Citation: *SC v Canada Employment Insurance Commission*, 2025 SST 319

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	S. C.
Representative:	T. C.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (0) dated December 6, 2024 (issued by Service Canada)

Tribunal member:	Lilian Klein
Type of hearing:	Teleconference
Hearing date:	February 3, 2025
Hearing participants:	Appellant Appellant's representative
Decision date:	March 11, 2025
File number:	GE-24-4051

Decision

[1] I'm allowing this appeal. My decision explains why I agree with the Appellant.

[2] The Appellant has rebutted the presumption that full-time students aren't available for work. He's also demonstrated that he was available for work without personal conditions that unduly (unreasonably) limited his availability.

[3] So, the Appellant isn't disentitled from receiving Employment Insurance (EI) while studying full time from March 8, 2021, to June 24, 2021, and from September 8, 2021, to March 5, 2022. This means that he doesn't have to repay EI based on a disentitlement.

Overview

[4] After he was laid off in March 2021, the Appellant applied for EI. The Canada Employment Insurance Commission (Commission) paid him benefits. Later, it retroactively disentitled him from receiving them. It says he wasn't available for work while attending high school full time. It's now asking him to repay benefits.

[5] This is now the third time that his appeal has come before the Social Security Tribunal's General Division (GD). On the first occasion, the GD dismissed the appeal and the Appellant disputed that decision at the Tribunal's Appeal Division (AD). The AD returned the appeal to the GD for reconsideration. On that second occasion, the GD allowed the appeal, which the Commission disputed at the AD.

[6] The AD has again returned this appeal to the GD. In its most recent decision, the AD says the GD incorrectly interpreted case law on rebutting the presumption that full-time students aren't available for work. The AD also said the GD hadn't explored personal conditions the Appellant may have put on his commute time. So, I'll be focusing on these issues when I review his availability for work.

[8] All EI claimants, including students, must prove availability for work by searching for a job without personal conditions that unduly limit their chance of finding suitable work.

The issues I must decide

[9] First, is the Appellant able to rebut the presumption that full-time students aren't available for work?

[10] Second, has the Appellant shown that he was available for work while studying full time without personal conditions that limited his availability?

Additional information

[11] At the hearing, I gave the Appellant a "full and fair" opportunity to submit as many details about his claim as he could remember.[1] I also accepted a post-hearing submission. I asked the Commission to respond to this submission but it made no further comment.

Analysis

[12] The GD has already found that the Commission used its discretionary powers properly when in February 2023, it finished reconsidering the Appellant's March 2021 claim. The AD didn't dispute this finding, so I won't return to that issue. The only question now before me is whether the Appellant was available for work while studying full time during his March 2021 claim.

You must be available for work

[13] All EI claimants must show that they're capable of and available for work on every working day for which they claim EI.[2] This rule also applies to students.[3] They have to show availability on a balance of probabilities.

First assuming that full-time students aren't available for work

[14] There's a presumption that full-time students **aren't** available for work.[4] This means we can presume (take for granted) that they aren't available **unless** they prove otherwise.

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[1] The Appeal Division doubted that the Appellant had been given this opportunity (see AD-24-624).
[2] Section 18(1)(a) of the *Employment Insurance Act* (EI Act) says you can't get benefits for a working day unless you prove that on that day you were capable of and available for work and couldn't get a suitable job.
[3] In March 2020, the EI Act was amended in response to COVID-19. Section 153.161 confirms that students in non-referred training must prove that they're capable of and available for work.
[4] See *Canada (Attorney General) v Cyrenne*, 2010 FCA 349.

So, I'll start by considering whether I can assume that the Appellant, who was in school from 9:00 am to 3.00 pm, was **unavailable** for work. Then I'll look at if he was **available**.

[15] The previous GD Member said the Appellant, a full-time student, could rebut the non-availability presumption based on a decision called *Page*.[5] The GD said his documented efforts to remain employed **during** his claim met the *Page* principles.

[16] The Commission disputed this interpretation of the case law. It says according to *Page*, it's the claimant's employment history **before** the claim starts that counts. In its most recent decision, the AD agreed with the Commission. I also agree on this point.

[17] But I still find that the Appellant can rebut the presumption based on his experience working while studying in high school full time **before** his EI claim began. His Record of Employment (ROE) shows he worked 352 hours in the qualifying period for this claim.

[18] The Commission says this isn't enough to rebut the presumption of non-availability. It says without the COVID hours allowance, he wouldn't even have qualified for EI.

[19] Generally, students can only rebut the presumption of non-availability where they have experience working full time while studying full time [6] or have exceptional circumstances.[7] A history of working irregular hours and a willingness to drop the course to accept work are significant factors in that determination. The Appellant met those two criteria but I agree that he'd only worked part time in the year before his claim, not full time.

[20] In the *Page* case, the claimant had worked up to 30 hours a week while the Appellant had often worked less than that. But I'm relying on a decision of Tribunal's Appeal Division (AD) in a fact situation similar to this appeal.[8] In that case, the AD found that the part-time nature of a previous job and the ability to maintain this level of work while studying full time was an exceptional circumstance. It allowed that claimant to rebut the non-availability presumption. *Page* confirms that a job doesn't always have to be full time.

