Citation: *KG v Canada Employment Insurance Commission*, 2022 SST 126

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	K. G. (also known as K. H.)
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (434486) dated October 20, 2021 (issued by Service Canada)

Tribunal member:	Linda Bell
Type of hearing:	Videoconference
Hearing date:	February 1, 2022
Hearing participant:	Appellant
Decision date:	February 4, 2022
File number:	GE-21-2308

Decision

[1] I am dismissing the appeal, with modification to the end date of the disentitlement.

[2] The Appellant, K. G., hasn't shown that she meets the availability requirements for Employment Insurance (EI) benefits from October 5, 2020, to July 16, 2021. This means she is disentitled from EI benefits during this period.

[3] The Appellant is responsible (liable) to repay the overpayment of benefits. This means I am not reducing or writing off the overpayment.

Overview

[4] The Appellant stopped working on February 21, 2020, due to an injury. She received Workers' Compensation Benefits (WCB) until July 28, 2020. She didn't return to work because her employer was temporarily closed due to the global COVD-19 pandemic. Her employer terminated her employment on November 13, 2020.

[5] The Appellant submitted an application for the Emergency Response Benefit (ERB). The Commission set up her claim for the EI-ERB effective September 6, 2020.[1] When the EI-ERB ended, the Commission automatically started her claim for EI benefits effective October 4, 2020.

[6] Eight months later, the Commission started a review of the Appellant's claims. It determined that the Appellant wasn't entitled to receive EI benefits because she failed to prove that she met the availability requirements for benefits. The Commission imposed an indefinite disentitlement retroactive to October 19, 2020. This results in a $16,000.00 overpayment of EI benefits.

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[1] In March 2020, the Government of Canada created two types of emergency benefits in response to the COVID-19 pandemic. CRA administers the first benefit called the Canada Emergency Response Benefit (CERB). The Commission administers the second benefit called the Employment Insurance Emergency Response Benefit (EI-ERB). Not everyone who requests the CERB, EI-ERB, or regular EI benefits can receive benefits. This is because applicants still have to prove that they are entitled to receive the benefits.

[7] The Appellant disagrees with the Commission. She appeals to the Social Security Tribunal (Tribunal). She says that her training didn't prevent her from looking for work. This is because her training was on-line and self-paced. She says she had family responsibilities, including providing care for her six-year-old daughter, so she could only work when her daughter was in school and she wasn't doing her training.

Issues

[8] Does the Appellant meet the availability requirements for EI benefits?

[9] If not, did the Commission review and amend her previous claims within the required time limit?

[10] Is the Appellant required to repay an overpayment of EI benefits?

Analysis

Availability

[11] Different sections of the law require Appellants to show that they are available for work.[2] The Commission says the Appellant was disentitled under both sections because she hasn't shown she was capable of and available for work and unable to find suitable employment while attending unapproved training.[3]

[12] Recent changes to the Act created new provisions. As I read them, the new provisions displace the presumption of unavailability.[4] This is because the new provisions do not presume that a full-time student is unavailable. Instead, the new

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[2] Paragraph 18(1)(a) of the *Employment Insurance Act* (Act) 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. Subsection 50(8) of the Act provides that, for the purpose of proving that a Appellant is available for work and unable to obtain suitable employment, the Commission may require the Appellant to prove that he or she is making reasonable and customary efforts to obtain suitable employment.
[3] See the Commission's submissions on page GD4-1.
[4] Section 153.161 of the Act states that a claimant who attends a course, program of instruction or training to which the claimant is not referred is not entitled to be paid benefits for any working day in a benefit period for which the claimant is unable to prove that on that day they were capable of and available for work.

provision says that full-time students must prove their availability just like any other claimant.[5]

[13] I find the Appellant is a full-time student for the purposes of EI benefits. I acknowledge that the Appellant says she wasn't attending training full-time because she was doing her courses on-line.[6]

[14] Despite the Appellant's statements, I find the Appellant was a full-time student, for the purposes of EI benefits. I made this finding after reviewing the training contract and program outline.[7]

[15] Based on the above, I find that the new provisions apply to the Appellant.[8] So, I will now review the requirements of the Act and decide whether the Appellant has shown she meets the availability requirements for EI benefits.

