[TRANSLATION]

Citation: *SN v Canada Employment Insurance Commission*, 2024 SST 456

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	S. N.
Representative:	Marilyn Gariépy
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (0) dated July 4, 2023 (issued by Service Canada)

Tribunal member:	Normand Morin
Type of hearing:	Videoconference
Hearing date:	March 1, 2024
Hearing participants:	Appellant Appellant's representative A representative of the Appellant's former employer, witness
Decision date:	April 26, 2024
File number:	GE-23-1878

Decision

[1] The appeal is allowed.

[2] I find that the Appellant has proven that she was available for work from September 27, 2020, while taking training.[1] This means that she is entitled to Employment Insurance (EI) benefits as of that date.

Overview

[3] In the fall of 2019, the Appellant began full-time training at X. The training was for a college diploma (DEC) in dental hygiene.[2] She says that she did her fall 2020 term from August 24, 2020, to December 25, 2020,[3] and her winter 2021 term from January 25, 2021, to May 21, 2021.[4] She says that it was a three-year training program. She finished it in 2022.[5]

[4] On March 19, 2020, after a period of employment with X from September 2013 to March 12, 2020, she made an initial claim for EI benefits (regular benefits).[6] A benefit period for the EI Emergency Response Benefit (EI ERB) was established effective March 15, 2020, and a benefit period for regular benefits was established effective September 27, 2020.[7]

[5] On April 1, 2022, the Canada Employment Insurance Commission (Commission) told the Appellant that it was unable to pay her EI benefits from September 27, 2020, because she was taking training on her own initiative and hadn't proven her availability for work. The Commission said that she would receive a notice of debt if she owed money.[8]

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[1] See sections 18(1)(a) and 153.161 of the *Employment Insurance Act* (Act) and sections 9.001 and 9.002(1) of the *Employment Insurance Regulations* (Regulations).
[2] See GD3-13, GD3-17 to GD3-21, GD3-30, and GD6-8 to GD6-10.
[3] See GD3-19, GD3-20, GD6-9, and GD6-10.
[4] See GD3-18, GD6-9, and GD6-10.
[5] See GD3-30.
[6] See GD3-3 to GD3-12, GD3-10, GD3-16, GD3-28, GD6-7, RGD15-2 to RGD15-4, and RGD16-51.
[7] See GD3-1, GD4-1, and AD2-1.
[8] See GD3-22.

[6] On May 26, 2022, after a request for reconsideration, the Commission told the Appellant that it was upholding its decision.[9]

[7] On June 23, 2022, the Appellant challenged the Commission's reconsideration decision before the Social Security Tribunal of Canada (Tribunal).[10]

[8] On November 3, 2022, the Tribunal's General Division (General Division) allowed the Appellant's appeal.[11] In its decision, the General Division found that the Commission hadn't exercised its discretion judicially, so it could not retroactively reconsider the Appellant's claim for benefits.[12]

[9] On November 24, 2022, the Commission applied to the Tribunal's Appeal Division (Appeal Division) for permission to appeal the General Division decision.[13] It was given permission to appeal on December 9, 2022.[14]

[10] On July 4, 2023, the Appeal Division allowed the Commission's appeal on the issue of the Commission's exercise of discretion. The Appeal Division sent the file back to the General Division to determine whether the Claimant (the Appellant before the General Division) was entitled to benefits from September 27, 2020, while taking training.

[11] The Appellant says that she was available for work from September 27, 2020. She says that she has been able to take training and work part-time at the same time for many years. She says that she started working for X in 2013 and worked for that employer while in school. She says that she stopped working for it in March 2020 because of the COVID-19[15] restrictions introduced by the Quebec government, including the closure of bars and restaurants. She says that she looked for a job after being laid off. She explains that she also kept in touch with her employer. She says that

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[9] See GD2-9, GD2-10, GD3-32, and GD3-33.
[10] See GD2-1 to GD2-10.
[11] See AD1A-1 to AD1A-11.
[12] See AD1A-1 to AD1A-11.
[13] See AD1-1 to AD1-8.
[14] See AD0-1 to AD0-4.
[15] Coronavirus disease 2019.

he told her he had no work for her, given the restrictions in place. She says that for her fall 2020 and winter 2021 terms, the vast majority of her classes were distance learning, and she could attend them at her convenience. She argues that she is entitled to benefits from September 27, 2020.

