



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

[TRANSLATION]

Citation: *DP v Canada Employment Insurance Commission*, 2020 SST 863

Tribunal File Number: GE-20-478

BETWEEN:

**D. P.**

Appellant

and

**Canada Employment Insurance Commission**

Respondent

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**SOCIAL SECURITY TRIBUNAL DECISION**  
**General Division – Employment Insurance Section**

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DECISION BY: Normand Morin

HEARD ON: August 4, 5, and 13, 2020

DATE OF DECISION: September 4, 2020

## Decision

[1] The appeal is dismissed. I find that the Appellant has not shown that he was available for work from September 2, 2019, to November 12, 2019.<sup>1</sup> His entitlement to Employment Insurance benefits cannot be established for that period.

## Overview

[2] On September 5, 2019, the Appellant made a claim for Employment Insurance benefits effective September 1, 2019.

[3] On December 11, 2019, the Canada Employment Insurance Commission (Commission) informed the Appellant that, according to its records, and contrary to what he had told it, he was not available for work from September 2, 2019, to November 12, 2019. It told him that it would send him a notice of debt and instructions for repayment of the benefits that were overpaid to him (overpayment).<sup>2</sup>

[4] The Commission submits that the Appellant does not meet the requirement that he prove that he is available for work and unable to obtain suitable employment, given the little effort that he made in this regard.<sup>3</sup>

[5] The Appellant argues that he was available for work. He says that he made efforts to find a job during the period from September 2, 2019, to November 12, 2019. The Appellant indicates that he had a suspended driver's licence at the time, which made his job search difficult. He points out that he looked for work with potential employers within a reasonable distance of his home, specifically 15 to 20 kilometres. The Appellant argues that there is no basis for asking him to repay the benefit amounts that were overpaid to him. On February 10, 2020, the Appellant challenged the Commission's reconsideration decision. That decision is now being appealed to the Tribunal.

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<sup>1</sup> See section 18(1)(a) of the *Employment Insurance Act* (Act).

<sup>2</sup> See GD3-27 and GD3-28.

<sup>3</sup> See GD4-4.

[6] I must decide whether the Appellant has proven that he was 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 was available for work.

[7] I must also decide whether the benefits that were overpaid to the Appellant (overpayment) have to be repaid.

## **Issues**

[8] I must determine whether the Appellant was available for work each working day in his benefit period from September 2, 2019, to November 12, 2019.<sup>4</sup>

[9] To do so, I must answer the following questions:

- 1) Did the Appellant show a desire or willingness to return to the labour market as soon as a suitable job was offered?
- 2) Did the Appellant express that desire through efforts to find a suitable job?
- 3) Did the Appellant set personal conditions that might have unduly limited the chances of returning to the labour market?
- 4) Do the benefits that were overpaid to the Appellant have to be repaid?

## **Analysis**

[10] A claimant is not entitled to be paid 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 obtain suitable employment.<sup>5</sup>

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<sup>4</sup> See section 18(1)(a) of the Act.

<sup>5</sup> See section 18(1)(a) of the Act.

[11] To prove availability for work, the Commission may require the claimant to prove that they are making reasonable and customary efforts to obtain suitable employment.<sup>6</sup>

[12] There are specific criteria for determining whether a claimant's efforts to find a suitable job constitute reasonable and customary efforts.<sup>7</sup> According to these criteria, efforts must be 1) sustained, 2) directed at finding a suitable job, and 3) compatible with nine specific activities that can be used to help claimants obtain suitable employment.<sup>8</sup> These activities include contacting employers who may be hiring, applying for jobs, and attending job interviews.<sup>9</sup>

[13] The criteria for determining what constitutes suitable employment 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 are not incompatible with the claimant's family obligations or religious beliefs; and
- 3) the nature of the work is not contrary to the claimant's moral convictions or religious beliefs.<sup>10</sup>

[14] The notion of "availability" is not defined in the Act. Federal Court of Appeal (Court) decisions have set out criteria that can be used to establish a person's availability for work and whether they are entitled to Employment Insurance benefits.<sup>11</sup>

[15] These three criteria are:

- 1) the desire to return to the labour market as soon as a suitable job is offered;
- 2) the expression of that desire through efforts to find a suitable job; and

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<sup>6</sup> See section 50(8) of the Act.

<sup>7</sup> See section 9.001 of the *Employment Insurance Regulations* (Regulations).

<sup>8</sup> See section 9.001 of the Regulations.

<sup>9</sup> See section 9.001 of the Regulations.

