



Citation: *GP v Canada Employment Insurance Commission*, 2021 SST 792

## Social Security Tribunal of Canada General Division – Employment Insurance Section

# Decision

**Appellant:** G. P.

**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** Canada Employment Insurance Commission  
reconsideration decision (421712) dated April 26, 2021  
(issued by Service Canada)

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**Tribunal member:** Amanda Pezzutto

**Type of hearing:** Videoconference

**Hearing date:** June 21, 2021

**Hearing participant:** Appellant

**Decision date:** June 30, 2021

**File number:** GE-21-857

## **Decision**

[1] G. P. is the Claimant. The Canada Employment Insurance Commission (Commission) decided that he couldn't receive Employment Insurance (EI) benefits. He is appealing this decision to the Social Security Tribunal (Tribunal).

[2] I am dismissing the Claimant's appeal. I find that he hasn't proven that he was available for work until March 1, 2021. This is because he was in school and his study permit wouldn't let him work more than 20 hours a week.

[3] However, I find that he was available during the winter break, December 25, 2020 to January 3, 2021. He wasn't in school and his study permit allowed him to work full-time.

## **Overview**

[4] The Claimant was a student on a study permit. He applied for regular EI benefits and collected benefits for several months. Then, Commission reviewed his entitlement to benefits. The Commission decided that the Claimant wasn't available for work from October 5, 2020 to February 26, 2021 because he was a full-time student and because his study permit wouldn't let him work more than 20 hours a week. The Commission made this decision retroactively. The Commission asked the Claimant to repay benefits.

[5] The Claimant is appealing this decision to the Tribunal. He argues that he was looking for work. He says that he gave the Commission information about his school and his study permit when he applied.

[6] The Commission says the Claimant's school schedule and study permit mean that he wasn't available for work. The Commission says he has to repay benefits because he wasn't entitled.

## **Matter I have to consider first**

[7] The Claimant asked for an interpreter. Tribunal staff couldn't find an interpreter before the hearing. At the beginning of the hearing, I told the Claimant that there wasn't

an interpreter. I gave him different choices about how to proceed. I said we could adjourn the hearing until Tribunal staff found an interpreter. We could adjourn the hearing and find an interpreter in another language. We could proceed via written questions and answers. The Claimant asked to proceed with the hearing in English. He said he didn't want to adjourn until the Tribunal found an interpreter.

[8] During the hearing, the Claimant asked me to rephrase some questions, but he generally answered questions clearly and thoroughly. He didn't say that he had trouble understanding or explaining himself. I was satisfied that the Claimant understood the hearing and could explain his arguments. For this reasons, I proceeded with the hearing in English, without an interpreter.

## **Issue**

[9] Was the Claimant available for work while in school?

## **Analysis**

### **Availability**

[10] Two different sections of the law require claimants to show that they are available for work;<sup>1</sup> the Commission disentitled the Claimant from being paid benefits under both. In addition, the Federal Court of Appeal has said that claimants who are attending school full time are presumed to be unavailable for work.<sup>2</sup> I am going to start by looking at whether the presumption applies to the Claimant. Then, I will look at the two sections of the law on availability.

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<sup>1</sup> Subsection 50(8) of the *Employment Insurance Act* (EIA) provides that, for the purpose of proving that a claimant is available for work and unable to obtain suitable employment, the Commission may require the claimant to prove that he or she is making reasonable and customary efforts to obtain suitable employment. Paragraph 18(1)(a) of the EIA provides that a claimant is not entitled to be paid benefits for a working day in a benefit period for which he or she fails to prove that on that day he or she was capable of and available for work and unable to obtain suitable employment.

<sup>2</sup> *Canada (Attorney General) v Cyrenne*, 2010 FCA 349.

***Presumption that full-time students are not available for work***

[11] The presumption applies only to full-time students. This means I have to decide if the Claimant was a full-time student.

[12] The Claimant has always said he was a full-time student. The Commission agrees. There is no evidence that makes me doubt this. I accept that the Claimant was a full-time student. This means that the presumption that he isn't available for work applies to him.