Preliminary matters

[12] At the hearing, held by videoconference, the testimony of H. K., the Appellant's former employer, was interrupted because of a technical problem. When this problem was resolved, the witness was no longer available to continue his testimony. Given the situation, he finished what he had wanted to explain during his testimony in a written statement sent to the Tribunal.[16]

Issues

[13] I have to decide whether the Appellant has proven that she was available for work from September 27, 2020, while taking training.[17] I have to answer the following questions:

- Has the Appellant rebutted the presumption that she was unavailable for work?
- Did the Appellant show a desire to go back to work as soon as a suitable job was available?
- Did the Appellant express that desire through efforts to find a suitable job?
- Did the Appellant set personal conditions that might have unduly limited her chances of going back to work?

[16] See RGD15-2 to RGD15-4.
[17] See sections 18(1)(a) and 153.161 of the Act and sections 9.001 and 9.002(1) of the Regulations.

Analysis

[14] The Federal Court of Appeal (Court) has held that a person who is in school full-time is presumed to be unavailable for work.[18] This is called "presumption of non-availability." It means we can suppose that this person isn't available for work when the evidence shows that they are taking training full-time.

[15] But this presumption can be rebutted if certain conditions are met. The Court tells us that principles related to returning-to-studies cases can help rebut the presumption of non-availability.[19] These principles include:

- having a history of full-time employment while studying full-time
- the existence of "exceptional circumstances" that would enable the claimant to work while taking their course (for example, whether the claimant has a history of working part-time while studying full-time, whether the claimant has a history of being employed at irregular hours, the attendance requirements of the course, the claimant's willingness to give up their studies to accept employment)[20]

[16] Although this presumption of non-availability can be rebutted, the student still has to show that they are actually available for work.

[17] Two sections of the Act indicate that claimants have to show that they are available for work.[21] Both sections deal with availability, but they involve two different disentitlements.[22]

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[18] See the Court's decision in *Cyrenne*, 2010 FCA 349.
[19] The Court established or reiterated these principles in the following decisions: *Lamonde*, 2006 FCA 44; *Cyrenne*, 2010 FCA 349; *Wang*, 2008 FCA 112; *Gagnon*, 2005 FCA 321; *Rideout*, 2004 FCA 304; *Boland*, 2004 FCA 251; *Loder*, 2004 FCA 18; *Primard*, 2003 FCA 349; and *Landry*, A-719-91.
[20] The Court established or reiterated these principles in the following decisions: *Lamonde*, 2006 FCA 44; *Cyrenne*, 2010 FCA 349; *Wang*, 2008 FCA 112; *Gagnon*, 2005 FCA 321; *Rideout*, 2004 FCA 304; *Boland*, 2004 FCA 251; *Loder*, 2004 FCA 18; *Primard*, 2003 FCA 349; and *Landry*, A-719-91.
[21] See sections 18(1)(a) and 50(8) of the Act.
[22] See sections 18(1)(a) and 50(8) of the Act.

[18] First, a claimant isn't entitled to receive benefits for a working day in a benefit period for which the claimant fails to prove that on that day the claimant was capable of and available for work and unable to find a suitable job.[23]

[19] Second, to prove availability for work, the Commission may require the claimant to prove that they are making reasonable and customary efforts to find a suitable job.[24]

[20] The Commission didn't base any of its arguments on section 50(8) of the Act, which says that it may require a claimant to prove that they are making reasonable and customary efforts to find a suitable job.[25] For the most part, it relied on sections 18 and 153.161 of the Act.[26]

[21] To determine whether a claimant is available for work, I have to consider the specific criteria set out in the Act for determining whether the claimant's efforts to find a suitable job are reasonable and customary.[27] According to these criteria, the efforts must be 1) sustained, 2) directed toward finding a suitable job, and 3) consistent with nine specified activities that can be used to help claimants get a suitable job.[28] These activities include assessing employment opportunities, registering for job search tools or with online job banks or employment agencies, contacting prospective employers, and submitting job applications.[29]

[22] The criteria for determining what constitutes a suitable job are the following: 1) the claimant's health and physical capabilities allow them to commute to the place of work and to perform the work, 2) the hours of work aren't incompatible with the claimant's family obligations or religious beliefs, and 3) the nature of the work isn't contrary to the claimant's moral convictions or religious beliefs.[30]

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[23] See section 18(1)(a) of the Act.
[24] See section 50(8) of the Act.
[25] See section 50(8) of the Act.
[26] See GD4-1 to GD4-11, AD2-1 to AD2-5, RGD8-1, and RGD8-2.
[27] See section 9.001 of the Regulations.
[28] See section 9.001 of the Regulations.
[29] See section 9.001 of the Regulations.
[30] See section 9.002(1) of the Regulations.