<sup>10</sup> See section 9.002(1) of the Regulations.

<sup>11</sup> The Court established or reiterated this principle in the following decisions: *Faucher*, A-56-96; *Bois*, 2001 FCA 175; and *Wang*, 2008 FCA 112.

- 3) not setting personal conditions that might unduly limit the chances of returning to the labour market.<sup>12</sup>

[16] When considering each of these factors, it is necessary to look at a claimant's attitude and conduct.<sup>13</sup>

[17] In this case, the Appellant in no way met the criteria mentioned above from September 2, 2019, to November 12, 2020 [*sic*]. The Appellant has not shown that his efforts to find a job during that period were reasonable and customary.

**Issue 1: Did the Appellant show a desire or willingness to return to the labour market as soon as a suitable job was offered?**

[18] Even though the Appellant argues that he was available for work, he did not show his desire to return to the labour market as soon as a suitable job was offered during the period from September 2, 2019, to November 12, 2019.

[19] I find that the Appellant had to show his desire to return to the labour market as soon as a suitable job was offered but that he failed to do so.

[20] The Appellant says that he lost his driver's licence on July 23, 2019, after being arrested. He indicates that this penalty was imposed on him because he had a high blood alcohol level.

[21] According to the Appellant, he worked up until the loss of his driver's licence in July 2019. He explains that he was unable to work as of July 23, 2019.

[22] The Appellant states that he got permission to drive again on November 13, 2019, after a breathalyzer<sup>14</sup> was installed in his vehicle.<sup>15</sup> He indicates that, around November 3, 2019, he learned that such a device was going to be installed in his vehicle when the Société de l'assurance automobile du Québec [Quebec's automobile insurance corporation] (SAAQ)

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<sup>12</sup> The Court established or reiterated this principle in the following decisions: *Faucher*, A-56-96; *Bois*, 2001 FCA 175; and *Wang*, 2008 FCA 112.

<sup>13</sup> The Court established this principle in the following decisions: *Whiffen*, A-1472-92; and *Carpentier*, A-474-97.

<sup>14</sup> Device that measures breath alcohol.

<sup>15</sup> See GD3-19 to GD3-22.

informed him of the steps he had to take to get permission to drive with this device and that a letter would be sent to him in this regard.<sup>16</sup>

[23] The Appellant explains that, during the period in question, he was available for work, but within a reasonable distance of his home.<sup>17</sup>

[24] I find that, despite the fact that he expressed his availability for work, but within what he considers a reasonable distance of his home because he had lost his driver's licence, the Appellant did not show his desire or willingness to return to the labour market as soon as a suitable job was offered during the period from September 2, 2019, to November 12, 2019.

## **Issue 2: Did the Appellant express that desire through efforts to find a suitable job?**

[25] The Appellant did not express his desire to return to the labour market through significant efforts to find a suitable job during the period from September 2, 2019, to November 12, 2020 [*sic*].

[26] The Appellant explained that he had worked in kitchen cabinet installation for several years. He specified that he had worked in this area for two employers over the previous two years. The Appellant mentioned having previously worked in construction. He indicated that he once had a renovation company.<sup>18</sup>

[27] The Appellant says that he has a competency certificate ([translation] “apprentice card” or apprentice competency certificate [CCA]) from the Commission de la construction du Québec [Quebec's construction commission] (CCQ).<sup>19</sup> He points out that the CCQ issued him another [translation] “apprentice card” given that he had left construction for more than five years to try something else.

[28] The Appellant indicates that losing his driver's licence complicated his job search.<sup>20</sup>

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<sup>16</sup> See GD3-25, GD3-26, GD3-32, and GD3-33.

<sup>17</sup> See GD3-30 and GD3-31.

<sup>18</sup> See GD3-25 and GD3-26.

<sup>19</sup> See GD3-19 to GD3-22.

<sup>20</sup> See GD3-17.