[13] The Claimant can rebut this presumption. If he can rebut the presumption, then it doesn't apply to him. He can rebut the presumption that he wasn't available for work by showing that he has a history of working full-time while also studying<sup>3</sup> or by showing exceptional circumstances.<sup>4</sup>

[14] The Claimant says the presumption shouldn't apply to him. He says he was looking for a job while he was in school.

[15] The Commission disagrees. The Commission says that the Claimant was only looking for part-time work.

[16] I agree with the Commission. I find that the Claimant hasn't rebutted the presumption that he wasn't available for work.

[17] The Claimant described his school schedule at the hearing. He said he had classes Monday through Thursday from 9 a.m. until 3:30 p.m. He had classes from 9 a.m. to noon on Fridays. His classes were online but he had to attend them as scheduled. He couldn't watch pre-recorded lectures on his own time.

[18] He said he was looking for full or part time work. He couldn't rearrange his class schedule and he wasn't willing to leave his classes if he found a job that conflicted with his class times. He wanted to find a job and keep going to school. He said he could start

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<sup>3</sup> *Canada (Attorney General) v Rideout*, 2004 FCA 304.

<sup>4</sup> *Canada (Attorney General) v Cyrenne*, 2010 FCA 349.

working full-time as of March 1, 2021 because his study program included a full-time work component. He couldn't work more than 20 hours a week before March 1 because of the terms of his study permit.

[19] He said he found a job on February 3, 2021 and worked part-time while going to school for about a month. Then he increased his hours and now he is working full-time.

[20] The Claimant said that he didn't have any restrictions on his ability to work during the winter break. He said his study permit allowed him to work full-time and he didn't have any scheduled classes between December 25, 2020 and January 3, 2021.

[21] I understand that the Claimant wanted to work. I believe that he wanted to find a job that would let him balance work and school. But I find that he hasn't proven that his situation was exceptional. He could only work part time while he was in school. His classes were all on weekdays and during the day and he couldn't change his class schedule. He could only accept a job if it didn't conflict with his school schedule. He doesn't have a history of working full-time while going to school.

[22] However, the Claimant didn't have any of these restrictions during the winter break. I accept that he could work full time and he didn't have any classes.

[23] I find that the Claimant has failed to rebut the presumption that he wasn't available for work while he was in school. However, I agree that the presumption shouldn't apply during the winter break.

[24] The Federal Court of Appeal has not 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 Claimant is presumed to be unavailable.

***Reasonable and customary efforts to find a job***

[25] There is a section of the law that says that Claimants have to prove that their efforts to find a job were reasonable and customary.<sup>5</sup>

[26] The Commission says it used this section of the law to disentitle the Claimant from receiving benefits. The Commission says it asked the Claimant to prove that he was making reasonable and customary efforts to find a job.

[27] I disagree. I don't think the Commission has proven that it used this section of the law to disentitle the Claimant. I won't look at this section of the law in my decision.

[28] When the Commission first spoke to the Claimant about his availability for work, the Claimant told the Commission that he was looking for work. He told the Commission about his job search activities.<sup>6</sup> The agent told the Claimant that he wasn't available for work because he was in school. The agent only spoke about the section of the law that talks about availability and capability for work.<sup>7</sup> The Commission's decision letter only talks about the Claimant's study permit and the personal restrictions that made it hard for him to find a job. The letter doesn't say anything about a failure to make reasonable and customary efforts to find a job.<sup>8</sup>

[29] Even during the reconsideration process, the Commission agent didn't ask the Claimant for details about his job search activities.<sup>9</sup>

[30] I find that the Commission hasn't given me enough evidence to show that it ever looked at the Claimant's job search activities. The Commission didn't ask the Claimant about his job search activities. The Commission didn't ever describe the list of reasonable and customary job search activities to the Claimant. The Commission didn't

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<sup>5</sup> Subsection 50(8) of the *Employment Insurance Act*.