[23] The notion of “availability” isn’t defined in the Act. Court decisions have set out criteria for determining a person’s availability for work and whether they are entitled to EI benefits.[31] These three criteria are:

- wanting to go back to work as soon as a suitable job is available
- expressing that desire through efforts to find a suitable job
- not setting personal conditions that might unduly limit the chances of going back to work[32]

[24] Whether a person who is taking a full-time course is available for work is a question of fact that must be determined in light of the specific circumstances of each case but based on the criteria set out by the Court. The claimant’s attitude and conduct must be considered.[33]

[25] In this case, the Appellant has met the Court’s criteria to prove that she was available for work from September 27, 2020. In addition to rebutting the presumption of non-availability, she has shown that her efforts to find a job during the relevant periods were reasonable and customary.

Issue 1: Has the Appellant rebutted the presumption that she was unavailable for work?

[26] Among the principles related to returning-to-studies cases that can prove a claimant’s availability for work while taking training, I note that the Appellant has a history of working while taking training full-time, that she has been employed at irregular hours, and that the attendance requirements of her courses weren’t an obstacle to work from March 2020.

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[31] The Court established or reiterated this principle in the following decisions: *Faucher*, A-56-96; *Bois*, 2001 FCA 175; and *Wang*, 2008 FCA 112.
[32] The Court established or reiterated this principle in the following decisions: *Faucher*, A-56-96; *Bois*, 2001 FCA 175; and *Wang*, 2008 FCA 112.
[33] See the following Court decisions: *Carpentier*, A-474-97; *Whiffen*, A-1472-92; and *Rondeau*, A-133-76.

[27] I find that these are exceptional circumstances that allow the Appellant to rebut the presumption that she was unavailable for work from September 27, 2020.

[28] The Appellant explains that for part of her winter 2020 term, that is, from mid-March 2020, as well as during her fall 2020 and winter 2021 terms, the vast majority of her classes were distance learning because of the pandemic.[34]

[29] She says that for the fall 2020 term, there was only one course she had to attend in person, on Tuesday afternoons (workshop).[35] She says that for the winter 2021 term, this was the case for only one course, on Friday afternoons (clinic).[36]

[30] The Appellant says that apart from those two, the rest of her classes were recorded (for example, videos) and asynchronous, meaning she could attend them at her convenience.

[31] According to the Appellant, she spent up to 15 to 20 hours per week on her studies during her fall 2020 and winter 2021 terms.[37] She points out that a number of the recorded classes weren't as long as advertised (for example, less than an hour instead of three hours).

[32] The evidence on file and the Appellant's testimony indicate that from September 2013, while in school (for example, high school, French-language learning, university), she worked in the restaurant and hotel business, among other things.[38] She points out that she always worked when she was a student.

[33] According to the testimony and statements of H. K., the Appellant's former employer (X), the Appellant worked for him from September 2013 to March 2020, while

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[34] See the Appellant's course schedules for the fall 2020 and winter 2021 terms—GD6-9 and GD6-10.
[35] See GD6-9.
[36] See GD6-10.
[37] See GD3-13, GD3-16, GD3-17, and GD3-26.
[38] See GD3-10, GD3-16, GD3-28, GD6-7, RGD15-2 to RGD15-4, and RGD16-51.

she was in school, and she was laid off in March 2020 because of the COVID-19 pandemic.[39]

[34] He says that the Appellant worked Thursday afternoons and weekends and was on call the rest of the week.[40]

[35] The Appellant explains that in the fall of 2019, when she started her full-time training in dental hygiene, she worked part-time, specifically 16 to 30–35 hours per week.[41]

[36] She says that she was available to do so almost every day of the week, usually starting in the afternoon, Monday to Friday, and on weekends.[42]

[37] The Appellant's representative argues that the Appellant has rebutted the presumption that she was unavailable for work while studying full-time. She says that while in school, the Appellant was available for a job like the one she had before she applied for benefits, with an irregular schedule of 16 to 30 or more hours per week.

