Citation: *RN v Canada Employment Insurance Commission*, 2024 SST 343

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:	Audrey Mitchell
Type of hearing:	Teleconference
Hearing date:	March 13, 2024
Hearing participant:	Appellant
Decision date:	April 5, 2024
File number:	GE-24-322

Decision

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

[2] The Appellant has shown that she is 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 is disentitled from receiving EI regular benefits as of October 5, 2020, 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 is 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 is available for work.

[5] The Commission says the Appellant isn't available because she was in school full-time.

[6] The Appellant disagrees and says she was actively looking for work, but most businesses were closed due to the COVID-19 pandemic. She says she has to work to sustain herself.

Issues

[7] Is the Appellant available for work while in school?

Analysis

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

[9] 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.

[10] 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.

[11] 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.

[12] In addition, the Federal Court of Appeal has said that claimants 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.

[13] 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.

Presuming full-time students aren't available for work

[14] 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

[15] 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.

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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.

– The Appellant is a full-time student

[16] 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.

[17] 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]

[18] The Appellant says she worked before while attending school. She also says that because her classes were recorded, she was able to work during the day.

[19] The Commission says the Appellant hasn't rebutted the presumption of non-availability because her main focus was to complete school, and she was not willing to accept a job if it conflicted with school.

[20] I find that the Appellant has rebutted the presumption of non-availability due to exceptional circumstances.

[21] The Appellant started her university program in September 2020, studying health and disease, and political science. She completed training questionnaires where she said she's a full-time student.

[22] In her training questionnaire, the Appellant said she has a history of working while in school. But the details on the hours she worked and the hours she studied during the period where she worked and studied don't seem accurate. For example, in the questionnaire, for the period September 1 to December 18, 2020, she said she studied 100 hours a week and worked 100 hours a week.

[23] I asked the Appellant about her history of working while in school. The Appellant testified that she started working at a grocery store from November 2018. She worked after school a couple times a week until 9:00 or 10:00 p.m., and she also worked there

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

on weekends. While in university, she testified that she worked maybe 10 or 15 hours a week.

[24] I accept as fact that the Appellant has a history of working while in school full-time. Even though I find from the Appellant's testimony that her work history was part-time, I find that her efforts to find work were geared towards continuing the same or similar pattern of employment as her history of work. The Appellant said she was looking for work at grocery stores and other companies that she named, which would have allowed her to work similar hours to those she worked at the grocery store that had originally laid her off.

[25] The Appellant testified that all her classes were online and recorded. So, she said she could watch the recordings at any time. But she said she had to attend tutorials at the time they were held. She added that because of this, she could have worked throughout the day except for an hour here or there.

[26] The Appellant first told the Commission that she had to be present for her online classes when they were held. But she later told the Commission the classes were recorded so she could attend the classes at any time of the day. This is what she testified to at the hearing, and I have no reason to doubt it due to the nature of educational instruction during the pandemic.

[27] The Appellant testified that it wasn't as if she had an option to work; she needed to work to sustain herself. She said she now works at two part-time jobs while she's still in school and works up to 30 hours a week. I find that this supports her statements that she "was available for and capable of the same type of work and under the same conditions as she was before she started school".[8]

[28] I find that the opportunity to do course work at any time because of the pandemic is an exceptional circumstance that rebuts the presumption that the Appellant is not available while she is a full-time student. I find that in this unique circumstance, she is

[8] See page GD3-34. This is one of the questions asked on the bi-weekly reports as shown in the Commission's reconsideration file under question 6.

able to work and do her schoolwork around her work schedule. I make this finding knowing the Appellant had to attend in-person tutorials from time to time.

[29] I also note that the law doesn't require claimants to show that they are available for full-time work to demonstrate availability. And since the Appellant has a history of part-time work while studying, I find that this, along with the added flexibility at school due to online, recorded classes, the Appellant has rebutted the presumption of non-availability.

[30] The Commission points to some of the factors that suggest that the Appellant hasn't rebutted the presumption of non-availability. It says she invested a large sum of money to attend school and she wasn't willing to give up school if a suitable job was offered, so her main intention was to complete school.

[31] I agree with the Commission about the factors in the Appellant's case that suggest she's not available. But I accept the Appellant's evidence as fact that she needed to work to sustain herself. And I find that her attempts to find work in line with her work history, which ultimately proved successful, and her ability during the pandemic to work daytime hours are exceptional circumstances. So, I don't agree with the Commission's conclusion. I find that the Appellant has rebutted the presumption that she isn't available for work.

– **The presumption is rebutted**

[32] 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

[33] 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 are reasonable and customary.[9]

[9] Se section 50(8) of the Act.

[34] The law sets out criteria for me to consider when deciding whether the Appellant's efforts are reasonable and customary.[10] I have to look at whether his efforts are sustained and whether they are directed toward finding a suitable job. In other words, the Appellant has to have kept trying to find a suitable job.

[35] 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
- registering for job-search tools or with online job banks or employment agencies
- applying for jobs

[36] The Commission says the Appellant made it clear on a number of occasions that she wasn't looking for work.

[37] The Appellant disagrees. She says she looked for work, but many places were closed due to the pandemic. She says she continued to look for work because she needed the money.

[38] I find that the Appellant has done enough to prove her efforts to find a job are reasonable and customary.

[39] The Appellant said in her training questionnaire that she didn't look for work. I asked her about this since it's different from what she told the Commission after it denied her application for benefits and what she put in her notice of appeal. The Appellant said she doesn't know why she responded in the way she did, because she was looking for work.

