Citation: *MG v Canada Employment Insurance Commission*, 2023 SST 1996

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	M. G.
Representative:	K. G.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (564864) dated January 10, 2023 (issued by Service Canada)

Tribunal member:	Raelene R. Thomas
Type of hearing:	Teleconference
Hearing date:	June 21, 2023
Hearing participants:	Appellant Appellant's representative
Decision date:	July 18, 2023
File number:	GE-23-349

Decision

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

[2] The Appellant has shown she was available for work while in school taking training. This means 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 the Appellant was disentitled from receiving EI regular benefits from September 7, 2021 because she wasn't available for work.[1] A claimant has to be available for work to get EI regular benefits.[2] Availability is an ongoing requirement. This means that a claimant has to be searching for a job.

[4] I must decide whether the Appellant has proven she was available for work. The Appellant has to prove this on a balance of probabilities. This means she has to show it is more likely than not she was available for work.

[5] The Commission says the Appellant wasn't available because she was in school taking a training course on her own initiative.

[6] The Appellant disagrees. She says she applied for a sponsorship but did not get approval. She contacted Service Canada and was told her EI was okay, meaning she would receive EI while she was in school. The Appellant says she was available for work and she worked part-time throughout her training. The Appellant's Representative argues the Appellant is available for full time hours. That she is available from 4:00 p.m. to 12:00 midnight daily is no different from being available from 8:00 a.m. to 4:00 p.m. daily.

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[1] Service Canada delivers the Commission's EI program.
[2] A person who applies for EI benefits is called a "claimant." A person who appeals a decision of the Commission is called and "Appellant."

Matter I have to consider first

Post hearing documents

[7] The Appellant testified she spoke to a Service Canada officer twice in July or August 2021 to confirm her EI benefits would continue once she attended school. The Appellant said two officers told her the claim was approved and EI benefits were approved while she was in school.

[8] After the hearing, I asked the Commission to provide any records it had of these two conversations. The Commission replied it had no records.

[9] I note Service Canada officers do not record every conversation with claimants. I also note the lack of a record of a conversation between a Service Canada officer does not mean the conversation did not take place.

Issue

[10] Was the Appellant available for work from September 7, 2021 while in school taking training?

Analysis

[11] Two different sections of the law require claimants to show they are available for work.

[12] First, the *Employment Insurance Act* (EI Act) says the Commission may ask a claimant to prove they are making "reasonable and customary efforts" to find a suitable job.[3] The *Employment Insurance Regulations* (EI Regulations) give criteria that help explain what "reasonable and customary efforts" mean.[4]

[3] See section 50(8), EI Act. This is how I refer to the law that applies to the circumstances of this appeal.
[4] See section 9.001, EI Regulations.

[13] Second, the EI Act says a claimant has to prove they are "capable of and available for work" but aren't able to find a suitable job.[5] Case law (decisions from the courts) gives three things a claimant has to prove to show they are "available" in this sense.[6]

[14] The Commission decided the Appellant was disentitled under both these sections. So, it says she must meet the criteria of both sections to get benefits.

[15] In addition, the Federal Court of Appeal (FCA) has said claimants who are in school taking training full-time are presumed to be unavailable for work.[7] This is called the "presumption of non-availability." It means we can suppose students aren't available for work when the evidence shows they are in school taking training full time.

[16] I will start by looking at whether I can presume 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

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

– The Appellant was a full-time student

[18] The Appellant testified she was laid off from a job when she applied for EI benefits. She applied to a Practical Nursing (PN) program, was accepted but had not yet started the program when she applied for EI benefits. The Appellant's application for EI benefits, completed on July 21, 2021, shows she was full-time and attending training from September 7, 2021. I see no evidence to contradict this, so I accept it as fact. Accordingly, the presumption applies to her from September 7, 2021.

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[5] See section 18(1)(a) of the EI Act.
[6] See *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96. This is how I refer to the courts' decisions that apply to the circumstances of this appeal.
[7] See *Canada (Attorney General) v Cyrenne*, 2010 FCA 349.