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[5] See *Page v Canada Attorney General*, 2023 FCA 169.
[6] See *Canada (Attorney General) v Rideout*, 2004 FCA 304.
[7] See *Cyrenne*, above.
[8] See *J. D. v Canada Employment Insurance Commission*, 2019 SST 438. I don't have to follow the decisions of the Tribunal's Appeal Decision (AD), but their logic guides me, as in this case.

[21] I also note that the COVID hours allowance was in response to the exceptional effects of the pandemic on the labour market. So, I don't agree with the Commission that having to use those hours to claim EI should be interpreted in a negative light.

[22] For the above reasons, I find that the Appellant has rebutted the non-availability presumption. But I must now still consider whether he was really available for work.

Proving you're available for work

[23] I'll now consider the disentitlement that the Commission imposed under the following test for availability.[9]

Was the Appellant available for work?

[24] To show he was available for work, the Appellant had to prove these three things: [10]

i) He wanted to return to work as soon as he could find a suitable job.
ii) He tried to make this happen through efforts to find work.
iii) He had no personal conditions that unduly limited his chance of finding suitable work.

[25] I have to consider each of these factors to decide the question of availability.[11] I must also look at the Appellant's overall attitude and conduct where work is concerned.[12]

[26] The Commission says the Appellant wasn't unable to obtain suitable full-time employment from May 8, 2021, until the end of his claim. It says he was **unwilling** to seek work beyond the hours he could get at his former job, which was near his home.

[27] The Commission says it made this finding since the Appellant had reported that he hadn't looked for more than three jobs. It says those early statements are more reliable than what he said **after** his EI claim was retroactively denied. The law supports this general principle.[13] But there are exceptions based on a claimant's credibility.

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[9] This test is under sections 18(1)(a) and 153.161 of the EI Act.
[10] This is a plain-language version of the factors used to assess availability for work. See the original language in *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96.
[11] The Appellant's capability isn't an issue in this appeal.
[12] *Canada (Attorney General) v Whiffen*, A-1472-92; *Carpentier v Canada (Attorney General)*, A-474-97.
[13] See *Bellefleur v Canada (Attorney General)*, 2008 FCA 13.

[28] In this case, I found the Appellant's sworn statements credible since they were clear and detailed and they clarified his earlier interactions with the Commission. The Commission didn't attend the hearing to test the credibility of these statements. As noted, it didn't comment on the extra job-search details in his post-hearing submission either.

The Appellant wanted to return to work

[29] The Appellant has shown that he wanted to return to work. I make this finding based mainly on the strong work ethic he demonstrated while in high school. His work history **before** his EI claim began supports this finding.

[30] His work ethic is also evident in his attitude to working **during** his EI claim. Appellant says he worked all the hours that were available after his COVID-related lay-off. He says he got those hours since others were unwilling to work during the pandemic. His employer (CT) has confirmed that he worked every available hour.

[31] So, the Appellant`s attitude and conduct demonstrate an overall wish to return to the labour market. As noted above, the law says these are important factors to consider.

[32] The Commission gives little weight to these factors. It appears to doubt his statements that he was prepared to drop out of high school to accept full-time work. It points out that he needed a high school diploma to get into his post-high school course.

[33] But I believe the Appellant. I've put weight on his testimony. He could have put off starting his higher-level course. Or, if he`d dropped out of Grade 12 to accept work, there were options for him to finish high school or get equivalent credentials later.

[34] So, I find that the Appellant **later** taking a higher-level course isn't enough, on its own, to cast doubt on his statements that he'd drop his high school course to accept work.

The Appellant tried to find work

[35] I acknowledge that the Appellant didn't keep a proper job search record. But considering his most recent job search information together with his sworn testimony, I

find, on balance, that he's shown he tried to find work during his claim. Applying to three jobs doesn't mean that he didn't assess the labour market for others. He says there were no jobs. You can't apply for jobs that don't exist, as was often the case during COVID.

[36] The Commission says there were jobs but the Appellant limited his job search to just three employers, including his previous one. It says during his claim, the government`s Job Bank showed "hundreds of entry level jobs in the M, P and S."[14] It hasn't listed any of these jobs, so I can't assess their suitability or if they were within his **work area** (see below for discussion of his work area).

[37] The Commission's description of such wide job availability is puzzling. According to publicly available information from Statistics Canada, thousands of jobs were lost in the area during the pandemic. So, without concrete examples of the "hundreds" of jobs that the Commission cites, it's hard to reconcile this apparent contradiction.

[38] The Commission also says the Appellant shouldn't have been content with the part-time hours from his former employer. It says he had to search for full-time work. I agree the law says claimants can't just wait for a recall to their jobs. They have to search for all other available work. But I note that the Appellant's employment had previously only been part-time and the law doesn't require you to be **more** available than before.