[38] Additionally, the representative argues that the Appellant has also proven her availability for work because of special circumstances related to the COVID-19 pandemic, given that from March 2020, her classes were distance learning and asynchronous, meaning she could attend them at her convenience.[43]

[39] I find the Appellant's testimony about being able to work while taking training full-time to be persuasive.

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[39] See GD3-28, GD6-7, RGD15-2 to RGD15-4, and RGD16-51.
[40] See RGD15-2 to RGD15-4.
[41] See GD3-16 and GD3-30.
[42] See GD3-16.
[43] See the General Division decisions in *LK v Canada Employment Insurance Commission*, 2023 SST 1722; and *ER v Canada Employment Insurance Commission*, 2021 SST 959—RGD16-38 to RGD16-50.

[40] The Appellant's statements are also supported by the testimony and statements of her former employer, from 2013 to March 2020, which show that she has been able to do this for many years.[44]

[41] The Appellant doesn't dispute that she was in school full-time during her fall 2020 and winter 2021 terms.

[42] I find that the Appellant has a work-study history showing that she was able to balance part-time work with her full-time studies.

[43] Although the Commission argues that the Appellant never worked full-time while in school and that she was restricting her availability to part-time work,[45] this doesn't mean that she can't rebut the presumption that she was unavailable for work.

[44] The Court tells us that a claimant with a history of working part-time while taking training full-time can rebut this presumption.[46]

[45] A number of Appeal Division decisions also indicate that the law doesn't require that a claimant have a history of full-time employment while attending school to rebut the presumption that as a full-time student, they are unavailable for work under the Act.[47]

[46] The Commission argues that the Appellant hasn't rebutted the presumption of non-availability for being in school full-time, relying on the following points:

a) The Appellant hasn't shown that her main intention was to immediately accept suitable employment, since she made very little effort to find a job.

b) She hasn't shown that she could have changed her course schedules.

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[44] See GD3-28, GD6-7, RGD15-2 to RGD15-4, and RGD16-51.
[45] See GD4-4.
[46] See the Court's decision in *Page*, 2023 FCA 169.
[47] See the Appeal Division decisions in *SS v Canada Employment Insurance Commission*, 2022 SST 749, AD-22-115; *JD v Canada Employment Insurance Commission*, 2019 SST 438; and *YA v Canada Employment Insurance Commission*, 2020 SST 238.

c) She was available to work only 20 hours per week, outside her school hours.

d) She would not have dropped her courses for a job.

e) She hasn't shown that her training was of secondary importance.

f) She acknowledges and has shown that her training was her priority, since she limited her availability for work in favour of her training. This shows that her training was an obstacle to seeking and accepting suitable employment.[48]

[47] The Commission also argues that the Appellant hasn't proven the existence of "exceptional circumstances" that would have enabled her to work while taking training. It explains that despite being an exceptional situation, the COVID-19 pandemic didn't excuse the Appellant from her obligations to be capable of and available for work and to actively search for a job, noting that she was told about them.[49]

[48] I don't accept the Commission's arguments about the presumption of non-availability.

[49] I find that the Commission hasn't considered the fact that the Appellant has a history of working part-time while studying full-time, or the fact that she has a history of being employed at irregular hours, or the attendance requirements of her course during her fall 2020 and winter 2021 terms.

[50] I find that the Appellant has shown that she has a significant work-study history. She has shown that for many years, she worked and at the same time was able to continue her studies, including the full-time training she began in the fall of 2019.

[51] The Appellant has also shown that she has a history of being employed at irregular hours. Given the atypical work schedules in the restaurant and hotel business, she worked starting in the afternoon on weekdays, as well as weekends.

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[48] See GD4-5.
[49] See GD4-5.

[52] In addition, the Appellant has shown that because of the pandemic, the attendance requirements of her courses changed so she could attend her classes remotely and at her convenience. So, she didn't have to leave her training to work.

[53] These are exceptional circumstances that allow the Appellant to rebut the presumption that she was unavailable for work.

[54] Although the Appellant has rebutted this presumption, I now have to decide whether she was actually available for work under the Act from September 27, 2020.

