Citation: *SA v Canada Employment Insurance Commission*, 2024 SST 457

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

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

Decision under appeal:	Canada Employment Insurance Commission RGD2 dated February 28, 2024. Original reconsideration decisions dated January 4, 2023, and March 14, 2023.

Tribunal member:	Gerry McCarthy
Type of hearing:	Teleconference
Hearing date:	April 24, 2024
Hearing participant:	Appellant
Decision date:	April 29, 2024
File number:	GE-24-670

Decision

Issue 1

[1] The appeal is allowed.

[2] The Appellant wasn't able to work from August 14, 2022, to August 27, 2022, because of her illness. And, the Appellant would have been available for work if she hadn't been sick and recovering from her illness. Her illness was the only thing stopping her from being available for work.

[3] This means that the Appellant isn't disentitled from receiving Employment Insurance (EI) sickness benefits from August 14, 2022, to August 27, 2022. So, the Appellant may be entitled to benefits.

Issue 2

[4] The appeal is allowed.

[5] The Appellant has shown that she was available for work while in school. This means that she isn't disentitled from receiving regular EI benefits from August 28, 2022. So, the Appellant may be entitled to benefits.

Overview

Issue 1

[6] The Appellant wasn't able to work because of an illness. To be able to receive EI sickness benefits, the Appellant must "otherwise be available for work."[1] In other words, the Appellant's illness has to be the only reason why she wasn't available for work.

[1] Section 18(1)(b) of the *Employment Insurance Act* (EI Act) sets out this rule and uses this wording.

[7] The Canada Employment Insurance Commission (Commission) says that the Appellant wouldn't have been available for work anyway because the Appellant was attending a full-time year-long course of instruction.

[8] The Appellant disagrees and says she was still recovering from her surgery from August 14, 2022, to August 27, 2022. She says she was told that starting to take a college course wouldn't affect her claim for sickness benefits. She further says the first two-weeks of her college course (August 15, 2022, to August 27, 2022) only involved working on simple and basic computer scenarios. Finally, the Appellant says she didn't have to attend the morning class during the week and could connect to a recording of the class at other times.

Issue 2

[9] The Commission decided the Appellant was disentitled from receiving EI regular benefits as of August 28, 2022, 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.

[10] 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.

[11] The Commission says the Appellant wasn't available because she was attending a full-time course.

[12] The Appellant disagrees and says she was available for work while attending her course. She says she was available for work in the afternoons, evenings and weekends. She further says she had the flexibility not to attend her morning class during the week.

Matters I have to consider first

Appeal Division decision

[13] On September 12, 2023, a member of the General Division of the Tribunal dismissed the Appellant's Appeal. The Appellant filed leave to appeal on September 29, 2023. On February 12, 2024, the Appeal Division decision member sent the case back to the General Division of the Tribunal for reconsideration.

[14] After reviewing the Appeal Record, I proceeded to set down a teleconference hearing because the Appellant initially selected a teleconference hearing in her Notice of Appeal to the Tribunal (GD2).

[15] Before the commencement of the hearing on April 24, 2024, the Appellant confirmed she had the entire Appeal Record. The Commission didn't attend the teleconference hearing but provided their written supplementary representations on February 24, 2024 (RGD2).

Issue 1

[16] The Appellant wasn't able to work because of her illness. But, was the illness the only thing stopping her from being available for work?

Analysis

[17] It is clear that, if you are sick or injured, you aren't available for work. The law for EI sickness benefits reflects this matter. However, the law says that, if you are asking for sickness benefits, you must **otherwise** be available for work. This means that the Appellant has to prove that her illness is the only reason why she wasn't available for work.[2]

[2] See section 18(1)(b) of the EI Act.

[18] 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 would have been available for work if it hadn't been for her illness.

Available for work

[19] Case law sets out three factors for me to consider when deciding whether a claimant is available for work. A claimant has to prove the following three things:[3]

a) They want to go back to work as soon as a suitable job is available.

b) They are making efforts to find a suitable job.

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

[20] The Appellant doesn't have to show that she is actually available. She has to show that she would have been able to meet the requirements of all three factors if she hadn't been sick. In other words, the Appellant has to show that her illness was the only thing stopping her from meeting the requirements of each factor.

