Citation: *RG v Canada Employment Insurance Commission*, 2022 SST 74

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

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

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (436427) dated October 15, 2021 (issued by Service Canada)

Tribunal member:	Amanda Pezzutto
Type of hearing:	Teleconference
Hearing date:	December 20, 2021
Hearing participant:	Appellant
Decision date:	January 27, 2022
File number:	GE-21-2209

Decision

[1] R. G. is the Claimant. The Canada Employment Insurance Commission (Commission) made decisions about his entitlement to Employment Insurance (EI) benefits. The Claimant is appealing these decisions to the Social Security Tribunal (Tribunal).

[2] I must dismiss the Claimant's appeal. He hasn't proven that he was available for work starting January 4, 2021. This means he isn't entitled to EI benefits.

Overview

[3] The Claimant collected EI Emergency Response Benefits (EI ERB) in 2020. Starting September 27, 2020, the Claimant's EI ERB ended and he started collecting EI regular benefits. He started a full-time college program in January 2021. He reported details about his studies to the Commission when he did his biweekly claimant reports. After several months, the Commission reviewed the Claimant's entitlement to EI benefits. The Commission decided that he wasn't available for work starting January 4, 2021 because he was a full-time student. The Commission asked the Claimant to repay several weeks of EI benefits.

[4] The Commission says the Claimant hasn't proven that he was available for work because he was a full-time student. The Commission says he was only looking for part-time work and he was waiting for more hours with his regular employer instead of looking for other work.

[5] The Claimant disagrees. He says he was honest with the Commission about his studies. He says that he worked as much as he could, but his employer didn't have much work for him because of the pandemic.

Issue

[6] Has the Claimant proven that he was available for work?

Analysis

Does the Commission have the power to review the Claimant's entitlement to EI benefits?

[7] The law gives the Commission very broad powers to revisit any of its decisions about EI benefits.[1] But the Commission has to follow the law about time limits when it reviews its decisions. Usually, the Commission has a maximum of three years to revisit its decisions.[2] If the Commission paid you EI benefits you weren't really entitled to receive, the Commission can ask you to repay those EI benefits.[3]

[8] The law specifically gives the Commission the power to review students' availability for work. The law gives the Commission this review power even if it already paid EI benefits.[4]

[9] In this case, the Commission looked at the EI benefits it paid to the Claimant starting January 4, 2021. According to the Commission's evidence, the Commission started its review on August 20, 2021. During this conversation, the Commission told the Claimant that it was reviewing his availability for work. The Commission decided that the Claimant wasn't available for work and notified him of its decision by letter dated August 23, 2021. The Commission sent the Claimant a notice of debt about the overpayment on August 28, 2021.

[10] So the evidence shows me that the Commission completed each part of the retroactive review within the time limits allowed by the law. The Commission reconsidered the Claimant's claims for benefits, made a decision, calculated the

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[1] See *Briere v Canada Employment and Immigration Commission*, A-637-86 on the broad power given by section 52 of the *Employment Insurance Act*:

> This provision authorizes it to amend *a posteriori* within a period of three or six years, as the case may be, a whole series of claims for benefit and to make a fresh decision on its own initiative as to entitlement to benefit, and in appropriate cases to withdraw its earlier approval and require claimants to repay what had been validly paid pursuant to such approval.

[2] Subsection 52(1) of the *Employment Insurance Act*. The law says the Commission has 36 months. See also *Canada (Attorney General) v Laforest*, A-607-87. In this decision, the Federal Court of Appeal held that the Commission has 36 months to reconsider a claim for benefits, make a decision, calculate the overpayment, if any, and notify the claimant of the overpayment.

[3] Subsection 52(3) of the *Employment Insurance Act*.

[4] Subsection 153.161(2) of the *Employment Insurance Act*.

overpayment, and notified him of the decision and overpayment all within 36 months of the date it originally paid the benefits.

[11] So, I find that the Commission used its power to retroactively review the Claimant's entitlement to EI benefits in a way that respects the law. The law gives the Commission the authority to make a retroactive review, and the Commission followed the guidelines and time limits described in the law when it did its retroactive review.

[12] I understand that the Claimant gave the Commission information about his studies when he completed his biweekly reports. Even though the Commission had information about the Claimant's studies, the Commission waited several months to make a decision. This has led to a large overpayment for the Claimant. I am sympathetic to his circumstances, and I understand that the Commission's delay has caused him financial problems. But I find that the law gives the Commission the authority to make a retroactive decision about the Claimant's availability for work.

The Claimant's availability for work

[13] Two different sections of the law say that you have to prove that you are available for work to get EI benefits.