Issue 2: Did the Appellant show a desire to go back to work as soon as a suitable job was available?

[55] I find that the Appellant showed a desire to go back to work as soon as a suitable job was available from September 27, 2020. I find that even though she was in training full-time as of that time, her intention was also to stay in the labour market.

[56] In the training questionnaire she completed on August 28, 2020, the Appellant indicated that she was available for work and capable of working in the same type of job and under the same or better conditions (for example, hours, type of work) as she was before she started her course or program.[50]

[57] The Appellant says that she has worked while studying full-time for many years.

[58] She says that she has been in the restaurant, hotel, and bar business since 2013.

[59] She says that the number of hours she spent on her training made it possible for her to continue working.[51]

[60] She says that she stopped working in March 2020 because the establishment where she worked had to close due to the COVID-19 pandemic.[52]

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[50] See GD3-14 and GD6-4.
[51] See GD3-26.
[52] See GD3-26.

[61] The Appellant says that she wanted to work and didn't want to [translation] "stay within four walls." She points out that it was the pandemic that "trapped" her and made her stay home.

[62] She argues that she needs to work to support herself. She says that working is, financially speaking, better than just getting loans and grants.

[63] The testimony and statements of H. K. (X, employer) indicate that the Appellant worked for him from September 2013 to March 2020, while she was in school.[53] According to him, she was laid off in March 2020 because he had to close his establishment as a result of government measures that were introduced to stop the spread of the pandemic.[54]

[64] The representative argues that the Appellant lost her job through no fault of her own. She also argues that the Appellant's testimony shows that she wanted to go back to work. She points out that the Appellant has also shown that it was more advantageous for her to work, since the income from her loans and grants wasn't enough to live on.

[65] I find that after her layoff in March 2020, the Appellant didn't stop showing her desire to find work.

[66] I have no reason to doubt that the Appellant wanted to work and stay in the labour market from September 27, 2020.

[67] I find that even though the Appellant chose to take training full-time, this situation didn't affect her desire to go back to work as soon as a suitable job was available as of that time.

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[53] See GD3-28, GD6-7, RGD15-2 to RGD15-4, and RGD16-51.
[54] See GD3-28, GD6-7, RGD15-2 to RGD15-4, and RGD16-51.

Issue 3: Did the Appellant express that desire through efforts to find a suitable job?

[68] I find that the Appellant expressed her desire to go back to work through efforts to find a suitable job from September 27, 2020.

[69] In the training questionnaire she completed on August 28, 2020, the Appellant indicated that she had made efforts to find work since the start of her course or training program or since becoming unemployed.[55]

[70] The Appellant explains that when she spoke with a Commission representative on April 1, 2022, she wasn't able to correctly answer the questions about her availability for work.[56] She says that she was attending a class when she answered the representative's questions. She says that she didn't understand them properly. She also says that she thought the questions about her availability for work were related to the current term (winter 2022 term), not the fall 2020 and winter 2021 terms.

[71] The Appellant says that during her training at X, she could work 16 to 30 or more hours per week (for example, Monday to Friday, usually in the afternoon, as well as on weekends).[57]

[72] According to the Appellant, after she stopped working, in March 2020, and after September 27, 2020, she made the following job search efforts, though she says she doesn't remember the exact dates she made them:

a) She contacted the employer she had been working for since 2013 (X).[58]

b) She checked Indeed and posted her résumé on that job site.

c) She looked into jobs selling cosmetics in department stores through Indeed.[59]

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[55] See GD3-15 and GD6-4.
[56] See GD3-19 to GD3-21.
[57] See GD3-16.
[58] See GD3-26.
[59] See GD3-19 to GD3-21.

d) She updated her résumé.

e) She applied for jobs with prospective employers (for example, looked for work through word of mouth in food service establishments, cafés, or bars and provided her résumé).[60]

[73] The employer the Appellant started working for in 2013 says that she contacted him repeatedly after his establishment closed in March 2020 to find out whether there was work for her.[61]

[74] The representative argues as follows:

a) The Appellant explained the context in which she answered the Commission's questions in April 2022, when she was attending a class, that it wasn't the right time to do so, and that it seemed she didn't understand the questions.[62] In the representative's view, everything seems to show that there was poor communication between a Commission representative and the Appellant, based on the summary of that conversation.[63] The Appellant's testimony indicates that her April 1, 2022, statements to the Commission were taken [translation] "out of context." The representative points out that even at the hearing, the Appellant had trouble understanding the questions.

b) Given the pandemic, the Appellant was entitled to wait for her employer to call her back, as the Court stated in one of its decisions.[64]

c) The Commission never asked the Appellant to prove that she had made reasonable and customary efforts to find a job. It decided that she wasn't entitled to benefits because of her full-time studies and found that she hadn't rebutted the presumption that she was unavailable for work.

