Citation: *RS v Canada Employment Insurance Commission*, 2024 SST 524

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

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

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (637327) dated January 18, 2024 (issued by Service Canada)

Tribunal member:	Marc St-Jules
Type of hearing:	Videoconference
Hearing date:	March 8, 2024
Hearing participant:	Appellant
Decision date:	April 2, 2024
File number:	GE-24-462

Decision

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

[2] The Appellant hasn't shown that he is available for work. This means that he isn't disentitled from receiving benefits.

Overview

[3] This appeal is about the Appellant's availability for work.

[4] The Canada Employment Insurance Commission (Commission) decided that the Appellant is disentitled from receiving Employment Insurance (EI) regular benefits as of January 8, 2024, because he 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.

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

[6] The Commission says that the Appellant isn't available because he is enrolled in a full-time program. The Appellant has not met the availability requirements which are in place for all claimants who want regular employment insurance benefits.

[7] The Appellant disagrees and states that the program he enrolled in can no longer be accepted as an approved course. Only courses up to 12 months can now be approved. The Appellant's course is 16 months and cannot be approved.

[8] The Appellant says that because of his age, finding work has been extremely difficult. He tried for several years to obtain full-time work able to sustain him.

[9] He was unable to find work and argues this course is the best way for him to find sustainable work.

Issue

[10] Is the Appellant available for work?

Analysis

[11] 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, he has to meet the criteria of both sections to get benefits.

[12] First, the *Employment Insurance Act* (EI Act) says that a claimant has to prove that they are making "reasonable and customary efforts" to find a suitable job.[1] The *Employment Insurance Regulations* (Regulations) give criteria that help explain what "reasonable and customary efforts" mean.[2] I will look at those criteria below.

[13] Second, the EI Act says that a claimant has to prove that they are "capable of and available for work" but aren't able to find a suitable job.[3] Case law gives three things a claimant has to prove to show that they are "available" in this sense.[4] I will look at those factors below.

[14] The Commission decided that the Appellant was disentitled from receiving benefits because he isn't available for work based on these two sections of the law.

[15] I will now consider these two sections myself to determine whether the Appellant is available for work.

Reasonable and customary efforts to find a job

[16] The law sets out criteria for me to consider when deciding whether the Appellant's efforts are reasonable and customary.[5] I have to look at whether his efforts

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[1] See section 50(8) of the *Employment Insurance Act* (Act).
[2] See section 9.001 of the *Employment Insurance Regulations* (Regulations).
[3] See section 18(1)(a) of the Act.
[4] See *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96.
[5] See section 9.001 of the Regulations.

are sustained and whether they are directed toward finding a suitable job. In other words, the Appellant has to have kept trying to find a suitable job.

[17] 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 activities are the following:[6]

- preparing a résumé or cover letter
- registering for job-search tools or with online job banks or employment agencies
- networking
- contacting employers who may be hiring
- applying for jobs

[18] I looked through the evidence in the appeal file. I did not see any requests from the Commission requiring the Appellant to prove he made reasonable and customary efforts to find a suitable job.

[19] I find a decision of the Appeal Division on disentitlements under section 50(8) of the EI Act to be persuasive.[7] The decision says the Commission can ask a claimant to prove that they have made reasonable and customary efforts to find a job. They can disentitle a claimant for failing to comply with this request. But they must ask the claimant to provide this proof and tell the claimant what kind of proof will satisfy their requirements.

[20] I did not see any evidence where the Commission asked the Appellant to prove his efforts were reasonable and customary. The Commission did not make any submissions on how the Appellant failed to prove that he was not making reasonable and customary efforts. The Commission only summarized what the legislation says regarding section 50(8) of the EI Act and section 9.001 of the EI Regulations.

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[6] See section 9.001 of the Regulations.
[7] *L.D. v. Canada Employment Insurance Commission,* 2020 SST 688.

[21] I find the Commission did not disentitle the Appellant under section 50(8) of the EI Act. This is based on the lack of evidence. Therefore, I do not need to consider that part of the law when reaching my decision on this issue.