[29] In a statement to the Commission, he stated that he was unable to work until November 13, 2019.<sup>21</sup>

[30] Concerning his efforts to find a job, the Appellant's testimony and his statements to the Commission indicate the following:

- 1) The Appellant explained that, during the period from September 2, 2019, to November 12, 2019, he looked for employment with cabinet-making businesses or kitchen cabinet manufacturers. He pointed out that he searched for jobs near his home so that he could work at employers he could get to on foot or by bicycle, public transit, taxi, or carpooling.<sup>22</sup> The Appellant indicated that he would have been able to work only near his home until November 13, 2019, and that there were few potential employers where this would have been possible.<sup>23</sup> He explained that the employers he applied to were about 10 kilometres from his home, specifically in Granby's industrial park, where cabinet-making businesses are concentrated. The Appellant indicated that, in one of his statements to the Commission, he had said that he looked for work within approximately 15 to 20 kilometres of his home<sup>24</sup> because he was including employers located outside Granby's industrial park (for example, in Saint-Paul-d'Abbotsford).
- 2) The Appellant stated that he applied to nine potential employers near his home: three in October 2019; another four in October, November, and December 2019; and another two in December 2019.<sup>25</sup> He mentioned that he did not have the exact dates for these efforts. The Appellant specified that he applied to these employers by contacting them online to send them his résumé or by delivering the document to them in person. The Appellant said that he did not hear back from them. He argued that jobs in his field were harder to come by during the period in question, from

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<sup>21</sup> See GD3-20.

<sup>22</sup> See GD2-4, GD3-18, GD3-30, and GD3-31.

<sup>23</sup> See GD3-19 to GD3-22.

<sup>24</sup> See GD3-32 and GD3-33.

<sup>25</sup> In an email that his representative sent to the Tribunal on August 25, 2020, the Appellant mentions that he applied to three potential employers in October 2019; another four in October, November, and December 2019; and another two in December 2019—see GD8-1 and GD8-2.

September to November 2019. The Appellant noted that the summer “rush” was over. He was therefore unable to find a job in his field.

- 3) The Appellant explained that, if he had received a job offer to work in a cabinet-making business, he could have commuted with someone he knew who worked for one of the employers in that field. He indicated that, if that were not possible, he would have asked the employer whether there was another employee living near him so that he could commute with that person. The Appellant said that, otherwise, he would have gone to work on foot or by bicycle if the employer were close enough to his home.<sup>26</sup>
- 4) The Appellant indicated that he was invited to and attended an information session given by the Employment Insurance office (the Commission) on October 30, 2019.<sup>27</sup> He specified that he then gave the Commission a list of employers he had applied to.
- 5) The Appellant explained that he made other efforts to find a job by updating his résumé and by signing up on job search sites (for example, the government’s Job Bank website) to look at job postings and receive job alerts. He pointed out that this is how he found out about the job openings at two potential employers he had applied to (Construction Ouellette and Maisons Dunfab inc.).<sup>28</sup>
- 6) The Appellant indicated that he also made calls to people he knew to see if their employers could offer him work in his field and, if so, whether he could secure transportation to work. He noted that he knew someone who worked for an employer located in Saint-Paul-d’Abbotsford and with whom he could have carpooled to work there, too. However, the Appellant did not get a callback from that potential employer after applying there.

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<sup>26</sup> See GD3-32 and GD3-33.

<sup>27</sup> See GD3-17 and GD3-18.

<sup>28</sup> See GD3-19 to GD3-22, GD3-25, and GD3-26.



- 7) The Appellant indicated that he also contacted his last two employers from the previous two years but that the work teams were already full at those employers.
- 8) On November 22, 2019, in a statement to the Commission, the Appellant mentioned also looking for manual work in renovations.<sup>29</sup>
- 9) The Appellant explained that he had turned down the job at GouPro Aluminium. He indicated that the job was far from his home, specifically more than 10 kilometres away.<sup>30</sup> The Appellant argued that the job was not in his area of expertise. He explained that he would have tried the job, but it would have cost \$35.00 just to get there by taxi, and \$70.00 to get there and back, five days a week. He pointed out that such a cost amounted to more than half the pay he would have had working at that employer. That job would not have been worth the \$150.00 or \$200.00 he would have been left with after taxes, for 40 hours of work. The pay that employer was offering was a little less than what he had previously had with his other employers. He said that the employer in question did a lot of work [translation] “that was not subject to the decree,” which meant a salary of \$17.00 per hour.<sup>31</sup>
- 10) On January 16, 2020, in his statement to the Commission, the Appellant said that he turned down the job at GouPro Aluminium, but not because of a lack of available public transit to get there. He then explained that it was because the working hours were not a good [translation] “fit” for him. In response to the Commission’s comment that the distance between his home and the employer was about 10 kilometres, according to Google Maps, the Appellant indicated that, in his opinion, it was more than that, since it took around 20 minutes to get to where the employer was located. He argued that the only way to get to that employer based on those working hours was by taxi and that this was too expensive. The Appellant said that it was too far to get there on foot or by bicycle.<sup>32</sup>

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<sup>29</sup> See GD3-19 to GD3-22.