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[60] See GD3-29 and GD3-30.
[61] See GD3-28, GD6-7, RGD15-2 to RGD15-4, and RGD16-51.
[62] See GD3-19 to GD3-21.
[63] See GD3-19 to GD3-21.
[64] See the Court's decision in *Page*, 2023 FCA 169—RGD16-2 to RGD16-36.

d) Suitable employment must be determined based on a claimant's previous employment, which includes being employed part-time and at irregular hours, as was the case for the Appellant.[65] Suitable employment for the Appellant is employment in the restaurant and hotel business.[66]

e) Despite the pandemic and the business closures, the Appellant made reasonable efforts to find a job using the following methods: assessing employment opportunities (for example, going to establishments, selling cosmetics), registering for job search tools (for example, Indeed), networking (for example, talking to her former employer), and contacting prospective employers (for example, meeting with prospective employers and giving them her résumé).[67]

f) The Appellant wasn't trying to take advantage of the EI system when she applied for benefits. She had paid into EI for many years and continues to do so in her job as a dental hygienist.

g) The Appellant is entitled to benefits. She didn't receive any money as benefits that she wasn't entitled to.

[75] In this case, I find that from September 27, 2020, the Appellant made "reasonable and customary efforts" in the "search for suitable employment"—that is, sustained efforts directed toward finding a suitable job and consistent with nine specified activities that can be used to help claimants get a suitable job.[68] She used appropriate methods for her search (for example, assessing employment opportunities, networking, contacting prospective employers).[69]

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[65] See the Court's decision in *Page*, 2023 FCA 169—RGD16-2 to RGD16-36.
[66] See section 6(4) of the Act.
[67] See section 9 of the Regulations. See also the document entitled [translation] "Event Report on the Public Health Emergency Related to the COVID-19 Pandemic - Table of Orders in Council and Ministerial Orders"—RGD16-52 to RGD16-162.
[68] See section 9.001 of the Regulations.
[69] See section 9.001 of the Regulations.

[76] I accept the Appellant's explanation that she was unable to adequately explain her situation concerning her availability for work when she spoke with a Commission representative on April 1, 2022.[70] I find it plausible that she didn't fully understand the questions asked at that time, which may have created confusion in her answers about her availability for work during her fall 2020 and winter 2021 terms. I note that the questions about her availability for work for these two terms were asked about a year after she had finished them and while she was finishing her winter 2022 term.

[77] On this point, I also note that even though she indicated in her April 1, 2022, statement that she had classes from 8 a.m. to 5 p.m., Monday to Friday, she said during her testimony that she could attend them at her convenience in the vast majority of cases. Her testimony is also supported by compelling documentary evidence showing that all her classes were [translation] "distance learning" except for one "in-person" class for both her fall 2020 term and her winter 2021 term, and that her schedule could be adjusted according to her preferences.[71]

[78] In assessing the Appellant's availability for work and her efforts to find a suitable job, I am also taking into account the fact that she worked part-time for many years during her studies, including the full-time training she began in the fall of 2019. I also note that she had sometimes studied full-time before that training, while working part-time. I find that her part-time employment is her usual employment.

[79] I find the Appellant's testimony that she has been working while studying since 2013 to be credible. Her statement is also supported by the testimony and statements of the employer she worked for from 2013 to March 2020.[72]

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[70] See GD3-19 to GD3-21.
[71] See the Appellant's course schedules for the fall 2020 and winter 2021 terms—GD6-9 and GD6-10.
[72] See GD3-28, GD6-7, RGD15-2 to RGD15-4, and RGD16-51.

[80] Although section 9.002(1) of the Regulations describes the criteria for determining what constitutes a suitable job,[73] it doesn't otherwise or more clearly define "suitable employment."

