Citation: *KW v Canada Employment Insurance Commission*, 2024 SST 363

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	K. W.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (0) dated January 25, 2024 (issued by Service Canada)

Tribunal member:	Raelene R. Thomas
Type of hearing:	Teleconference
Hearing date:	March 22, 2024
Hearing participant:	Appellant
Decision date:	April 11, 2024
File number:	GE-24-470

Decision

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

[2] The Appellant has shown she was available for work. This means she isn't disentitled from receiving employment insurance (EI) benefits. So, the Appellant may be entitled to benefits.

Overview

[3] The Canada Employment Insurance Commission (Commission) decided that the Appellant was disentitled from receiving EI regular benefits from September 8, 2021 to June 24, 2022 because she wasn't available for work.[2] 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 must decide whether the Appellant has proven she was available for work. The Appellant has to prove this on a balance of probabilities. This means she has to show it is more likely than not that she was available for work.

[5] The Commission says that the Appellant wasn't available because she was in high school full time.

[6] The Appellant disagrees and says she was looking for work while she was in high school. She has been working since she was fourteen and had worked in her first two years of high school. The Appellant said she could not get a job in her last year of high school. She says after high school she was planning to learn a trade. She could be admitted to a trades training program with a General Education Development (GED) high school equivalency, so this meant she could quit high school to work full-time.

---

[1] A person who applies for employment insurance (EI) benefits is called a "claimant." A person who appeals to the Social Security Tribunal is called an "Appellant."
[2] The Commission made this decision on August 18, 2022. It's decision meant the Appellant had to pay back $20,800 of EI benefits it said she was not entitled to receive.

Matters I considered first

The appeal was returned to the General Division

[7] The Commission confirmed its decision to the Appellant on November 16, 2022 that it could not pay her EI benefits because she was not available for work. The Appellant asked a representative to help her with her appeal to the Tribunal. The appeal had to be filed by December 16, 2022. Her representative filed the appeal on June 20, 2023.

[8] The General Division member assigned to the appeal sent an email to the Appellant's representative to find out why her appeal was filed after the deadline to appeal.[3] There was no response to that letter. In the absence of a response from the Appellant's representative, the General Division member dismissed the appeal because it was filed late, and no reasonable explanation was given for the delay.

[9] The Appellant was not aware her appeal was filed late. She had not signed the appeal form authorizing a representative and neither she nor the representative authorized the Tribunal to communicate with them by email.

[10] The Appellant appealed to the Tribunal's Appeal Division. The Appeal Division found the Appellant was not given an opportunity to present her case to the General Division. And the General Division, although unknowingly, failed to provide a fair process when it relied on the fact that the Appellant and representative did not respond to the email requesting more information on why the appeal was late.

[11] The Appeal Division ordered the appeal to be returned to the General Division for a hearing. This decision is a result of that hearing.

The hearing was adjourned

[12] The hearing before me was originally scheduled to take place on March 15, 2024. At that hearing it was determined the Appellant had not received the

[3] Section 52 of the Department of *Employment and Social Development Act* says an appeal of a decision of the Commission must be made within 30 days of the decision being communicated to them.

Reconsideration File (marked GD3) or the Representations of the Commission to the Tribunal (marked GD4) in time to prepare for the hearing. I adjourned the hearing to March 19, 2024 to give the Appellant an opportunity to review the documents and to prepare for the hearing. The hearing went ahead on March 19, 2024 as scheduled.

Issue

[13] Was the Appellant available for work while taking training?

Analysis

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

[15] First, the *Employment Insurance Act* (EI Act) says the Commission may ask a claimant to prove they are making "reasonable and customary efforts" to find a suitable job.[4] The *Employment Insurance Regulations* (EI Regulations) give criteria that help explain what "reasonable and customary efforts" mean.[5]

[16] Second, the EI Act says a claimant has to prove they are "capable of and available for work" but aren't able to find a suitable job.[6] Case law (decisions from the courts) gives three things a claimant has to prove to show they are "available" in this sense.[7]

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

[18] There are additional rules that typically apply to decide whether students are available for work.

---

[4] See section 50(8), EI Act. This is how I refer to the law that applies to this appeal.
[5] See section 9.001, EI Regulations.
[6] See section 18(1)(a) of the EI Act.
[7] See *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96. This is how I refer to the courts' decisions that apply to the circumstances of this appeal.

[19] Case law, that is decisions of the courts, says that claimants who are in school taking training full-time are presumed to be unavailable for work.[8] This is called the "presumption of non-availability." It means we can suppose students aren't available for work when the evidence shows they are in school taking training full-time.