Reasonable and customary efforts to find suitable employment

[16] The law sets out criteria for me to consider when deciding whether the Appellant's efforts were reasonable and customary. I have to look at whether her efforts are sustained and whether they are directed toward finding suitable employment (a suitable job). In other words, the Appellant has to have kept trying to find a suitable job.

– suitable employment

[17] The Act doesn't define suitable employment. Instead, the law provides criteria I must consider when determining whether employment is not suitable or suitable for the Appellant.[9]

[18] I accept that suitable employment for the Appellant changed after February 21, 2020. This is when she stopped working as a server, due to an injury. As stated in her

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[5] See section 153.161(1) of the Act.
[6] The Appellant provides a course listing at page GD5-8. This document states the recommended path for completing the program in two years as a full-time student.
[7] See pages GD2-9 and GD2-10.
[8] Section 153.161 came into effect on September 27, 2020. This was still in effect when the Appellant's benefit period started on October 4, 2020.
[9] See section 6 of the Act.

November 30, 2020, medical note, she has medical conditions which prohibit her from working as a restaurant server (or any other labour requiring similar activity), indefinitely.[10]

[19] Prior to February 21, 2020, the Appellant worked as a restaurant server, bartender, and assistant manager of two coffee shops. The Appellant says that she had attended college where she completed courses toward a hotel and restaurant management diploma. She didn't obtain her diploma because she didn't finish the last course.

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

[20] I find the Appellant didn't start making reasonable and customer efforts to find a job until she completed her training on July 16, 2021. Here is what I considered.

[21] The Commission submits that the Appellant's job search records didn't begin until July 16, 2021. It also submits that although the Appellant says she started networking in June 2021, she wasn't able to provide any proof of that job search when it asked her to do so.

[22] The Commission says that the Appellant stated more than once that she was in a full-time course. The Commission asserts that the Appellant told them that she wasn't able to work while she was completing school, caring for her family, and caring for her chronic pain.

[23] At the hearing, the Appellant said that she "presumed" that she wasn't required to look for work because she had discussed her attendance at training with the Commission. She admits that after she spoke with the Commission, she sought approval to attend training from WorkBC. She says WorkBC denied her request because she had already paid for her course.

[10] See the medical note signed by the Appellant's physician at page GD3-58.

[24] The Appellant says she was taking the Job Search and Resume Writing course in June 2021.[11] This is when she signed up on Indeed and started making a list of prospective jobs. She admits that she was only making the lists for her course. She didn't start actively seeking or applying for jobs until mid-July 2021. She completed her training and issued her certificate on July 16, 2021. She applied for three jobs and attended an interview. She then started working full-time for her current employer on August 5, 2021.

[25] The Appellant consistently says that her medical conditions didn't prevent her from working or looking for work. Instead, it was the combination of her training, family obligations, and her medical conditions. She says she has been able to work full-time since August 5, 2021, while managing her medical conditions. This is because her school had ended and her family circumstances changed when her husband completed his training. This means he is available now to assist with their family obligations and childcare.

[26] After consideration of the above, I find that the Appellant didn't make reasonable and customary efforts to find suitable employment until July 16, 2021. This is when she started making efforts to actively seek and apply for a job. Her efforts were successful and she started working full-time on August 5, 2021.

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

[27] I must consider whether the Appellant has shown she was capable of and available for work and unable to find suitable employment.[12] The Appellant has to prove three things to show she was available under this section:

a) A desire to return to the labour market as soon as a suitable job is available

b) That desire is expressed through efforts to find a suitable job

[11] See page GD2-18.
[12] Paragraph 18(1)(a) of the Act.

c) No personal conditions that might unduly limit their chances of returning to the labour market[13]

[28] I have to consider each of these factors to decide the question of availability,[14] looking at the attitude and conduct of the Appellant.[15]

– **Desire to return to work**

[29] I find that the Appellant has shown she had a desire to return to the labour market as soon as a suitable job was available. The Appellant consistently says she had a desire to return to work. This is why she was taking training courses to improve her chances of finding a job she felt was desirable and suitable.