[81] I note that in addition to those criteria,[74] the Act also sets out characteristics describing what constitutes employment that is "not suitable."[75] I find that the criteria set out in the Regulations[76] and these characteristics[77] have to be considered together to be able to determine what constitutes suitable employment based on a claimant's circumstances.

[82] These characteristics indicate, for example, that employment isn't suitable employment if it isn't in the claimant's usual occupation.[78] Section 6(4)(c) of the Act also says that this employment in a different occupation, or that isn't suitable, includes conditions less favourable or lower earnings than those that a claimant could reasonably expect to obtain, taking into account the conditions and earnings the claimant would have had if they had remained in their previous employment. Section 6(5) of the Act broadens the types of jobs that can be suitable, since the provisions of section 6(4)(c) of the Act no longer apply after a reasonable period.

[83] Based on the characteristics set out in the Act to describe what constitutes employment that isn't suitable,[79] I am of the view that suitable employment includes employment that is in the claimant's usual occupation (for example, same nature, earnings, and working conditions).[80]

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[73] Those criteria are the following: 1) the claimant's health and physical capabilities allow them to commute to the place of work and to perform the work, 2) the hours of work aren't incompatible with the claimant's family obligations or religious beliefs, and 3) the nature of the work isn't contrary to the claimant's moral convictions or religious beliefs.
[74] See section 9.002(1) of the Regulations.
[75] See sections 6(4) and 6(5) of the Act.
[76] See section 9.002(1) of the Regulations.
[77] See sections 6(4) and 6(5) of the Act.
[78] See section 6(4)(c) of the Act.
[79] See sections 6(4) and 6(5) of the Act.
[80] In English, sections 6(4)(b) and 6(4)(c) of the Act use the expression "claimant's usual occupation," which can also be translated as "*occupation habituelle d'un prestataire*."

[84] With this in mind, I find that the fact that the Appellant worked part-time for many years in the restaurant and hotel business while in school amounts to employment in her usual occupation, since it was her usual employment. This was the same type of job she had had since she started her training in the fall of 2019.

[85] The Court also tells us that the notion of suitable employment is defined in part with reference to the claimant's personal circumstances.[81]

[86] So, in assessing the Appellant's availability for work, I am taking into account the specific characteristics of her case, namely that she worked part-time in the restaurant and hotel business while in school.

[87] Although the Commission argues that the Appellant was restricting her availability to part-time work and never worked full-time while in school,[82] I note that the Act doesn't specifically require a claimant to be available for full-time work to prove their availability for work. In addition, the Appellant's usual employment is part-time employment. I find that it is suitable employment in her case.

[88] The Court also tells us that a person with a history of working part-time can prove their availability for work.[83]

[89] In determining that the Appellant has proven her availability for work, and in addition to the fact that she worked part-time, I also note that when she stopped working in March 2020, she went through a period of uncertainty as to when she would be going back to her job with the employer she had been working for since 2013. This period of uncertainty was caused by the COVID-19 pandemic.

[90] The Commission argues that the Appellant made little effort to find work and that she mostly just waited for her employer to call her back while the establishment where she worked was closed because of the pandemic.[84] The Commission points out that

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[81] The Court established this principle in *Whiffen*, A-1472-92.
[82] See GD4-4 and RGD8-1.
[83] See the Court's decision in *Page*, 2023 FCA 169.
[84] See GD4-5.

with the exception of her usual employer, the Appellant sent applications to two or three employers, and she hasn't specified when she made these efforts.[85]

[91] Despite the Commission's arguments on these points, I find that the situation created by the pandemic has to be considered in assessing the Appellant's availability for work.

[92] This situation forced the Appellant to stop working at her job in the restaurant and hotel business, the business she had been in for many years.

[93] This means that the Appellant's personal circumstances were affected by the particular job market conditions in many sectors of the economy due to the pandemic. Because of the pandemic, the Quebec government introduced health restrictions at different times starting in March 2020, including during the Appellant's training periods.[86]

[94] These restrictions included business closures, including the closure of bars and restaurants.[87] They also included reduced operating hours for businesses and specific customer capacity limits based on the space occupied by these businesses.[88]

[95] The Appellant's chances of finding another job in an establishment similar to the one she usually worked in were also non-existent, since the reason that establishment was closed applied to all establishments of that type.

