Citation: *RN v Canada Employment Insurance Commission*, 2023 SST 1860

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

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

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (468170) dated May 16, 2022 (issued by Service Canada)

Tribunal member:	Kristen Thompson
Type of hearing:	Teleconference
Hearing date:	May 23, 2023
Hearing participant:	Appellant
Decision date:	May 25, 2023
File number:	GE-22-3860

Decision

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

[2] The Appellant hasn't shown that she was available for work while in school. This means that she can't receive Employment Insurance (EI) benefits.

[3] Also, the Appellant hasn't shown that the Canada Employment Insurance Commission (Commission) didn't act judicially when using its discretionary powers to reassess her claim for EI benefits.

Overview

[4] The Commission decided that the Appellant was disentitled from receiving EI regular benefits as of October 5, 2020, because she 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.

[5] 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.

[6] The Commission says that the Appellant wasn't available because she was in school full-time. It says that she wasn't willing to accept a job that conflicted with her school schedule. It says that it can impose a retroactive disentitlement even when the Appellant's training may have been initially allowed.

[7] The Appellant disagrees and says that she was working part-time, and she was looking for another part-time job that fit around her school schedule. She says that the Commission didn't act judicially when using its discretionary powers to reassess her claim for EI benefits – she repeatedly gave it information about her studies, was told by agents that she was eligible for benefits, and is experiencing financial hardship.

Issue

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

[9] Did the Commission act judicially when using its discretionary powers to reassess her claim for EI benefits?

Analysis

[10] 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.

[11] 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.[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.

[12] 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.[3] Case law gives three things an appellant has to prove to show that they are "available" in this sense.[4] I will look at those factors below.

[13] 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.

[14] 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 school full-time.

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

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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.
[5] See *Canada (Attorney General) v Cyrenne*, 2010 FCA 349.

Presuming full-time students aren't available for work

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

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

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

[18] The presumption applies to the Appellant.

– The Appellant is a full-time student

[19] 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.

[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 says she didn't have a history of working full-time while also in school. She says that she was working part-time, and she was looking for another part-time job that fit around her school schedule.

[22] The Commission says that the Appellant hasn't rebutted the presumption. It says that her main intention was to complete her schooling. It says that she wasn't willing to accept a job that conflicted with her school schedule.

[23] The Appellant says that she is studying full-time at a university. She says that most of her classes were online and recorded. She says that she received participation marks for attending tutorials, but not lectures.

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

[24] The Appellant says that she was working part-time at a grocery store on weekends.

[25] I find that the Appellant hasn't rebutted the presumption that she is unavailable for work, as she doesn't have a history of working full-time while also in school and exceptional circumstances aren't present.

– **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 that I am going to consider says that Appellants have to prove that their efforts to find a job were reasonable and customary.[8]

[28] 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.

[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:[10]

- preparing a résumé or cover letter
- contacting employers who may be hiring
- applying for jobs
- attending interviews

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

[30] The Commission says that the Appellant didn't do enough to try to find a job. It says that, in her training questionnaires, the Appellant said that she wasn't making any efforts to find a job. It says that her later statements that she was looking for a job aren't credible. It says that she didn't conduct a serious job search. It says that she wasn't willing to stop her studies to take a job.

[31] The Appellant disagrees. She says that she handed out her résumé to numerous stores and looked at job listing on her school's website. She says that her efforts were enough to prove that she was available for work.

[32] The Appellant says that she prepared a résumé and cover letter.

[33] The Appellant says that she worked part-time at a grocery store on weekends. She says that she was looking for another part-time job. She says that she was available evenings and weekends, after her classes finished.

[34] The Appellant says that she applied to numerous grocery stores, other stores, and a coffee shop. She says that she gave out résumés once every 2 to 3 weeks. She says that there weren't a lot of job opportunities, due to the COVID-19 pandemic.

[35] The Appellant says that she also looked at job listings through her school's website.

[36] The Appellant says that she didn't receive any call backs.

[37] In the Appellant's questionnaires, she said that she made no effort to find a job.[11] At the hearing, she says that the questionnaire's instructions weren't clear to her. She says that she was trying to find a job.

[38] As said by the Federal Court of Appeal, remaining part of the workforce while in school doesn't mean an appellant is available for work – the appellant mustn't impose restrictions on her availability as to unduly limit her chances of holding employment.[12]

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[11] See GD3-14, 3-19, and 3-25.
[12] See *Canada v. Gagnon*, 2005 FCA 321.

[39] Case law also says that no matter how little chance of success an appellant may feel a job search would have, the EI Act is designed so that only those who are genuinely unemployed and actively seeking work will receive benefits.[13]

[40] I find that the Appellant hasn't proven that her efforts to find a job were reasonable and customary. I rely on the Appellant's testimony, which I found credible, when she said that she was trying to find a job and that the questionnaire's instructions weren't clear to her. However, her efforts weren't sustained, as she only gave out résumés once every 2 to 3 weeks.