<sup>30</sup> See GD3-18.

<sup>31</sup> See GD3-18 to GD3-22, GD3-32, and GD3-33.

<sup>32</sup> See GD3-32 and GD3-33.

[31] On November 29, 2019, in a statement to the Commission, the business GouPro Aluminium explained that the Appellant told it that he could not accept the position offered because he did not have a driver's licence. The potential employer specified that it was an apprentice carpenter-joiner position at 40 hours per week but that it would have accepted an availability of a few days a week given its urgent need for workers. The work was to begin in early November 2019. The hourly rate for the job was \$21.75 per hour for the [translation] "CCQ [Quebec's construction commission] hours" and about \$17.00 per hour for the hours [translation] "not subject to the decree" or [translation] "outside the CCQ."<sup>33</sup>

[32] I find that, during the period from September 2, 2019, to November 12, 2019, the Appellant's availability for work did not lead to concrete and sustained efforts to find employment.

[33] The Court informs us that a person's availability is assessed for each working day in a benefit period for which they can prove that, on that day, they were capable of and available for work and unable to obtain suitable employment.<sup>34</sup>

[34] The Appellant's testimony and statements show that he focused his job search on employers near his home because he had lost his driver's licence.

[35] Even though he looked for work during the period from September 2, 2019, to November 12, 2019, the Appellant has not shown that he made "reasonable and customary efforts" to "find a suitable job," meaning efforts that are sustained, directed at finding a suitable job, and compatible with nine specific activities that can be used to help claimants obtain suitable employment.<sup>35</sup>

[36] I find that the Appellant's efforts do not show that he tried to return to the labour market under normal circumstances given that a measure taken against him following his arrest led to the loss of his driver's licence because he had a high blood alcohol level.

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<sup>33</sup> See GD3-23 and GD3-24.

<sup>34</sup> The Court established this principle in the following decisions: *Cloutier*, 2005 FCA 73; and *Boland*, 2004 FCA 251.

<sup>35</sup> See section 9.001 of the Regulations.

[37] I note that the Appellant acknowledges that losing his driver's licence complicated his job search.<sup>36</sup>

[38] I find that the Appellant's job search efforts during the period in question were limited. The Appellant has not shown that he made such efforts in September 2019. He indicated that he applied to three employers in October 2019, but without providing dates for those efforts. The Appellant said that he applied to four other employers during the period from October to December 2019, again without mentioning any dates. Moreover, in the latter case, I note that it is unclear whether the Appellant's job search efforts were made during the period for which a disentitlement to benefits was imposed on him, from September 2, 2019, to November 12, 2019.<sup>37</sup>

[39] I note that the Appellant also acknowledges that there were few potential employers near his home.<sup>38</sup>

[40] I also find the Appellant's explanations for turning down the job at GouPro Aluminium to be contradictory.

[41] In his statement to the Commission on October 30, 2019, the Appellant cited the loss of his driver's licence for turning down the job offer because the job was far from his home.<sup>39</sup>

[42] In his statement to the Commission on January 16, 2020, the Appellant explained that he applied to employers within about 15 or 20 kilometres of his home. He explained that he turned down the job at GouPro Aluminium because it was too far to get there on foot or by bicycle, even though the Commission pointed out to him that the employer was about 10 kilometres from his home. The Appellant stated that it was too expensive for him to get there by taxi. He also explained that he turned down the job because of the working hours, but he did not specify what

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<sup>36</sup> See GD3-17.

<sup>37</sup> See GD8-1 and GD8-2.

<sup>38</sup> See GD3-22.

<sup>39</sup> See GD3-18.

they were when he said that they were not a good [translation] “fit” for him. He also mentioned that his refusal was unrelated to the lack of available public transit to work there.<sup>40</sup>

[43] At the hearing, the Appellant also argued that the job offered by that employer was not in his area of expertise and that the pay was less than what he had when he was working for other employers.

[44] I find that, after initially stating that he declined to work at that employer because he had lost his driver’s licence, he added reasons in an attempt to justify his refusal to work there.

[45] I put the most weight on the Appellant’s initial statements to the Commission that he turned down the job at GouPro Aluminium because he had lost his driver’s licence.

[46] I note that the statement from that potential employer confirms that the Appellant turned down the job it had offered him for that reason.<sup>41</sup>

[47] I note that, in one of his statements to the Commission, the Appellant also indicated that he was looking for manual work in renovations.<sup>42</sup>

[48] I find that, in this case, the Appellant’s availability for work did not lead to concrete and sustained efforts to find suitable employment.