[14] First, the Employment Insurance Act (EI Act) says that you have to prove that you are making "reasonable and customary efforts" to find a suitable job.[5] The Employment Insurance Regulations (Regulations) give criteria that help explain what "reasonable and customary efforts" mean.[6]

[15] Second, the EI Act says that you have to prove that you are "capable of and available for work" but aren't able to find a suitable job.[7] Case law gives three things a

[5] See section 50(8) of the *Employment Insurance Act*.
[6] See section 9.001 of the *Employment Insurance Regulations* (Regulations).
[7] See section 18(1)(a) of the *Employment Insurance Act*.

claimant has to prove to show that they are "available" in this sense.[8] Students have to prove their availability for work under this part of the law.[9]

[16] You have to prove that you are available for work on a balance of probabilities. This means that you have to prove that it is more likely than not that you are available for work.

[17] The Commission says it used both sections of the law to refuse EI benefits. So, I will look at both sections of the law when I decide if the Claimant has proven his availability for work.

Reasonable and customary efforts to find a job[10]

[18] I find that the Claimant hasn't proven that he was making reasonable and customary efforts to find a job. This is because he hasn't given enough evidence to show that he made job search efforts beyond looking for work with his current employer.

[19] The law explains how I must decide whether the Claimant was making reasonable and customary efforts to find a suitable job. I have to look at whether he made sustained efforts. He has to show that he kept trying to find a suitable job.

[20] The law gives examples of which kinds of job search activities are reasonable and customary. For instance, I can look at whether the Claimant was doing the following kinds of activities:

- Assessing employment opportunities
- Preparing a resume or cover letter

[8] See *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96.
[9] Subsection 153.161(1) of the *Employment Insurance Act*.
[10] The Appeal Division warns me that I should be certain that the Commission genuinely used this part of the law to assess entitlement. See *LD v Canada Employment Insurance Commission*, 2020 SST 688. I will include this section in this decision. This is because the Commission asked the Claimant about his job search activities during the reconsideration process. The Commission also made submissions about the Claimant's job search efforts and why it determined that these efforts weren't reasonable and customary.

- Networking
- Submitting job applications[11]

[21] The Commission argues that the Claimant wasn't making reasonable and customary efforts to find a job.

[22] The Claimant disagrees. He says that he was looking for work and waiting for more hours from his regular employer.

[23] The Claimant told the Commission that he was waiting for his employer to give him full-time hours. He told the Commission that his employer, a gym, didn't have much work because of health restrictions. He told the Commission that he wasn't trying to find work with other employers.

[24] On his notice of appeal and at the hearing, the Claimant agreed that he was waiting for his employer to give him more hours. But, he said he also looked for work with other employers. He said he used Indeed, Craigslist, and government websites to look for work.

[25] After the hearing, he submitted evidence showing that he inquired about jobs with two employers in January 2021. He didn't provide evidence showing any job applications after January 2021. These two applications alone aren't enough to prove that the Claimant was making reasonable and customary efforts to find a job.

[26] I think the Claimant's statements to the Commission are more reliable. This is because he consistently gave the Commission the same information about his job search efforts. He only changed his statement and said he was looking for work with other employers after he appealed to the Tribunal. I think it is likely that the Claimant's primary job search activity was waiting for his usual employer to give him more hours.

[27] But I find that waiting for his regular employer to give him more hours isn't enough to show that he was making reasonable and customary efforts to find a job. The

[11] Section 9.001 of the *Employment Insurance Regulations*.

Claimant hasn't given me enough evidence to show that he was doing other kinds of job search activities, aside from the two applications in January 2021.

[28] So I find that the Claimant hasn't proven that he was making reasonable and customary efforts to find a job.

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

[29] The second part of the law that talks about availability says that you have to prove that you are capable of and available for work but unable to find a suitable job.

[30] Case law gives me three factors to consider when I make a decision about availability for work. This means I have to make a decision about each one of the following factors:

1. You must show that you wanted to get back to work as soon as someone offered you a suitable job. Your attitude and actions should show that you wanted to get back to work as soon as you could;

2. You must show that you made reasonable efforts to find a suitable job;

3. You shouldn't have limits, or personal conditions, that could have prevented you from finding a job. If you did set any limits on your job search, you have to show that the limits were reasonable.[12]

[31] Students have to prove that they are available for work, just like anyone else asking for EI benefits.[13]

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[12] In in *Faucher v. Canada Employment and Immigration Commission*, A-56-96, the Federal Court of Appeal says that you prove availability by showing a desire to return to work as soon as a suitable employment is offered; expressing your desire to return to work by making efforts to find a suitable employment; and not setting any personal conditions that could unduly limit your chances of returning to the labour market. In *Canada (Attorney General) v. Whiffen*, a-1472-92, the Federal Court of Appeal says that claimants show a desire to return to work through their attitude and conduct. They must make reasonable efforts to find a job, and any restrictions on their job search should be reasonable, considering their circumstances. I have paraphrased the principles described in these decisions in plain language.
[13] Section 153.161 of the *Employment Insurance Act*.