[20] The Appellant can rebut the presumption in a number of ways. She can show she has a history of working full-time while also in school taking training [9] or, she can show there are exceptional circumstances in her case.[10]

[21] I will start by deciding whether the presumption applies to the Appellant and, if so, whether she has rebutted it. Then, I will look at whether she was available based on the two sections of the law on availability.

The presumption does not apply

[22] The presumption that full-time students aren't available for work does not apply the Appellant. My reasons for this finding follow.

[23] In response to the COVID-19 pandemic, the government made temporary changes to the law to help people access benefits. This included new temporary rules about the availability of students.[11] These temporary rules applied to claimants whose benefit periods began during the period from September 27, 2020 to September 25, 2021.[12]

[24] The temporary rules allowed the Commission to pay a full-time student regular EI benefits as long as they could show they were available for work.[13] In other words, the law said the Commission was able to presume that a student was available for work rather than unavailable, provided they could meet the sole requirement to prove their

---

[8] See *Canada (Attorney General) v Cyrenne*, 2010 FCA 349.
[9] See *Canada (Attorney General) v Rideout*, 2004 FCA 304.
[10] See *Canada (Attorney General) v Cyrenne*, 2010 FCA 349.
[11] See section 153.16(1) of the EI Act.
[12] See section 333 of the Budget Implementation Act, 2021, SC 2021, c. 23.
[13] See section 153.161(1) of the EI Act, which says that a claimant who attends a course, a program of instruction or training to which he was not referred, is only disentitled from being paid benefits for working days in their benefit period for which they are unable to prove that they are capable of and available for work.

availability for each working day in their benefit period. This means under the temporary rules the presumption of non-availability of full-time students was not a consideration when determining the availability of full-time students.

[25] The Appellant's benefit period began on August 15, 2021, which falls in the period when the temporary rules were in place. So, the presumption of non-availability is not a consideration and does not apply to her.

[26] The temporary rules also allowed the Commission to delay verifying whether a claimant was entitled to benefits. Rather than making that decision when a person applied for EI benefits and before it paid out any EI benefits, the temporary rules said the Commission could wait until after the EI benefits were paid to verify whether a claimant was entitled to EI benefits.[14] This what the Commission did in the Appellant's case when it paid her EI benefits from September 8, 2021 to June 24, 2022 and first decided on August 18, 2022 she was not entitled to those EI benefits.

Reasonable and customary efforts to find a job

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

[28] I also have to consider the Appellant's efforts to find a job. The EI Regulations list nine job search activities I have to consider. Some examples of those activities are the following:

- preparing a résumé or cover letter
- registering for job-search tools or with on-line job banks or employment agencies

[14] See section 153.161(2) of the EI Act, which says the Commission may, at any point after benefits are paid to a claimant who is attending or has attended unreferred training, verify that he or she is entitled to those benefits by requiring proof they were capable and available for work on any working day of their benefit period.

- networking
- contacting employers who may be hiring
- applying for jobs

[29] On May 26, 2022 the Commission sent the Appellant a request to complete a Job Search Record for the period from August 15, 2021 to May 28, 2022.[15]

[30] The Appellant completed the job search record, and it was received at the Commission on July 20, 2022.

[31] The Job Search Record has four columns headed: Date of Contact; Business Name, Address and Contact Name; Method of Contact; and Result.

[32] The Job Search Record shows that from August 15, 2021 to May 28, 2022 the Appellant had eight contacts with businesses. She contacted one home care business twice. In all she made four applications to work in home care. The Appellant explained that she has her own car, so she drove to a nearby town where she dropped off her résumé to several retail sores and a grocery store. She was not old enough to work in bars. The Appellant spoke to her former employer, a coffee shop, about returning to work but was told they had enough staff. She did get work with this employer after the period under review.

[33] The Appellant included with her appeal a list of employers that she contacted from September to the following August. Some of the employers and dates of contact are the same as those on her Job Search Record. In addition, to the contacts on the Job Search Record, the list shows Appellant contacted a design store in October, a drug store in June, a grocery sore in July and a retail store in August. These last two jobs fall outside the period of disentitlement. The list shows that the Appellant contacted the home care agency in August, January, June and July. She also made a

[15] The Job Search Record is a form created by the Commission. The completed form is on page GD3-28.

second contact with a retail store that she said she contacted once in her Job Search Record.

[34] The Appellant testified she checked InDeed for jobs, sent in her résumé to jobs advertised on InDeed, she was registered for and received alerts from the Job Bank. She also regularly checked a provincial Job Seekers group on FaceBook for jobs in her area and nearby towns. The Appellant said she spoke to friends and family about job opportunities. Her mother also checked with others to see if there was work available for the Appellant.