<sup>6</sup> GD3-23

<sup>7</sup> GD3-22

<sup>8</sup> GD3-24

<sup>9</sup> GD3-30

tell the Claimant that it was using this section of the law to assess his entitlement to benefits.

[31] I will not look at this section of the law when I make my decision.<sup>10</sup>

***Capable of and available for work and unable to find suitable employment***

[32] I must consider whether the Claimant has proven that he is capable of and available for work and unable to find suitable employment.<sup>11</sup> The Claimant has to prove three things to show he was available under this section:

1. A desire to return to the labour market as soon as a suitable job is available
2. That desire expressed through efforts to find a suitable job
3. No personal conditions that might have unduly limited their chances of returning to the labour market<sup>12</sup>

[33] I have to consider each of these factors to decide the question of availability,<sup>13</sup> looking at the attitude and conduct of the Claimant.<sup>14</sup>

Did the Claimant have a desire to return to the labour market as soon as a suitable job is available?

[34] The Claimant has always said that he wanted to work. He started working on February 3, 2021, and he is still working now. I find that his attitude and his statements show that he had a desire to work.

Has the Claimant made efforts to find a suitable job?

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<sup>10</sup> I am relying on the Appeal Division decision in *LD v Canada Employment Insurance Commission*, especially the reasoning in paragraphs 10 to 18.

<sup>11</sup> Paragraph 18(1)(a) of the *Employment Insurance Act*.

<sup>12</sup> *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96.

<sup>13</sup> *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96.

<sup>14</sup> *Canada (Attorney General v Whiffen*, A-1472-92 and *Carpentier v The Attorney General of Canada*, A-474-97.

[35] I find that the Claimant made enough efforts to find a suitable job.

[36] The Claimant has to prove that his job search efforts were reasonable, given his circumstances. His attitude and conduct are important factors that I have to consider.<sup>15</sup>

[37] At the hearing, the Claimant said that he started looking for a job in May 2020. He said he looked for work as a cashier or barista. Even though many places closed because of the pandemic, he kept looking for work. He applied for work in stores. He also tried to find a job in a laboratory because he has a biology degree. He used websites like Indeed and the Government of Canada Job Bank. He looked at his school's job board. He researched job opportunities. He had a job interview in January 2021, and started working in February 2021.

[38] I think the Claimant's job search activities were reasonable. He did different kinds of things to find a job. He used different job search resources. The fact that he eventually found a job shows that he was making sincere efforts to find a job. I find that the Claimant has proven that he made enough efforts to find a job. He has met the requirements of this second factor.

Did the Claimant set personal conditions that might have unduly limited his chances of returning to the labour market?

[39] This is the most important factor in this appeal. I find that the Claimant's study permit meant that the Claimant had to put serious limits on his job search. I also find that his course schedule unduly limited his chances of finding a job.

[40] The Commission says that the Claimant couldn't work more than 20 hours a week while he was in school.

[41] The Claimant agrees with the Commission's information about his study permit. At the hearing, he said he couldn't work more than 20 hours a week during the school

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<sup>15</sup> *Canada (Attorney General v Whiffen*, A-1472-92



year. He said he was free to work full-time during the winter break. He could work full time as of March 1, 2021 because this was part of his program.

[42] I find that the study permit seriously limited the Claimant's chances of returning to the labour market. He couldn't work more than 20 hours a week.<sup>16</sup>

[43] I also find that the Claimant's class schedule unduly limited his chances of returning to the labour market. He had to attend scheduled classes Monday through Friday. From Monday to Thursday, he was attending classes from 9 a.m. to 3:30 p.m. On Fridays, he had to attend classes from 9 a.m. until noon. He couldn't change his class schedule and he wasn't willing to accept a job that conflicted with his class schedule.

[44] This means that he could only accept a job that would accommodate his school schedule. This was a significant personal condition. It made it harder for him to find a job.