[40] The Commission asked the Appellant to provide a job search to show her efforts to look for work. The Appellant didn't do so. But in her notice of appeal, she gave some

[10] See section 9.001 of the Regulations.
[11] See section 9.001 of the Regulations.

information about what she did to find work and jobs she applied for. The Appellant also attached a form showing that she started a part-time job on September 13, 2022, and partnership agreement for a job she started in October 2022.

[41] According to the Appellant's evidence, she looked for jobs on Tik Tok and on a job search portal at school. She also asked friends if they knew of any job opportunities. She added that in 2021, students still had not gone back to school fully, so there were no job search workshops she could attend.

[42] The Appellant said she prepared a résumé of her work experience and cover letter. She handed out her résumé at grocery stores during the pandemic since they were considered essential. She tried to get work at school, but since school was online, the campus and libraries were closed. The Appellant named 11 companies where she applied for jobs. She testified that because of COVID-19 a lot of places were closed, and job opportunities were limited, but she applied to anything that was open.

[43] Despite what the Appellant said in her training questionnaires about not looking for work, I give more weight to her testimony. She explained at the hearing that she was on her own and had to find a way to provide for herself. She said it wasn't as if she had an option to work. She needed to work to sustain herself.

[44] I found the Appellant to be sincere in her testimony. She readily admitted when she didn't know why she had responded the way she did in her training questionnaires, and corrected what appeared to be mistakes in the questionnaires. She explained that she didn't fully understand what the questionnaires were asking and made mistakes. So, I have no reason to doubt her testimony.

[45] Again, as an example of what appeared to be a mistake in the questionnaire, for the period September 1 to December 18, 2020, the Appellant said she studied 100 hours a week and worked 100 hours a week. I asked the Appellant about this. She said she had no idea what was going on in her head when she answered this way. She said it might have been 10 hours per week for each.

[46] Based on the above, I accept the Appellant's testimony as fact that she doesn't know why she answered some of the questions the way she did, but she was looking for work while in school. And I find that the activities she undertook are of the type listed in the law that claimants normally use to find work.

[47] I have no reason to doubt the Appellant's evidence that it was difficult to find work during the pandemic. I accept as fact that she tried to find work at businesses that were considered essential but didn't get any of the jobs she applied to. I find that her efforts finally paid off when she was able to get two part-time jobs. I'm satisfied from her evidence that she made sustained and sufficient efforts to find work.

[48] The Appellant has proven that her efforts to find a job are reasonable and customary.

Capable of and available for work

[49] 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 wants to go back to work as soon as a suitable job was available.

b) she is making efforts to find a suitable job.

c) she hasn't set personal conditions that might unduly (in other words, overly) limit her chances of going back to work.

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

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[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.

– **Wanting to go back to work**

[51] The Appellant has shown that she wants to go back to work as soon as a suitable job is available.

[52] In her notice of appeal, the Appellant said she was working hard to pursue her education and work to take care of necessities. She said she continued to look for work because she needed the money. And I have found that she was making reasonable and customary efforts to find work. So, I'm satisfied that she wanted to return to work as soon as a suitable job was offered.

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

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

[54] 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]

[55] The Appellant's efforts to find a new job included updating her cover letter and résumé, asking her friends about potential jobs, looking for jobs on Tik Tok and on her school's job portal, handing out her résumé at grocery stores, and applying for jobs.

[56] As noted above, the Appellant said that it was difficult to get a job due to the pandemic. But she continued to look for work, and I have accepted this as fact. And I find that the efforts she made are enough to meet the requirements of this second factor. I find that because she continued to look for work and used the kinds of activities listed in the law until she found two part-time jobs, the Appellant has made enough effort to find a suitable job.

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

[57] The Appellant hasn't set personal conditions that might unduly limit her chances of going back to work.

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[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.

[58] The Commission says the Appellant's desire to work only part-time was a restriction. It says she intended to continue her studies, making employment secondary to school.

[59] I don't find that the Appellant's choice to work part-time hours unduly limits her chances of returning to work.

[60] In each of her training questionnaires, the Appellant said she was working part-time at a grocery store. She said she had worked there since November 2018, and did so after school on evenings a couple times a week and on weekends. As noted above, she testified that she worked 10 or 15 hours a week.

[61] The companies the Appellant named where she had applied for jobs included grocery stores, retail stores and fast-food restaurants. I find that this is reasonable given her work experience, even if the Appellant could only work on evenings and weekends, outside of a normal daytime school schedule.

[62] The Commission said that the Appellant's history of being employed in school was not on a regular basis. But I don't agree.

[63] The Federal Court of Appeal has held that where a claimant has a pattern of regular work outside full-time school hours, it isn't an error of law to find that they are available for work, if they are available like they were in their previous work schedule.[15] And I find that the Appellant working part-time, 10 or 15 hours a week, although not full-time hours, shows a pattern of regular work.

[64] I don't find that the Appellant's decision to work part-time and not give up her studies was unduly limiting given the type of experience she has and her pattern of previous employment. And given the hours that retail and grocery stores and fast-food restaurants operate, I find it reasonable that the Appellant would look for these kinds of jobs.

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[15] See *Page v Canada (Attorney General)*, 2023 FCA 169.

[65] I find that the Appellant looked for jobs in her usual type of employment that would allow her to continue with her full-time studies. Her job search was consistent with her previous work type. So, I don't find that this would have unduly limited her chances of returning to work.

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

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

Conclusion

[67] The Appellant has shown that she is available for work within the meaning of the law. Because of this, I find that the Appellant isn't disentitled from receiving benefits. This means that the appeal is allowed.

Audrey Mitchell
Member, General Division – Employment Insurance Section