The Appellant didn't put personal conditions on his availability

[39] He had no personal conditions that unreasonably limited his chance of finding suitable work. I'll consider several common conditions, not just restrictions on his commute.

Did the Appellant put conditions on the hours he'd work?

[40] No, because he was willing to drop his course to accept work.

[41] The Commission says the Appellant limited his availability because of the hours he spent studying full time. Although the school moved to online teaching during COVID, it told the Commission that attendance was monitored. I agree that this requirement meant the Appellant was only free for evening and weekend work.

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[14] See GD3-35.

[42] There's case law that says only being available outside your class schedule means you can't show availability for work.[15] Where your classes affect your ability to accept a job, this is a personal condition that "**unduly**" limits your ability to find work.[16]

[43] But more recent case law acknowledges that not all work nowadays takes place during what used to be considered normal working hours. Shift work is now common. And as the AD cited for this appeal, *Page* says there's "no bright line rule establishing that full time students who must attend daytime classes from Monday to Friday are not entitled to benefits."[17] Students pay EI premiums on their part-time wages. So, there are circumstances where they can collect benefits based on irregular part-time hours.

[44] For all the above reasons, I find that studying full time wasn't a personal condition that unduly limited the Appellant's chance of finding suitable work.

Did the Appellant put conditions on the type of work he'd accept?

[45] No, because he was open to working at different types of jobs.

[46] The Appellant's job search shows he enquired about work in construction. He went to convenience stores, diners and home hardware stores to drop off his resume. He searched online. He'd worked as a cook while in high school, but his resume shows he'd also worked in the fisheries industry, butchering fish and operating equipment.

[47] I find that this shows the Appellant wasn't someone who'd only accept certain types of work or restrict himself to working at his previous job in the food industry.

Did the Appellant put conditions on the length of his commute?

[48] Yes, but given the area where he lived, these weren't unreasonable conditions.

[49] The Commission doesn't agree. It says the Appellant put an undue "voluntary geographic restriction" on his job search.[18] The AD says the issue is pivotal to his appeal.

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[15] See *Duquet v Canada (Attorney General*), 2008 FCA 313.
[16] See *Gagnon v Canada (Attorney General),* 2008 FCA 313.
[17] See *Page, above,* paragraphs 55 and 72.
[18] See page GD07-2 of the Commission's most recent submission.

[50] For a job to be suitable, you must be able to commute to the workplace as well as do the work.[19] Elsewhere, the Commission recognizes that your **work area** is the geographical region where you're "normally gainfully employed."[20]

[51] It's the Appellant's obligation to prove availability for work. But, as noted above, the Commission's given no labour market information to show there were suitable vacancies within the Appellant's **work area**. In other words, at a reasonable commuting distance from his home in the region where he'd normally been employed.

[52] The Commission concedes that the Appellant had the right to decline a job offer that wasn't suitable due to "commute cost versus income". Under this principle, his wish to work near home wasn't unreasonable. But the Commission also says he couldn't "assume" a long commute would be an issue and, on that basis, stop looking for work.

[53] I agree that the Appellant had to keep looking for suitable work but, as noted above, work is only suitable if you can get to the workplace.

[54] I don't accept the Commission's assumption that the Appellant could have driven to work that might otherwise be inaccessible. I considered its submission that he was inconsistent on this point. First, he said he had a car and later, that the vehicle wasn't entirely roadworthy. He says he could only drive to work up to 30-40 minutes each way.

[55] But I see no significant inconsistency since he's explained that he'd be borrowing his father's car, an older model. An older car is usually more suitable for short commutes.

[56] I note that having a car to get to work isn't a condition to receive EI. And if you must rely on public transportation, this has to be available in your work area.

[57] As noted, the Commission said there were three locations that had vacancies. But since the Appellant was relying on borrowing an older car, he'd likely have to rely on a bus, at least sometimes. He says he couldn't get to those three places by bus.

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[19] See section 9.002(1)(a) of the *Employment Insurance Regulations (EI Regulations)*.
[20] See the Commission's definition of a work area in its *Digest of Benefit Entitlement*, section 10.4.1.

[58] The Commission hasn't explored or commented on whether the Appellant could get to those job locations by public transportation. So, I've given weight to what he said about the difficulties of commuting to jobs far from where he lived without a reliable car.

[59] So, looking for work closer to home with a manageable commute wasn't a personal condition that **unreasonably** limited the Appellant's chance of finding suitable work.

So, was the Appellant available for work?

[60] Combining my findings on the above three factors, I find on a balance of probabilities that the Appellant was available for work and unable to find a suitable job.

Conclusion

[61] The Appellant has rebutted the non-availability assumption. He's also shown that he was actively available for work while studying full time during his claim. So, he's not disentitled from receiving the EI that the Commission already paid him.[21]

[62] This explains why I'm allowing his appeal.

Lilian Klein
Member, General Division – Employment Insurance Section

[21] I make no finding on the amount of his overpayment since some of it was due to reporting errors during his claim. That issue isn't before me in this appeal.