Capable of and available for work

[41] I also 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) 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.

[42] 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

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

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[13] See *Cornelissen-O'Neill*, A-652-93; CUB 13957.
[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.
[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.

[44] The Appellant says that she was working part-time and trying to find another part-time job that fit around her school schedule.

[45] After COVID-19 pandemic emergency measure ended, the Appellant says that she was able to find and hold two jobs. As of October 2022, she says that she works 14 hours per week as a community ambassador and three 6-hour shifts in the evening at a café.

[46] I rely on the Appellant's testimony and find that she wanted to go back to work as soon as a suitable job was available.

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

[47] The Appellant hasn't made any effort to find a suitable job.

[48] 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]

[49] The Appellant's efforts to find a new job included preparing a résumé, applying for jobs at stores every 2 to 3 weeks, and looking at job postings on her school's website. I explained these reasons above when looking at whether the Appellant has made reasonable and customary efforts to find a job.

[50] Those efforts weren't enough to meet the requirements of this second factor because they were not sustained – she didn't actively look for a job on a daily or even weekly basis.

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

[51] The Appellant set personal conditions that might have unduly limited her chances of going back to work.

[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.

[52] The Appellant says that she wasn't willing to leave her studies for a job. She says that she was looking for a job that fit around her school schedule – weekday evenings and weekends.

[53] Federal Court of Appeal case law says that an appellant has to be available during regular hours for every working day of the week. As well, restricting availability to only certain times on certain days of the week, including evenings and weekends, is a limitation on availability for work and a personal condition that might unduly limit the chances of going back to work.[18]

[54] In a recent Appeal Division decision, the Tribunal said that an appellant wasn't available because she was available for work only outside her school hours (on weekday evenings and weekends) and she was unwilling to drop her course to accept a full-time job.[19]

[55] I find that the Appellant set personal conditions that might have unduly limited her chances of going back to work, as she was only available for work outside her school hours on weekday evenings and weekends.

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

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

The Commission's discretionary powers to reassess

[57] The Appellant says that the Commission didn't act judicially when using its discretionary powers to reassess her claim for EI benefits. She says that she repeatedly gave it information about her studies. She says that she called the Commission several times and was told by agents that she was eligible for benefits.

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[18] See *Vezina* v *Canada (Attorney General)*, 2003 FCA 198; *Canada (Attorney General)* v *Rideout*, 2004 FCA 304.
[19] See *Canada Employment Insurance Commission v CB*, 2022 SST 1017.

[58] The Appellant says that she needed the benefits to survive. She says that she lived in a youth homelessness centre. She says that she was required to pay her own expenses, including tuition, without support from her family.

[59] The Commission says that it can impose a retroactive disentitlement even when the training may have been initially allowed. It says that it can ask for evidence for the Appellant to prove her availability.

[60] When the Commission revisits a decision, it has to use its discretion judicially. The Tribunal can set aside a discretionary decision if, for example, a person can establish that the Commission: [20]

- acted in bad faith
- acted for an improper purpose or motive
- took into account an irrelevant factor
- ignored a relevant factor
- acted in a discriminatory manner

[61] In a recent Appeal Division decision, the Tribunal said the Commission used its discretion judicially when it assessed an overpayment, as the appellant wasn't able to verify her availability while in school full-time during the pandemic, even though she acted in good faith and repeatedly reported her training to the Commission.[21]

[62] In another Appeal Division decision, the Tribunal said that the Commission's long delay, throughout the pandemic, to reassess an appellant's benefits didn't rise to the level required to suggest it acted in bad faith, in a discriminatory manner, or for an improper purpose.[22]

[63] I sympathize with the Appellant's situation. However, I find that the use of the Commission's discretionary powers to reassess the Appellant's eligibility for EI benefits

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[20] See *SF v Canada Employment Insurance Commission,* 2022 SST 1095; *Canada (Attorney General)* v *Purcell*, 1995 CanLII 3558 (FCA).
[21] See *Canada Employment Insurance Commission* v *AL*, 2023 SST 253.
[22] See *IP v Canada Employment Insurance Commission*, 2022 SST 786.

was done judicially. The Appellant didn't give new and relevant facts at the hearing that weren't already known to the Commission. For example, the Commission addressed the Appellant's financial situation in its representations.[23] There is no evidence that it acted in bad faith, for an improper purpose, or in a discriminatory manner.

Conclusion

[64] The Appellant hasn't shown that she was available for work within the meaning of the law. Because of this, I find that the Appellant can't receive EI benefits.

[65] This means that the appeal is dismissed.

Kristen Thompson
Member, General Division – Employment Insurance Section

[23] See GD4-3 and 4.