[96] I note that the employer the Appellant worked for from 2013 to March 2020 says that she contacted him repeatedly to find out whether he had work for her, and [he] told her that his establishment was closed because of the government's health restrictions.[89]

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[85] See GD4-5.
[86] See the document entitled [translation] "Event Report on the Public Health Emergency Related to the COVID-19 Pandemic - Table of Orders in Council and Ministerial Orders"—RGD16-52 to RGD16-162.
[87] See the document entitled [translation] "Event Report on the Public Health Emergency Related to the COVID-19 Pandemic - Table of Orders in Council and Ministerial Orders"—RGD16-52 to RGD16-162.
[88] See the document entitled [translation] "Event Report on the Public Health Emergency Related to the COVID-19 Pandemic - Table of Orders in Council and Ministerial Orders"—RGD16-52 to RGD16-162.
[89] See RGD15-2 to RGD15-4.

[97] In the circumstances, I find that the Appellant was entitled to a reasonable period to assess how she would be able to go back to her job before making efforts to work in another field.

[98] The Court tells us that there is no hard-and-fast rule that a claimant must immediately engage in a job search in all circumstances and that claimants should be given a reasonable period before starting to look for work to see if they will be recalled.[90]

[99] Although the Appellant can't be specific as to when she made her job search efforts, she has given concrete examples of her efforts.

[100] I find that she made enough effort to go back to work as soon as possible after being laid off in March 2020.

[101] Considering the obstacles she faced because of the pandemic, I find that the Appellant's availability for work led to concrete and sustained efforts to find suitable employment with prospective employers.

[102] I find that from September 27, 2020, the Appellant fulfilled her responsibility of actively searching for a suitable job.

Issue 4: Did the Appellant set personal conditions that might have unduly limited her chances of going back to work?

[103] I find that the Appellant didn't set "personal conditions" that unduly limited her chances of going back to work from September 27, 2020. I find that her decision to take training full-time didn't hurt her desire and efforts to go back to work.

[104] In the training questionnaire she completed on August 28, 2020, the Appellant indicated that she hadn't been approved for her course or program under an employment or skills development program and that she had decided on her own to

[90] See the Court's decision in *Page*, 2023 FCA 169.

take it.[91] In the questionnaire, she also indicated that if she found full-time work but the job conflicted with her course or program, she would accept the job as long as she could delay the start date to allow her to finish her training.[92]

[105] The Appellant argues that despite her full-time training, she could work because her classes weren't in person and she could attend them at her convenience (for example, classes recorded and delivered in video format during the fall 2020 and winter 2021 terms).[93]

[106] The representative argues that the Appellant didn't set personal conditions that limited her chances of going back to work. She explains that the Appellant attended her classes virtually and asynchronously, which allowed her to attend them at her convenience. The representative says that the Appellant had an irregular work schedule.

[107] I find that by choosing to take training full-time, the Appellant set personal conditions. But in my view, they weren't conditions that unduly limited her chances of going back to work.

[108] Objectively, despite taking training full-time, the Appellant made sustained efforts to go back to work as soon as possible.

[109] I don't accept the Commission's argument that the Appellant was restricting her availability to part-time work and that her training was an obstacle to seeking and accepting suitable employment.[94]

[110] I find that the Appellant has shown that her training didn't prevent her from getting a suitable job given the flexibility she had in attending her classes (for example, asynchronous classes).

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[91] See GD3-13 and GD6-3.
[92] See GD3-15 and GD6-4.
[93] See GD3-26.
[94] See GD4-4 and GD4-5.

[111] I find that the part-time job that the Appellant had from 2013 to March 2020 is her usual employment and suitable employment in her case.

[112] As the Court stated, a person can prove their availability for work if they have a history of working part-time.[95]

[113] In my view, the Appellant didn't unduly limit her chances of going back to work despite the demands of her training. She has shown that she was able to balance work with her training.

[114] I find that from September 27, 2020, the Appellant didn't set personal conditions that unduly limited her chances of going back to work.

Conclusion

[115] I find that the Appellant has proven that she was available for work from September 27, 2020, while taking training. So, she is entitled to benefits as of that date.

[116] This means that the appeal is allowed.

Normand Morin
Member, General Division – Employment Insurance Section

[95] See the Court's decision in *Page*, 2023 FCA 169.