Capable of and available for work

[22] Case law sets out three factors for me to consider when deciding whether the Appellant is capable of and available for work but unable to find a suitable job. The Appellant has to prove the following three things:[8]

a) He wants to go back to work as soon as a suitable job is available.

b) He has made efforts to find a suitable job.

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

[23] These 3 factors are commonly referred to as the "*Faucher* Factors" after the case in which they were first laid out by the court. When I consider each of these factors, I have to look at the Appellant's attitude and conduct.[9]

[24] The court have said that availability is determined for each working day in a benefit period.[10]

[25] The Court has also said that claimants who are in school full-time are presumed to be unavailable for work.[11] This is commonly referred to as the presumption of non-availability. I will start with this analysis.

– Presumption of non-availability

[26] The presumption that students aren't available for work applies only to full-time students. I find the Appellant is enrolled in a full-time course. This is what he testified. It

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[8] 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.
[9] 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.
[10] See *Canada (Attorney General) v. Cloutier*, 2005 FCA 73
[11] See *Canada (Attorney General)* v. *Cyrenne*, 2010 FCA 349.

is also consistent with what he told the Commission. I have no evidence before me to suggest this is a part-time course. So, this presumption applies to the Appellant.

[27] The presumption that full-time students are not available for work can be rebutted. If the presumption were rebutted, it would not apply.

[28] There are two ways the Appellant can rebut the presumption. He can show that he has a history of working full-time while also in school.[12] Or he can show that there are exceptional circumstances in his case.

[29] The Appellant does not have a history of working while in school. This is from the completed training course questionnaire which was submitted by the Appellant.[13] I have no reason to doubt this form completed by the Appellant. There is no evidence to the contrary. He also didn't say anything to the Commission or at the hearing about ever having worked full-time while in school before. I find that the Appellant can't rebut the presumption based on work history while attending school full time.

[30] I also find the Appellant hasn't shown any exceptional circumstances that would rebut the presumption. He didn't say anything at the hearing that would lead me to believe he has any exceptional circumstances.

[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. 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.

[32] In other words, even if a person rebuts the presumption, they still need to prove they are available. This requires an analysis of the *Faucher* factors.

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[12] See *Canada (Attorney General) v Cyrenne*, 2010 FCA 349.
[13] See GD03 page 48 and page 49.

– **Wanting to go back to work**

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

[34] The Appellant argues that he is attending school to enable him to secure suitable employment. He would like to continue the course and was hoping to work weekends with his previous employer.

[35] The Appellant says that he would quit his course if a suitable job were to be offered to him. The Appellant testified that a suitable job would be at $20 per hour or more. It would not have to be too physical in nature.

[36] I am putting a lot of weight on the Appellant's testimony. I believe him when he says that the course is a way for him to obtain suitable employment. I believe the Appellant wants to find suitable employment.

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

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

[38] I have considered the list of job-search activities given above in deciding this second factor. For this factor, that list is for guidance only.[14]

[39] The Appellant's efforts to find a new job included posting his résumé on websites for job seekers.

[40] The Appellant originally had a promise of a job when the golf season allowed for him to start in the spring of 2024. The agreement was for him to work on weekends. However, the Appellant testified that this fell through. When he was notified of this, the Appellant testified that he applied to three different golf courses.

[14] I am not bound by the list of job-search activities in deciding this second factor. Here, I can use the list for guidance only.

[41] Case law says the determinative factor in assessing availability is an active, serious, continual and intensive job search, demonstrated by a verifiable record of job applications.[15]

[42] I find the Appellant`s efforts aren't enough to meet the requirements of this second factor. The Appellant says he would quit his course if a suitable job were offered to him. He also says that he posted his résumé on Indeed.[16]

[43] There are court cases that a person must conduct a job search and must do so even when the **chance of finding a job is very low**. The EI Act is quite clear that to be eligible for benefits, a claimant must establish his or her availability for work, and that requires a job search.

[44] No matter how little chance of success a claimant may feel a job search would have, the EI Act is designed so that only those who are genuinely unemployed and actively seeking work will receive benefits.[17]

[45] I agree that posting a person's résumé on websites can potentially lead to employment. However, I find that it falls short of the active job search requirements that the courts have established is required.