– Wanting to go back to work

[32] The Claimant has always said that he wanted to work. He worked for one employer until September 14, 2021. At the hearing, he said he started a new job in September 2021, and now he is working for two employers.

[33] I think the fact that the Claimant was working shows that he had a desire to work. I find that the Claimant's attitude and actions show that he wanted to work.

– Making efforts to find a suitable job

[34] I find that the Claimant hasn't proven that he was making enough effort to find a job.

[35] The law describes a list of reasonable and customary job search activities. This list is only for the purpose of deciding whether the Claimant was making reasonable and customary efforts to find a job. This isn't the same as proving that he was making enough efforts to find a suitable job because this factor deals with a different part of the EI Act. But I find that the list of reasonable and customary job search activities is helpful when I look at this factor.

[36] I have already found that the Claimant wasn't making reasonable and customary efforts to find a job. I found that he limited his job search efforts to waiting for his employer to give him more hours. I found that he hasn't proven that he made other kinds of efforts to find a job. He hasn't given me evidence showing that he applied for jobs or did other kinds of job search activities aside from the two job applications in January 2021.

[37] Making two job applications in January 2021, and waiting for his usual employer to give him more hours aren't reasonable job search activity. This is especially true because the Claimant agreed that there wasn't work available with his usual employer because of public health closures.

[38] So, I find that the Claimant hasn't proven that he was making enough efforts to find a suitable job. He hasn't met the requirements of this factor.

– Unduly limiting chances of going back to work

[39] I find that the Claimant set personal conditions on his job search. I find that some of his personal conditions unduly limited his chances of returning to the labour market.

[40] The Commission says that the Claimant was a full-time student. The Commission says his study obligations made it too hard for him to find a job. The Commission also says that the Claimant limited himself to working with one employer.

[41] The Claimant disagrees. He says he has a history of working while going to school.

[42] At the hearing, the Claimant said he started his school program in September 2019. He said he was already working for a gym and so he continued working for the same gym after he started school. He said it was typical to work 15 to 20 hours a week at this gym. This is because he had to lead fitness classes and it was too much strain on his voice to work more than 20 hours a week in this job.

[43] The Claimant said we was in school from January 5 to April 28, 2021, and then the summer semester from April 28 until August 2021. He said his classes were mostly online and he could often adjust his study schedule to pick up shifts at work.

[44] The Claimant's Record of Employment shows that he worked from January 2021 to September 2021. So, I believe that the Claimant was capable of working at the same time that he was going to school. I believe that he balanced work and school before the pandemic affected his workplace. I also believe that the Claimant's studies weren't full-time during the summer.

[45] So, I find that the Claimant's studies were a personal condition, but I don't think this unduly limited his chances of returning to the labour market. This is because he successfully worked at the same time he was going to school.

[46] But I also have to look at whether the Claimant unduly limited his chances of returning to the labour market by limiting his job search to one employer.

[47] The Claimant gave conflicting information about whether he was looking for work with other employers, or whether he was waiting for his regular employer to give him more hours.

[48] The Claimant consistently told the Commission that he was waiting for his employer to give him more hours. He told the Commission that he wasn't looking for work with other employers. But after he appealed to the Tribunal, the Claimant said he was looking for work with other employers. In support of his arguments, he gave me two emails he sent to prospective employers in January 2021. He doesn't have any evidence showing that he looked for work with different employers aside from these two applications.

[49] I don't think the Claimant's statements on his notice of appeal and at the hearing are convincing. The fact that he only has two job applications from January 2021 isn't enough to overcome his statements to the Commission. I find it more likely that the Claimant limited himself to working with his regular employer.

[50] The Claimant said that public health measures and closures meant that his employer didn't have many hours for him. So, I find that it wasn't reasonable for him to wait for his regular employer to give him more hours. By putting this limit on his job search, I find that the Claimant unduly limited his chances of returning to the labour market. This is because it wasn't likely that this particular employer would have much work available for him. It would have been reasonable for the Claimant to expand his job search to include other employers and other kinds of work.

[51] So, I find that the Claimant set personal conditions on his job search because he was waiting for his regular employer to give him more hours. I find that this unduly limited his chances of returning to the labour market.

– **So, was the Claimant capable of and available for work?**

[52] I find that the Claimant has proven that he had a desire to work. But he hasn't proven that he was making reasonable efforts to find a job. He set personal conditions that unduly limited his chances of returning to the labour market. So, I find that the

Claimant hasn’t proven that he was capable of and available for work starting January 4, 2021.

Conclusion

[53] I am dismissing the Claimant’s appeal. I find that he hasn’t proven that he was available for work under the meaning of the law starting January 4, 2021. This means he isn’t entitled to EI benefits.

Amanda Pezzutto
Member, General Division – Employment Insurance Section