– Wanting to go back to work

[21] The Appellant has shown she would have wanted to go back to work as soon as a suitable job was available. I make this finding, because the Appellant testified she would have been otherwise available for work if she hadn't been recovering from her illness. I accept as credible the Appellant's testimony, because her statements were consistent and forthright.

– Making efforts to find a suitable job

[22] The Appellant has shown that she would have made enough efforts to find a suitable job. I make this finding, because the Appellant testified she would have been looking for work if it hadn't been for her illness. I accept as credible the Appellant's

[3] 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.

testimony on this matter, because her statements were forthright and supported by job search information submitted after she applied for regular EI benefits on September 12, 2022.

– Unduly limiting chances of going back to work

[23] The Appellant didn't set personal conditions that would have unduly limited her chances of going back to work.

[24] The Appellant says she didn't do this because she had just started her college course August 15, 2022, and only attended class in the morning. She further says she would have been available for work in the afternoons, evenings and on weekends. The Appellant further says she could have missed her morning class during the week to attend work without jeopardizing the course.

[25] The Commission says the Appellant wasn't otherwise available for work as she was attending a full-time year-long course of instruction.

[26] I find the Appellant didn't unduly limit her chances of going back to work for the following reasons:

[27] First: The Appellant had just started her college course and the requirements only involved one morning class from Monday to Friday with no assignments after class.

[28] Second: The Appellant testified she would have been available for work in the afternoons, evenings and weekends. I realize the Commission submitted the Appellant was attending a full-time course. Nevertheless, the Appellant testified that she could have been available for work from Monday to Friday in the mornings because the course was recorded (and she could have attended online at another time).

– So, would the Appellant have been available for work?

[29] Based on my findings on the three factors, I find the Appellant has shown that she would have been available for work.

[30] In short, the Appellant would have met the requirements of all three factors if she hadn't been sick and recovering from her surgery.

Issue 2

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

Analysis

[32] 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.

[33] 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.[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.

[34] 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.[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.

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

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

---

[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.

[37] 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

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

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

[39] 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.

[40] The presumption applies to the Appellant.

– The Appellant is a full-time student

[41] 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.

[42] 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]

[43] The Appellant says she worked while attending school full-time in 2012. The Appellant further explained that from 2014 to 2015 she was enrolled and completed the "ACE" certificate while working full-time.

[44] The Commission recognized the Appellant had a history of working full-time while attending a course, but this history wasn't recent.

---

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

[45] I find the Appellant has rebutted the presumption she wasn't available for work while attending school for the following reasons:

[46] First: The Appellant had a history of working full-time while attending school. I realize the Commission submitted the Appellant's history of working full-time while attending school wasn't recent. Nevertheless, I'm satisfied the Appellant has demonstrated she had some history of working full-time while attending school.

[47] Second: There were exceptional circumstances in the Appellant's case. Specifically, the Appellant testified she could miss her morning class during the week to attend work. I recognize the Commission submitted the Appellant was a full-time student. Still, the Appellant's circumstances were unique in that she could miss her morning class for work if required. On this matter, I accept as credible the Appellant's testimony on this matter because her statements were forthright, detailed, and plausible.

[48] In summary: The Appellant has rebutted the presumption that she was unavailable for work.

– **The presumption is rebutted**

[49] 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 was actually available.

Reasonable and customary efforts to find a job

[50] 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 were reasonable and customary.[11]

[51] The law sets out criteria for me to consider when deciding whether the Appellant's efforts were reasonable and customary.[12] I have to look at whether her

[11] See section 50(8) of the Act.
[12] See section 9.001 of the Regulations.

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.

[52] 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:[13]

- assessing employment opportunities
- preparing a résumé or cover letter
- applying for jobs

[53] The Commission says the Appellant didn't do enough to try to find a job. Specifically, the Commission says the 28 jobs the Appellant indicated she applied for were job postings from the job site "Indeed" to which she could have applied (AD3-6).

[54] The Appellant disagrees. She says that she applied to every potential employer listed in her most recent job search (RDG3-5 to RDG3-7). The Appellant says her efforts were enough to prove that she was available for work.