[46] The Appellant`s job search is not an active, serious, continual and intensive job search which is the threshold that the courts have said is required.

[47] Those efforts aren't enough to meet the requirements of this second factor because they are too limited to prove availability.

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[15] This principle was set out in the decision of *Cutts v. Canada (Attorney General)*, A-239-90.
[16] See GD02 page 5.
[17] *Canada (Attorney General) v Cornelissen-O'Neill*, A-652-93; *Faucher v Canada (Employment and Immigration Commission)*, A-56-96; *Canada (Attorney General) v Cloutier*, 2005 FCA 73; *DeLamirande v Canada (Attorney General)*, 2004 FCA 311.

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

[48] The Appellant has set personal conditions that might unduly limit his chances of going back to work.

[49] The Appellant says he hasn't done this because he has tried to find a suitable job and was unable to. The course he is now in is the best way to secure suitable employment.

[50] The Commission says the Appellant is only available on weekends. He is unduly limiting his chances of going back to work.

[51] In looking at this third factor, I considered what the law says:

- Trying to adapt a work schedule around a school schedule doesn't meet the availability requirements under the EI Act.[18]
- Being available only at certain times on certain days restricts availability and limits the chances of finding a job.[19]

[52] I find that the Appellant has placed personal conditions that would limit his chances of finding work. He was holding out for the part-time golf course job and is only available on weekends. He only went out seeking work with other golf courses when this one fell through.

[53] A recent decision of the Federal Court of Appeal (FCA), called *Page*, has said case law (that is, decisions of the courts), have not established "a bright line rule that full-time students are disentitled to employment insurance benefits if they are required to attend classes full time during weekday hours, Monday to Friday."[20]

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[18] See *Horton v Canada (Attorney General)*, 2020 FC 743, paragraph 36.
[19] The Federal Court of Appeal says this in *Duquet v Canada (Employment and Immigration Commission)*, 2008 FCA 313. See also *Horton v Canada (Attorney General)*, 2020 FC 743, paragraph 35, where the court says that a claimant who is only available for work outside their course schedule is restricting their availability and is not available for work within the meaning of the EI Act.
[20] *Page v Canada (Attorney General),* 2023 FCA 169.

[54] In *Page*, the FCA also said it is not an error of law to conclude that a claimant is available for work if they are available for employment in accordance with their previous work schedule.[21]

[55] How does the *Page* decision apply to the Appellant? The Appellant worked full-time while working at the golf course. He accumulated 1149 hours between April 11, 2023, and November 5, 2023.[22] This is approximately 30 weeks with an average of just over 38 hours per week. However, the Appellant is now looking for part-time work only. The Appellant is limiting himself to weekend work only because of the course. I find this is placing restrictions on his availability.

[56] I find that the Appellant cannot restrict himself to part-time work only. The employment he had to establish the claim was full time.

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

[57] Based on my findings on the three factors, I find that the Appellant hasn't shown that he is capable of and available for work but unable to find a suitable job.

[58] The Appellant argues he tried for many years to secure employment. He had to stop his renovation business when it became clear he would not be able to continue. Since 2020, he has searched for work. He has been unable to find suitable work which can sustain him.

[59] While I understand the Appellant's arguments, I cannot change the law.[23] The law says you need to have an active job search without restrictions to prove availability. Availability is a requirement to receive regular benefits.

[60] The EI fund cannot support the economic weight of the decision to return to school.[24]

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[21] *Page v Canada (Attorney General),* 2023 FCA 169
[22] See the Record of Employment (ROE) at page GD03 page 20.
[23] *Canada (Attorney General) v Knee*, 2011 FCA 301, at paragraph 9.
[24] *Canada (Attorney General) v Martel*, A-1691-92 at para 2; *Canada (Attorney General) v Mancheron*, 2001 FCA 174 at para 2.

Conclusion

[61] The Appellant hasn't shown that he is available for work within the meaning of the law. Because of this, I find that the Appellant is disentitled from receiving benefits.

[62] This means that the appeal is dismissed.

Marc St-Jules
Member, General Division – Employment Insurance Section