Citation: *HM v Canada Employment Insurance Commission*, 2022 SST 53

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	H. M.
Representative:	M. M.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (440043) dated November 25, 2021 (issued by Service Canada)

Tribunal member:	Lilian Klein
Type of hearing:	Teleconference
Hearing date:	December 23, 2021
Hearing participants:	Appellant Appellant's Representative
Decision date:	January 3, 2022
File number:	GE-21-2425

Decision

[1] I am dismissing the Claimant's appeal. This decision explains why.

[2] The Claimant has not shown that she was available for work while in school full time. This means that she is disentitled from receiving Employment Insurance (EI) regular benefits from January 4, 2021, to June 11, 2021. She must repay these benefits.

Overview

[3] The Claimant received regular benefits while taking a full-time course. The Canada Employment Insurance Commission (Commission) automatically approved her claim for the January to June 2021 semesters. It then disentitled her from receiving EI regular benefits starting on January 4, 2021 after finding that she was not available for work. This decision led to an overpayment of $11,500 in regular benefits.

[4] I must consider whether the Claimant was available for work. To show this, you have to search for jobs and set no personal conditions that might unduly limit your chances of finding work. You can only get regular benefits if you can prove availability.

[5] The Commission says the Claimant was not available for work because her availability was limited by her class schedule and she could only work on Saturday and Sunday nights. It says she prioritized finishing her course over finding work.

[6] The Claimant says she was available because she was prepared to work but could not find a job. She says the Commission should not have approved benefits and then demanded them back. She argues that it was not her responsibility to know the rules when claiming EI as a student and the Commission did not give her that information when she spoke to its agents.

The issue I must decide

[7] Was the Claimant available for work while in school full time from January 4, 2021, to June 11, 2021?

Analysis

[8] The law requires claimants to show that they are available for work.[1] A new temporary section of the *Employment Insurance Act* (EI Act) says claimants who attend a full-time course cannot receive benefits unless they prove that they are capable of and available for work.[2] They have to show it is more likely than not that they were available.

Presuming that full-time students are not available for work

[9] The Federal Court of Appeal says there is a presumption that claimants in school full time are unavailable for work.[3] I will start by looking at whether I can presume that the Claimant was unavailable for work. Then I will look at whether she showed that she was available for work.

[10] The presumption applies only to full-time students. The Claimant's program was full time. As a result, the presumption applies to her.

[11] The presumption can be rebutted, which means it would not apply. The Claimant can rebut the presumption by showing that she has a history of working full-time while also studying[4] or by showing exceptional circumstances.[5]

[12] The Commission says the Claimant cannot rebut this presumption because she would not take a job that conflicted with her weekday classes; this severely restricted her availability for work. It says her course was more important to her than finding work.

[13] The Claimant says she once tried working while studying full time but was unable to cope with this dual schedule. She told the Commission that she had not worked before while taking a course.[6] So, she did not show that she was able to manage both

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[1] S 18(1)(a) of the *Employment Insurance Act* (EI Act) says claimants are not entitled to benefits for a working day in a benefit period if they fail to prove that on that day they were capable of and available for work and unable to obtain suitable employment.
[2] In March 2020, the government amended the EI Act to allow the Minister to make interim orders to mitigate the economic effects of COVID-19 (s 153.3 of the EI Act). The Minister added s153.161, requiring claimants in non-referred training to prove that they are capable of and available for work.
[3] *Canada (Attorney General) v Cyrenne*, 2010 FCA 349.
[4] *Canada (Attorney General) v Rideout*, 2004 FCA 304.
[5] *Cyrenne*, see above.
[6] See GD3-35.

studying and working at the same time. Being able to manage both is sometimes seen as an exceptional circumstance.[7]

[14] This means that the Claimant has not rebutted the presumption that she is unavailable for work since she is studying full time. But I must still look at the law that applies in her case and decide whether she was, in fact, available for work.

[15] The Commission says claimants must make "reasonable and customary" efforts to find work. But it did not ask for Claimant for a job search or tell her about this requirement when she called to ask whether she had to declare her student loan.

[16] For this reason, I make no decision on a disentitlement under section 50 of the EI Act for failing to carry out a reasonable and customary job search.[8] I will only consider the following test for availability in sections 18(1)(a) and 153.161 of the EI Act.

Was the Claimant available for work and unable to find a suitable job?