[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 to the Appellant.

[20] There are two ways the Appellant can rebut the presumption. She can show she has a history of working full-time while also in school taking training.[8] Or, she can show there are exceptional circumstances in her case.[9]

– **The Appellant has rebutted the presumption**

[21] The Appellant has rebutted the presumption. The reasons for my finding follow.

[22] The Appellant has worked while she was in school. In 2019 she worked while she was in high school and also when she attended university for the 2019 Fall semester. While she was at university, she took four courses and worked 20 hours a week. Her work was afternoons, evenings and weekends. The Appellant was enrolled in a medical laboratory assistant (MLA) course from September 2020 to June 2021. She did not work during that program because she had to move to attend school.

[23] After the Appellant completed her MLA program, she had to wait to get a licence from a national licensing body to work as an MLA. The Appellant got a job as a labourer and painter. She worked evenings and weekends. While she was waiting to get her license, she also applied to work as an MLA at a hospital. She was accepted into the Practical Nursing program before she was hired to work as an MLA as a casual call-in employee. She started work in that job before she started the PN program.

[24] The hospital where the Appellant worked and the school she was attending for the PN program are in the same city.

[25] The Appellant testified the hospital gave her a list of shifts to work. The shifts were days, evenings and weekends. Her shifts were 7:00 am. to 3:00 p.m. or the occasional evening shift. She asked to be trained for the 4:00 p.m. to midnight shift but

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

was denied. The Appellant testified she was offered evenings and that allowed her to work around her class schedule. She is a member of a union when working as an MLA, earns seniority and is called in to work on the basis of seniority. As a casual call-in employee, she can get full-time hours during the summer months providing vacation relief.

[26] The Appellant testified her MLA casual call-in employment from June 28, 2021 to July 9, 2021 was evenings and weekends. Her employment from February 24, 2020 to August 28, 2020 while she was in high school was also evenings, weekends and during the summer months.

[27] The Commission says the Appellant has failed to rebut the presumption because she has not demonstrated the desire to return to the labour market as soon as a suitable position is available. It says the Appellant did not make any effort to find full-time employment while she was attending school and in addition set personal conditions that unduly limited her chances of returning to the labour market full-time. The Commission says the Appellant was not willing to abandon her course to accept full-time employment and indicated if she were not in school, she could have full-time hours with her employer.

[28] I do not agree with the Commission that the Appellant had to show she was available for full-time work while studying; there is no such requirement in the legislation. Her obligation was to show she was available for work consistent with her past work history.[10]

[29] In this case, prior to applying for EI benefits, the Appellant worked evenings and weekends while in school. She also worked evenings and weekends during the summer months. Before she started the NP program on September 7, 2021 the Appellant as working as a casual call-in MLA in the evenings and on weekends. The

[10] Although I am not bound by decisions of the Tribunal's Appeal Division, I am persuaded by the reasoning in *JD v. Canada Employment Insurance Commission*, 2019 SST 438. It says that a claimant's pattern of working part-time means that only looking for part-time work is not an undue restriction on her availability.

Appellant continued to work evenings and weekends after she started her training on September 7, 2021.

[30] As noted above, case law says the presumption is rebutted when a claimant can show she worked full-time while studying full-time or there are exceptional circumstances. The Appellant has a history of working part-time while studying full-time. Prior to enrolling in the NP program, she looked for work in her field of study. She was successful in getting casual call-in employment during the summer months which continued when she started the NP program. Her employer set her shifts as days and evenings. That the employer did not offer her full-time work is not determinative of the matter. The evidence shows the employer later started to offer the Appellant shifts on weekends. This pattern of work is consistent with the Appellant's pattern of work prior to attending the NP program. Considering this evidence, I find the Appellant has rebutted the presumption she is not available for work due to attending school full-time.

[31] 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.

