellant wasn`t looking for work and was taking a university program on his own initiative.

[41] I find that the Appellant limited his chances of being employed because he was in school full-time and didn`t have time to work during the week.

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[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.
[17] 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.

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

[42] 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 and unable to find suitable employment.

Conclusion

[43] 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.

[44] This means that the appeal is dismissed.

Katherine Parker

Member, General Division—Employment Insurance Section