Citation: *MM v Canada Employment Insurance Commission*, 2023 SST 1952

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	M. M.
Representative:	H. M.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (574705) dated February 23, 2023 (issued by Service Canada)

Tribunal member:	Denis Bourgeois
Type of hearing:	Teleconference
Hearing date:	July 12, 2023
Hearing participant:	Appellant's representative
Decision date:	August 22, 2023
File number:	GE-23-850

Decision

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

[2] The Appellant has not shown that she was available for work while attending university. This means that she cannot receive Employment Insurance (EI) benefits.

Overview

[3] The Canada Employment Insurance Commission (Commission) decided that the Appellant was disentitled from receiving EI regular benefits as of September 5, 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.

[4] 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.

Matters I have to consider first

The Appellant wasn't at the hearing

[5] The Appellant was not at the hearing. A hearing can go ahead without the Appellant if the Appellant got the notice of hearing.[1] The Appellant's sent an email saying that she would not attend. She also confirmed that her representative, her mother, would attend the hearing in her place. So, the hearing took place when it was scheduled, but without the Appellant.

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

I asked the Commission to clarify the disentitlement under section 50(8)

[6] The Commission had imposed a disentitlement pursuant to sections 18 and 50.[2]

[7] While looking at the evidence, I did not see any requests from the Commission to the Appellant to prove her reasonable and customary efforts, or any claims from the Commission that if they did, her proof was insufficient.

[8] I asked the Commission to clarify if it had requested a job search from the Appellant. It responded that it did not and that the Appellant was not disentitled under section 50(8). Therefore, it is not something I need to consider.

[9] Accordingly, I only need to decide if the Claimant was available for work under paragraph 18(1)(a) of the EI Act.

I accepted documents sent in after the hearing

[10] At the hearing, the Appellant's representative spoke about her job search efforts. I said I would accept it if she sent proof of her job search efforts after the hearing. The Appellant provided this evidence after the hearing.

[11] I accepted this evidence, and I am using it to make my decision because the Appellant thought it would be important for me to see. The Commission had a chance to ask the Appellant about her job search but did not, and so I don't think it would be unfair to the Commission if I rely on the Appellant's evidence.

Issue

[12] Was the Appellant available for work while attending university?

Analysis

[13] The *Employment Insurance Act* (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

---

[2] See GD4-1.
[3] See section 18(1)(a) of the Act.

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.

[14] The Commission decided that the Appellant was disentitled from receiving benefits because she wasn't available for work.

[15] 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.

[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 she was available based on the section 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 she was a full-time student

[18] 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 university full-time.

[19] The presumption applies to the Appellant.

[20] The Appellant is a full-time student. But the presumption that full-time students are not available for work can be rebutted (that is, shown to not apply). If the presumption were rebutted, it would not apply.

---

[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.

[21] 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]

[22] The Appellant says that she worked 2 or 3 evenings a week during high school. She said that she was ready to work part-time. She said that she would have changed her school schedule to accommodate a job.

[23] The Commission says that the Appellant had restricted her job around her course schedule.

[24] I find that the Appellant has not rebutted the presumption. She has never worked while attending university, except during the summers. She has said she would only accept a part-time job. Her initial comments were that she needed an employer that would be flexible to accommodate her.[8] Spontaneous initial declarations are considered more reliable than statements claimants make after the Commission first refuses them benefits.[9]

[25] The Appellant hasn't rebutted the presumption that she 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. I find there were no exceptional circumstances in her case.

---

[6] See *Canada (Attorney General) v Rideout*, 2004 FCA 304.
[7] See *Canada (Attorney General) v Cyrenne*, 2010 FCA 349.
[8] See GD3-20.
[9] See *Bellefleur* v *Canada (Attorney General),* 2008 FCA 13.

Capable of and available for work

[27] I have to consider whether the Appellant was capable of and available for work but unable to find a suitable job.[10] Case law sets out three factors for me to consider when deciding this. The Appellant has to prove the following three things:[11]

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.

[28] When I consider each of these factors, I have to look at the Appellant's attitude and conduct.[12]

– Wanting to go back to work

[29] The Appellant hasn't shown that she wanted to go back to work as soon as a suitable job was available.

[30] The law says that a claimant who attends a full-time training course is generally not considered to be available for work unless they can demonstrate that their **main intention** is to immediately accept suitable employment **and** that the course does not constitute an obstacle to seeking and accepting suitable employment.[13]

---

[10] See section 18(1)(a) of the Act.
[11] 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.
[12] 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.
[13] See *Canada (Attorney General)* v *Gagnon*, 2005 FCA 321, *Canada (Attorney General)* v *Loder*, 2004 FCA 18; *Canada (Attorney General)* v *Rideout*, 2004 FCA 304; *Canada (Attorney General)* v *Primard* (2003), 2003 FCA 349 (CanLII), 317 N.R. 359 (F.C.A.); *Canada (Attorney General)* v *Bois*, 2001 FCA 175.

[31] The Appellant said that she would not quit her studies to take on full-time employment.[14] At the hearing, her representative also said that she has both provincial and federal student loans.

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

[32] The Appellant hasn't made enough effort to find a suitable job.

[33] The Appellant's efforts to find a new job included applying online, making follow-up phone calls, asking friends, and asking family members about jobs.

[34] Those efforts weren't enough to meet the requirements of this second factor. The Appellant sent in a job search list, but it was quite vague. There are no dates or details other than the names of the places she said she applied.

[35] I do not find it credible that the Appellant applied for 40+ jobs in Toronto that included coffee shops and restaurants without getting one interview. She did not find a job for the whole academic school year.

[36] Only those who are actively seeking work can receive regular EI benefits. This means the Appellant needed to be looking for a job for every day of her benefit period in order to be entitled to the EI benefits. The lack of details of her job search efforts means she cannot prove that she was doing enough to find suitable employment, namely full-time work, for every working day of her benefit period.

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

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

[38] The Appellant says she hasn't done this because she would have accommodated her school schedule to her work schedule.

---

[14] See GD3-20.

[39] The Commission says that the Appellant was looking for student employment that would accommodate her study schedule. It says that she spent 38 to 43 hours on her studies and that she is in class Monday to Friday. It says she was looking for part-time work.

[40] The courts have found that focusing more time on school than on work is a personal condition that unduly limits your chances of finding a job.[15]

[41] I find that wanting to work only part-time was limiting her chances of getting a job.

NB-EI Connect program

[42] The Appellant says that she was part of the NB-EI Connect program and had been for 3 years. She says that she had been approved for her fourth year also. She explains that the counselors were well aware of her course of study and its duration. She says that this was established prior to the program being restructured.[16]

[43] It is unfortunate for the Appellant and for other students that had been referred through this program when it ended abruptly. However, this was a provincial program. The Tribunal does not have any jurisdiction over this matter. While I sympathize with the Appellant, I must follow the law.

---

[15] See *Duquet* v *Canada (Attorney General)*, 2008 FCA 313.
[16] See GD2-5.

Conclusion

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

[44] 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.

[45] 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 cannot receive EI benefits.

[46] This means that the appeal is dismissed.

Denis Bourgeois
Member, General Division – Employment Insurance Section