[32] 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 not presumed to be unavailable from September 7, 2021.

Reasonable and customary efforts to find a job

[33] In looking through the evidence in the appeal file, I did not see any requests from the Commission to the Appellant to prove she made reasonable and customary efforts to find a suitable job, or any claims from the Commission that if it did ask the Appellant, her proof was insufficient.

[34] I note the Commission did not make any submissions on how the Appellant failed to prove to it she was making reasonable and customary efforts. The Commission only summarized what the legislation says in regard to section 50(8) of the EI Act and section 9.001 of the EI Regulations.

[35] Based on the lack of evidence the Commission asked the Appellant to prove her reasonable and customary efforts under section 50(8) of the EI Act, I find the Commission did not disentitle the Appellant under section 50(8) of the EI Act. Therefore, I do not need to consider that part of the law when reaching my decision on this issue.

[36] I will only consider whether the Appellant was capable and available for work under the section 18 of the EI Act.

Capable of and available for work

[37] As noted above, I only need to consider whether the Appellant was capable of and available for work under paragraph 18(1)(a) of the EI Act.[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 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 she wanted to go back to work as soon as a suitable job was available. The Appellant testified she worked part-time while she was in high school and in university. While she was waiting to get her MLA license she applied for and got a summer job. Once she got her MLA license she applied for and got a casual

[11] See section 18(1)(a) of the EI 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.

call-in job as an MLA with a hospital. She continued to work casually at the hospital while she was attending the NP program. This evidence tells me the Appellant wanted to go back to work as soon as a suitable job was offered.

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

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

[41] There is a list of job search activities to look at when deciding availability under a different section of the law.[14] This other section does not apply in the Appellant's appeal. But I am choosing look at that list for guidance to help me decide whether the Appellant made efforts to find a suitable job.[15]

[42] There are nine job search activities in the list of job search activities. Some of the activities are: preparing a resume or cover letter, networking, contacting employers who may be hiring, submitting job applications, and attending interviews.[16]

[43] Case law has said when a claimant has good cause to believe she will be recalled to work she is entitled to a reasonable period to regard the promise of recall to work as the most probable means of obtaining employment.[17]

[44] The Appellant testified she contacted her former employer (from 2020) to see if they were hiring. She networked with people in her community about job opportunities. She responded to an email from her hospital employer looking for people to work extra hours. During the summer of 2022 she also worked as a Personal Care Attendant at the hospital.

[45] The Appellant testified she was a member of a union when working as an MLA. She said her shifts were assigned on a seniority basis. She wanted to work 4:00 p.m. to midnight, but her employer refused. Instead, her employer offered her days, evenings

[14] Section 9.001 of the EI Regulations, which is for the purposes of subsection 50(8) of the EI Act.
[15] 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
[16] Section 9.001 of the EI Regulations
[17] See Canada Umpire Benefits (CUBs) 14685, 14554, and 21160. Although I am not bound by CUBs, I am guided by the principles contained in these CUBs in reaching my decision.

and weekends. She was also able to get full-time employment during the summer months as vacation relief. The Appellant provided the Tribunal with texts between her and her employer. In some texts the employer is offering various shifts and in some cases the Appellant is advising of her availability.

[46] I find the Appellant's best chance for suitable employment, was to continue to be available for her call-in position as an MLA with the hospital. Her employer had the means to contact her for work. As noted earlier, that it did not offer her full-time hours while she was in the school is not determinative of the matter. In my opinion, the Appellant's efforts to find work with her former employer and in her community taken together with her seniority based call-in position, demonstrates she made efforts to find a suitable job.

[47] As a result, I find the Appellant has made enough effort to find a job and has met the requirements of this second factor.

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

[48] The Appellant did not set personal conditions that might have unduly limited her chances of going back to work.