[45] The Claimant said that he didn't have any personal conditions from December 25, 2020 until January 3, 2021. He said his study permit allowed him to work full-time during the break. He didn't have any scheduled classes. I agree that the Claimant had no personal restrictions that would affect his chances of returning to the labour market during the winter break.

***Was the Claimant capable of and available for work and unable to find suitable employment?***

[46] I agree that the Claimant wanted to work. I think he made reasonable efforts to find a job. But he had personal conditions that unduly affected his chances of returning to the labour market. I find that he wasn't available for work until March 1, 2021.

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<sup>16</sup> I find the Appeal Division's decision in *I.K. v Canada Employment Insurance Commission*, 2017 SSSTADEI 337 persuasive on this point.

[47] But I find that the personal conditions didn't affect his chances of working during the winter break. I find that he was available for work from December 25, 2020 to January 3, 2021.

### **The Claimant has an overpayment**

[48] I don't have the authority to make any decisions about the Claimant's overpayment. I don't have the power to order any remedies for him. But I want the Commission to look at the Claimant's circumstances and consider how the Commission's advice has caused the Claimant serious financial problems. I ask that the Commission consider possible remedies for the Claimant.

[49] At the hearing, the Claimant said he didn't know if he was going to be entitled to EI benefits when he applied. He told a Commission agent about his situation. He told the agent that he was in school and that he had a study permit. He said the Commission agent told him to apply for EI benefits. She told him that the Commission would review his application and make a decision about his entitlement to benefits. This was reasonable advice and the Claimant acted reasonably when he followed this advice.

[50] Then the Commission started paying benefits to the Claimant. It was reasonable for the Claimant to assume that the Commission had reviewed his situation and decided that he was entitled to benefits. He had been honest with the Commission about his studies and about his study permit. Why would he doubt his entitlement to benefits? Should he have called the Commission again to ask if he could accept the benefits? Should he have set the benefits aside every time he received a deposit?

[51] At the hearing, he said he made financial and life decisions because he thought he was entitled to EI benefits. He also spoke about how his immigration status will make it even more difficult for him to repay the overpayment.

[52] The Commission's decisions to pay benefits and then retroactively disentitle him have caused serious financial problems for the Claimant. The Commission's usual

reconsideration policy says that the Commission should avoid making these kinds of decisions retroactively.<sup>17</sup>

[53] I understand the Claimant's frustration with the Commission's decisions. The Claimant couldn't even rely on simple advice from a Commission agent: to apply for benefits, provide honest information about his situation, and let an agent determine his eligibility for benefits. He did all of these things but now he has a large overpayment.

[54] I don't have the authority to fix this for the Claimant. The law doesn't give me the power to write off his overpayment.<sup>18</sup> I don't have the authority to order the Commission to write off the overpayment.<sup>19</sup> I can't order the Commission to pay damages to the Commission because he relied on faulty advice.<sup>20</sup> The Commission's reconsideration policy is not a law, and so I don't have the power to enforce it. But I strongly urge the Commission to consider writing off the Claimant's overpayment. Alternatively, I urge the Commission to follow its reconsideration policy and change its decision to disentitle the Claimant retroactively.

[55] The Claimant may wish to ask for legal advice about his other options. He may be able to seek damages through the courts. He can ask for a judicial review if the Commission refuses to write off his overpayment. He can make a complaint to the Commission's Office for Client Satisfaction.

## Conclusion

[56] I must dismiss the Claimant's appeal. He wasn't available for work until March 1, 2021. But, I find that he was available for work during his winter break, from December 25, 2020 until January 3, 2021.

Amanda Pezzutto  
Member, General Division – Employment Insurance Section

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<sup>17</sup> Chapter 17.3.3 of the *Digest of Benefit Entitlement Principles*.

<sup>18</sup> *Canada (Attorney General) v. Buors*, 2002 FCA 372.

<sup>19</sup> *Canada (Attorney General) v. Woods*, 2002 FCA 91.

<sup>20</sup> *Granger v. Canada Employment Insurance Commission*, A-684-85, at para 10.