[17] To show she was available for work, the Claimant has to prove that

a) she wanted to return to the labour market as soon as a suitable job was available;

b) she tried to make this happen through efforts to find work; and that

c) she had no personal conditions that might unduly (unreasonably) limit her chances of returning to the labour market.[9]

[18] I have to consider each of these three factors to decide the question of availability.[10] To do this, I have to look at the Claimant's attitude and conduct.[11]

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[7] See *J. D. v Canada Employment Insurance Commission*, 2019 SST 438. I do not have to follow the decisions of the Tribunal's Appeal Decision (AD) but their logic guides me.
[8] If claimants do not comply with a request to prove they made "reasonable and customary" efforts to find work (s 50(8) of the EI Act), they may be disentitled under s 50(1). The Commission did not ask for a job search so the Claimant cannot be disentitled under that section of the law.
[9] This is a plain language version of the three factors used to assess availability for work. See *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96.
[10] *Faucher*, see above.
[11] *Canada (Attorney General) v Whiffen*, A-1472-92; *Carpentier v Canada (Attorney General)*, A-474-97.

Did the Claimant want to return to the labour market as soon as possible?

[19] The Claimant has not shown that she wanted to return to the labour market before she finished her course. She now says she would have dropped it to accept a full-time job, despite all the time, effort and money she had spent on her studies.

[20] I give little weight to this statement since she only made it after she was disentitled from receiving benefits.

Did the Claimant make efforts to find suitable employment?

[21] The Claimant has not shown that she made much effort to find suitable employment. To get regular benefits, you have to conduct a thorough job search on every working day that you want to claim benefits.

[22] The Claimant argues that she was willing to work with no conditions on type of job, pay or location. But willingness to work is different from being available for work. For example, she says she was in touch with a restaurant where she had worked before, but it could not use her. Its hours were cut because of COVID-19. But, due to her classes, she was not applying for shifts that might have actually been available.

[23] The Claimant argues that she tried to find work but could give few details of a job search. She did not register with any employment agency. She says she could have worked in a gym but they were partly closed due to COVID-19. She wanted to work at a store in a mall but malls are usually closed when she had free time to work. She says she looked for jobs at Superstore, convenience stores and Tim Horton's coffee shops but her availability was too limited to get her part-time work there.

[24] The Claimant argues that she could not find work since there were no jobs due to COVID-19. I agree that it was a difficult job market. However, claimants are still required to try to find work even if they believe that they are unlikely to succeed.[12]

[12] *De Lamirande v Canada (Attorney General)*, 2004 FCA 311.

[25] The Claimant says she only searched and applied online for work because she was too anxious due to COVID-19 to visit stores to drop off her resume and ask about vacancies in person. But she did not provide proof of any online applications.

[26] The job search that the Claimant describes is limited. She has no proof that she applied for jobs other than at places that could not accommodate her availability. The courts have found that you cannot restrict your availability to weekends.[13] That is why I find that she did little to show that she tried to find suitable employment.

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

[27] The Claimant set a personal condition since she would not accept work that clashed with her classes. Her course schedule filled the week during regular working hours. Her classes were online, but she still had to log in for them at fixed times and study on her own afterwards. Even at weekends, she could only work in the evenings.

[28] The Claimant restricted her availability since trying to combine work with studying had not been a success in the past. But this was a personal condition that unduly limited her chances of returning to the labour market while she was still in school.

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

[29] Based on my findings on the above three factors, I find that the Claimant has not shown that she was capable of and available for work but unable to find a suitable job.

[30] The Claimant argues that it is unfair for the Commission to demand repayment of her benefits. She says it should pay for its own mistakes in giving her these benefits. She says it was not her responsibility to know that she was not eligible for benefits.[14]

[31] The Claimant also argues that she was never told she had to search for work and keep a record of her job search efforts, even when she spoke to Commission agents.

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[13] *Canada (Attorney General) v Gauthier*, 2006 FCA 40.
[14] See the Claimant's appeal at GD2-3.

[32] I accept her sworn testimony that the agents she spoke to did not tell her this. But she says she called with questions on whether she had to report her student loan. It was reasonable for the agents to presume that the Claimant had reviewed and understood the following information, as provided when she applied for benefits.

[33] The Commission informed the Claimant on her benefit application that to get regular benefits, she had to be available for work, must actively search for jobs and keep a detailed record of her job search.[15] The application suggested ways to find work. Her training questionnaire reminded her to keep a list of employers she contacted, with the date and the result of the contact.[16]

[34] The Claimant signed an attestation on her benefit application that she had "read and understood" and accepted her rights and responsibilities, as set out in that application.[17] So, claiming ignorance of her obligations is not a compelling argument.

[35] Under the law, the Commission can verify that students were entitled to the regular benefits they received.[18] Since the Claimant did not show, on a balance of probabilities, that she was available for work, she must repay these benefits.[19]

Conclusion

[36] The Claimant has not shown that she was capable of and available for work while studying full time. This means that she is disentitled from receiving EI regular benefits from January 4, 2021, to June 11, 2021. She must repay the overpayment.

[37] This means that I am dismissing the Claimant's appeal.

Lilian Klein

Member, General Division – Employment Insurance Section

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[15] See GD3-8.
[16] See GD3-35.
[17] This attestation can be found at GD3-41.
[18] S 153.161 of the EI Act.
[19] S 44 of the EI Act.