[49] The Court has established that the claimant’s burden of proving their availability is a requirement of the Act that cannot be ignored. To receive Employment Insurance benefits, a claimant must be actively looking for suitable employment, even if it appears reasonable for the claimant not to do so.<sup>43</sup>

[50] I find that, from September 2, 2019, to November 12, 2019, the Appellant failed to meet his obligation to make efforts to find a suitable job.

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<sup>40</sup> See GD3-32 and GD3-33.

<sup>41</sup> See GD3-23 and GD3-24.

<sup>42</sup> See GD3-19 to GD3-22.

<sup>43</sup> The Court established this principle in the following decisions: *De Lamirande*, 2004 FCA 311; and *Cornelissen-O’Neil*, A-652-93.

**Issue 3: Did the Appellant set personal conditions that might have unduly limited the chances of returning to the labour market?**

[51] I find that the Appellant set “personal conditions” that unduly limited his chances of returning to the labour market from September 2, 2019, to November 12, 2019.

[52] I find that the personal conditions the Appellant set are mainly related to the loss of his driver’s licence, a situation stemming from his arrest, followed by the imposition of this penalty because he had a high blood alcohol level.

[53] I do not accept the argument of the Appellant’s representative that, even though there was a factor limiting the Appellant’s availability for work, he still had the opportunity to make several job search efforts within a reasonable distance to find employment.

[54] I find that the fact that the Appellant no longer had his driver’s licence significantly limited his search for suitable employment during the period in question.

[55] The Appellant limited his job search to potential employers near his home and based on whether he could get to work on foot, by bicycle, or by carpooling.

[56] I find that the Appellant wanted to work but that he set his own conditions and determined the conditions under which he would have accepted employment.

[57] I find that, from September 2, 2019, to November 12, 2019, the Appellant set personal conditions that unduly limited his chances of returning to the labour market.

**Issue 4: Do the benefits that were overpaid to the Appellant have to be repaid?**

[58] The benefits that were overpaid to the Appellant (overpayment) have to be repaid.

[59] A person who has received Employment Insurance benefits to which they were not entitled or because [*sic*] they were disqualified from receiving those benefits must repay those benefits or the excess amount.<sup>44</sup>

[60] I note that the Commission has 36 months to reconsider a claim about benefits paid or payable to a claimant and that the Commission has 72 months if, in its opinion, a false or misleading statement or representation has been made in connection with a claim.<sup>45</sup>

[61] I find that the Commission exercised its right to reconsider the Appellant's claim for benefits within the time allotted to do so.<sup>46</sup>

[62] Although the Appellant argues that, in his opinion,<sup>47</sup> the Commission had no basis for asking him to repay the benefit amounts that were overpaid to him (overpayment), the fact remains that he received benefits to which he was not entitled.

[63] The Court informs us that the amount of an overpayment specified in a notice of debt becomes repayable, under section 43 of the Act, on the date of the notification of the amount of the overpayment and that, under section 44 of the Act, a person who receives an overpayment of benefits is required to return the amount of the overpayment without delay.<sup>48</sup>

[64] The Appellant's situation cannot exempt him from his obligation to reimburse the amount of the overpayment that he is being asked to repay for benefits to which he is not entitled.

[65] I find that the Commission had just cause for asking the Appellant to repay the amount of the overpayment.<sup>49</sup>

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<sup>44</sup> See sections 43 and 44 of the Act.

<sup>45</sup> See section 52 of the Act.

<sup>46</sup> See section 52 of the Act.

<sup>47</sup> See GD2-4 and GD3-30.

<sup>48</sup> The Court established this principle in *Braga*, 2009 FCA 167.

<sup>49</sup> See sections 43, 44, and 52 of the Act.

## Conclusion

[66] I find that the Appellant has not shown that he was available for work from September 2, 2019, to November 12, 2019.

[67] The Appellant's entitlement to Employment Insurance benefits cannot be established for that period because he has not shown his availability for work.

[68] The amount of the benefit overpayment that the Commission is asking the Appellant to reimburse has to be repaid.

[69] This means the appeal is dismissed.

Normand Morin  
Member, General Division – Employment Insurance Section

HEARD ON:	August 4, 5, and 13, 2020
METHOD OF PROCEEDING:	Videoconference
APPEARANCES:	D. P., Appellant  Daniel Dupras (counsel), Representative for the Appellant