[49] The Appellant worked part-time while she was in high school, university and attending the NP Program. She also worked during the summer months. She was hired as casual employee at the hospital as an MLA and worked at that job while she was attending the NP program. She used her own car or carpooled to go to work. She was willing to drive 45 minutes to get to work, as that is how far away the hospital was from where she lived. She has a college diploma as an MLA. She looked for and was successful obtaining work consistent with her education. She was paid the collective agreement rate when working as an MLA. The Appellant said while she would like to work in her field, she would accept a job elsewhere. There are no jobs the Appellant could not do due to moral convictions or religious beliefs. The Appellant worked in casual call-in employment as an while she was in the NP program which is consistent with her past work history. This evidence tells me the Appellant's studies from September 7, 2021 did not limit her chances of going back to work.

[50] Accordingly, I find the Appellant has not set a personal condition on the hours she would and could work that might have unduly limited her chances of returning to the labour market.

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

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

Other Matters

– **Disentitlement after benefits were paid**

[52] The Appellant testified she was honest when she completed her application for EI benefits in July 2021. She reached out to Service Canada twice in July and August 2021 to confirm her benefits would continue once she started the NP program. An officer told her yes, her benefits would continue while she was in school.

[53] The Appellant testified she applied for EI benefits in 2022 because her hours of work had been reduced. She said when she applied in 2022, the Service Canada officer made a point to review her pervious year's benefits because she indicated in the 2022 application she was in a training program from September 2021 to April 2023.

[54] The appeal file shows that on November 23, 2022 the Service Canada officer told the Appellant she would be reviewing the Appellant's training period from September 2021 to April 2023. The officer said the review was required because the Appellant completed a training course questionnaire on September 26, 2022. This means the officer did a retroactive assessment of the Appellant's prior benefit period (2021-2022) and an assessment of the Appellant's current benefit period (2022-2023) at the same time.

[55] The law says the Commission may reconsider a claim for benefits and may verify a claimant's entitlement to benefits already paid to them.[18] If you were paid benefits you were not entitled to receive, the Commission can ask you to repay those benefits.[19]

[56] I note that, in response to the COVID-19 pandemic, Parliament made a number of changes to the EI Act to facilitate access to EI benefits.[20] Those temporary measures apply to claims starting between September 27, 2020 and September 25, 2021. The Appellant's claim for EI benefits began on July 18, 2021, so those temporary measures apply to her.

[57] Two temporary measures apply to claimants who attend a course, a program of instruction, or training to which they were not referred.[21]

[58] The first measure says a claimant, who attends training to which they have not been referred, is not entitled to be paid EI benefits for any working day in a benefit period for which the claimant is unable to prove that on that day they were capable of and available for work.[22]

[59] The second measure says the Commission may, at any point after benefits are paid to a claimant, verify that a claimant who is attending unreferred training is entitled to those benefits by requiring proof they were capable of and available for work on any working day of their benefit period.[23]

[60] While it would have been preferable to have the entitlement decision made once the Appellant spoke to Service Canada officers in July and August 2021 to confirm her EI benefits would continue when started the NP program, I find that section 153.161 of the EI Act as it is written allows for the Commission to retroactively review the Appellant's entitlement to benefits, even after the benefits were paid to her.

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[18] See section 52 of the EI Act. Usually, the Commission has 36 months to revisit its decisions.
[19] See section 52(3) of the EI Act.
[20] See section 153.5 of the EI Act.
[21] Section 25 of the EI Act says claimants who are referred to training by the Commission or a designated authority are considered to be available for work.
[22] See section 153.161(1) of the EI Act.
[23] See section 153.161(2) of the EI Act.

Conclusion

[61] The Appellant has rebutted the presumption she was not available for work due to attending school full-time.

[62] The Appellant has met all three factors to show she was available for work within the meaning of the law. Because of this, I find the Appellant isn't disentitled from receiving EI benefits from September 7, 2021 onward. So, the Appellant may be entitled to benefits.

[63] This means the appeal is allowed.

Raelene R. Thomas
Member, General Division – Employment Insurance Section