[55] I find the Appellant made reasonable and customary efforts to find work for the following reasons:

[56] First: The Appellant updated her resume and consistently looked for job opportunities on "Indeed."

[57] Second: The Appellant applied to numerous employers including: "TD Bank," "Potvin Financial Services," and "401 Group of Companies." I recognize the Commission submitted that the 28 jobs the Appellant indicated she applied for were job postings from the job site "Indeed" to which she could have applied. However, I accept as credible the Appellant's testimony that she applied to each employer listed in the job search information listed in RGD3-5 to RGD3-7. I accept the Appellant's testimony as credible because her statements were forthright and supported by a job search list that

[13] See section 9.001 of the Regulations.

included specific names of potential employers. Furthermore, the Appellant explained that she started working again in November 2023 for "X."

Capable of and available for work

[58] 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.

[59] 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

[60] The Appellant has shown that she wanted to go back to work as soon as a suitable job was available. I make this finding, because the Appellant was consistently forthright that she was making "every effort" to find work while attending her course.

– Making efforts to find a suitable job

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

[62] 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]

---

[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.
[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.

[63] The Appellant's efforts to find a new job included updating her resume and applying to numerous employers including: "TD Bank," "Potvin Financial Services," and "401 Group of Companies." I explained these reasons above when looking at whether the Appellant has made reasonable and customary efforts to find a job.

[64] Those efforts were enough to meet the requirements of this second factor, because the Appellant provided a specific list of employers she contacted about employment (RGD3-5 to RGD3-7). Furthermore, the Appellant testified she consistently looked for job opportunities on "Indeed."

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

[65] The Appellant didn't set personal conditions that might have unduly limited her chances of going back to work.

[66] The Appellant says she didn't do this because she was available for work during the afternoons, evenings, and weekends. The Appellant further says she could miss her morning class during the week if she needed to attend work.

[67] The Commission says the majority of positions in the Appellant's desired industry operated during the same hours of her course of instruction. The Commission says this would limit the chances of the Appellant obtaining suitable employment opportunities while attending the course.

[68] I find the Appellant didn't unduly limit her chances of going back to work, because she was available for work in the afternoons, evenings and weekends. I realize the Commission submitted the majority of positions in the Appellant's desired industry operated during the same hours as her course. However, the Appellant applied for some positions where she could work afternoons and evenings.

[69] Finally, I wish to emphasize that a recent decision from the Federal Court of Appeal explained that it was unreasonable to conclude that availability must be shown during regular hours for every working day.[18]

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

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

The Appellant's second claim for EI sickness benefits

[71] The Appellant filed a second claim for EI sickness benefits on February 6, 2023 (GD3-64). On March 14, 2023, the Commission wrote that the claim was re-activated on January 29, 2023. However, the Commission explained they were unable to pay sickness benefits from **August 15, 2022**, as the Appellant was taking a training course on her own initiative and did not prove that she was available for work if she were not sick.

[72] I wish to emphasize that the only issues before me were the ones identified by the Commission in their supplementary representations dated February 24, 2024. Specifically, the Commission wrote: "The Commission requests that a disentitlement from **August 14, 2022, to August 27, 2022**, be imposed as the claimant was not otherwise available while in receipt of sickness benefits, and a disentitlement to be imposed from **August 28, 2022**, indefinitely as the claimant was not considered available as she was in attendance of a full-time course while in receipt of regular benefits"(RGD2-3).

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

Conclusion

Issue 1

[73] The Appellant has shown that she would have been available for work within the meaning of the law. Because of this, I find the Appellant isn't disentitled from receiving EI sickness benefits from August 14, 2022, to August 27, 2022. So, the Appellant may be entitled to benefits during this period.

[74] This means the appeal is allowed.

Conclusion

Issue 2

[75] The Appellant has shown that she was available for work within the meaning of the law. Because of this, I find the Appellant isn't disentitled from receiving regular benefits from August 28, 2022. So, the Appellant may be entitled to benefits.

[76] This means the appeal is allowed.

Gerry McCarthy

Member, General Division – Employment Insurance Section