[35] I find the Appellant made reasonable and customary efforts to look for work from September 8, 2021 to June 24, 2022. Her job search shows that she looked for work with a number of employers and made multiple contacts with some of the employers. It also shows she submitted a résumé to these employers in person or on line. She searched InDeed for work and applied for jobs on that platform. The Appellant spoke to friends and family and her former employer about work opportunities. Her mother helped with her job search. This evidence tells me the Appellant's efforts to look for work were sustained. As a result, I find the Appellant was making reasonable and customary efforts to look for work from September 8, 2021 to June 14, 2022.

Capable of and available for work

[36] As noted above, case law sets out three factors for me to consider when deciding whether the Appellant was capable of and available for work but unable to find a suitable job. The Appellant has to prove the following three things:[16]

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 did not set personal conditions that might have unduly (in other words, overly) limited her chances of going back to work.

[16] See *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96.

[37] When I consider each of these factors, I have to look at the Appellant's attitude and conduct.[17]

– **Wanting to go back to work**

[38] The Appellant has shown that she wanted to go back to work as soon as a suitable job was available.

[39] The Appellant testified she has worked since 2019 when she was in grade nine. Her job at a coffee shop was her first job with an employer. She continued to work when she entered high school and worked throughout the first two years of high school. She said she does not like being dependent on anyone. She wants to make her own money. This evidence tells me the Appellant does want to work.

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

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

[41] 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.[18]

[42] The Appellant's efforts to find a job included dropping off or emailing her resume to potential employers. She checked back with potential employers and also applied for home care jobs with two employers. She checked on InDeed and applied for jobs on that platform. The Appellant was also registered to receive alerts from the Job Bank. The Appellant talked to her friends and family about finding work. She checked with her former employer to see if they were hiring.

[43] This evidence tells me the Appellant made enough effort to find a job to satisfy the requirements of this second factor.

---

[17] See *Canada (Attorney General) v Whiffen*, A-1472-92; and *Carpentier v Canada (Attorney General)*, A-474-97.
[18] 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.

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

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

[45] The Appellant testified she has a car and can commute to get to work. She was willing to commute up to one hour to work in nearby towns. The Appellant was willing to work in any job including a retail store, grocery store, coffee shop and in home care. She applied for jobs in these areas which is consistent with her education and work experience. The Appellant testified she was willing to work in her own community and in other nearby towns in the region. There are no jobs she could not do because of her health, religious or moral beliefs. The Appellant was willing to work for minimum wage and in a job that required on-the-job training.

[46] 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."[19] 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.[20]

[47] The Appellant testified she was enrolled in her last year of high school from September 2021 to June 2022. She said she could not change her course schedule. The Appellant said during her last high school year, attendance was dropped and did not form part of her final mark. She could choose to attend or not attend her classes. Many of her courses were on-line so she could complete her course work without attending class. There were no exams due to the COVID-19 pandemic.

[48] The Appellant has a history of working during the evenings and on weekends while she was attending grade nine and the first two years of high school.

---

[19] See *Page v Canada (Attorney General),* 2023 FCA 169.
[20] See *Page v Canada (Attorney General),* 2023 FCA 169.

[49] The Appellant said that her high school classes were from 9:00 a.m. to 3:00 p.m. Monday to Friday for the most part with every second Friday off. She would be able to work in the evenings and on the weekends.

[50] The Appellant testified that if she found a full-time job, that required her to work during school hours, she would have quit high school with her parent's permission. She said she was planning to enroll in a college trades course after high school. She was not required to have a high school diploma to be accepted at college for that trades course. Instead, she could be accepted if she had a General Education Development (GED) high school equivalency. She said she could work and complete the GED while working.

[51] Availability must be shown for full-time work on any working day of the week which the law says is Monday to Friday.[21]

[52] In my view, the Appellant's high school studies were not a personal condition that unduly limited her availability for work. This is for two reasons. First, she was available for work after 3:00 p.m. on weekdays and also on weekends which is consistent with her work history of working part-time while attending high school. Second, the Appellant was willing to leave high school if she found full-time work because she knew she could be accepted to a trades course without a high school diploma.

[53] The evidence tells me the Appellant's high school studies were not a personal condition that might unduly limit her return to the labour market. As a result, the Appellant has satisfied this factor.

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

[54] Based on my findings on the three factors, I find the Appellant has proven, on a balance of probabilities, she was capable of and available for work but unable to find a suitable job from September 8, 2021 to June 14, 2022.

---

[21] See section 32 of the EI Regulations.

Conclusion

[55] Based on my findings on the three factors, I find the Appellant has proven, on a balance of probabilities, she was capable of and available for work but unable to find a suitable job from September 8, 2021 to June 14, 2022. Because of this, I find that the Appellant isn't disentitled from receiving EI benefits. So, the Appellant may be entitled to benefits.

[56] This means the appeal is allowed.

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