[30] Based on the above, I find that the Appellant presented enough evidence to prove she had a desire to return to the labour market.

– **Efforts to find a suitable job**

[31] I find that the Appellant didn't start making efforts to find a suitable job until July 16, 2021. She readily admits that she made no effort to apply for a job until then.

[32] I recognize that the Appellant says that in June 2021, she was preparing her resume, signed up for on-line job alerts, and began looking on-line for suitable jobs. However, as set out above, she admits she was doing these activities because they were a requirement of her course work. She made no efforts to apply for suitable jobs until mid-July 2021, when she submitted three applications. She attended an interview in July 2021, and started working for her current employer on August 5, 2021.

[33] While they are not binding when deciding this particular requirement, I have considered the list of job-search activities, outlined below, as guidance when deciding this second factor.

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[13] *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96.
[14] *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96.
[15] *Canada (Attorney General v Whiffen*, A-1472-92 and *Carpentier v The Attorney General of Canada*, A-474-97.

[34] The *Employment Insurance Regulations* (Regulations) lists nine job-search activities I have to consider. Some examples of those activities are[16]

- looking for jobs listed on-line
- creating a resume
- networking and dropping off a resume
- applying for a job

[35] I recognize that there is no formula to determine a reasonable period to allow a claimant to explore job opportunities. This means I must consider specific circumstances on a case-by-case basis.[17]

[36] I have also considered the economic effects caused by the global COVID-19 pandemic when determining the reasonable period to explore job opportunities. I have also considered the public health orders that closed business at different times in the Appellant's province.

[37] In this case, I find that the Appellant's efforts were not enough to meet the requirements of this second factor for the period from October 4, to July 16, 2021. This is because she readily admits that she made no efforts to find a job until mid-July 2021. This is because she was attending to her family obligations and doing her training courses, while managing her medical conditions.

– **Unduly limiting chances of going back to work**

[38] I find that the Appellant set personal conditions that limited her chances of going back to work. Specifically she didn't make any efforts to look for or apply for a job until mid-July 2021.

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[16] See section 9.001 of the Regulations.
[17] See section 10.4.1.4 of the Digest of Benefit Entitlement Principles.

[39] I am not convinced that the Appellant was available to accept a job during normal or typical business hours on Monday through Friday, prior to July 16, 2021. This is because she says she was only available to work during the hours her daughter was in school and she wasn't doing her training courses.

[40] Further, I am not convinced that she would have accepted a job at X prior to her termination in November 2020. This is because she had paid for her training in early October 2020.

[41] The Appellant says she would have returned to work for her previous employer, X, if they had offered her a job in their accounting department during the hours her daughter was in school. Upon further clarification, she admits that she casually discussed her desire to work in that department, but there wasn't any opportunity to do so. She also admits that once she started her training course she could only do her course work while her daughter was in school because of her family obligations. So she wasn't available to work every weekday during normal business hours.

[42] I have also considered the fact that the Appellant was no longer able to work as a server or in a labour job. However, she possessed many other transferable skills, which she could have utilized in other jobs. As stated above, she had previously attended college where she took courses in hotel and restaurant management. She also had experience working as an assistant manager in two coffee shops. Instead of utilizing her existing skills, she made a personal choice to limit her chances of going back to work by attending training and restricting her availability to accounting jobs, for which she wasn't fully trained for until July 16, 2021.

[43] In this case, I find that the Appellant was unduly limiting her changes of going back to work from October 4, 2020, to July 16, 2021. She was restricting her availability while caring for her family, attending unapproved training, and managing her medical conditions.

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

[44] After considering my findings on each of the three factors together, I find that the Appellant hasn't shown that she was capable of and available for work and unable to find a suitable job from October 4, 2020, to July 16, 2021.[18] She didn't start applying for jobs until mid-July 2021. Then attended an interview shortly thereafter and started working full-time on August 5, 2021.

[45] As explained during the hearing, the Employment Insurance scheme is not a pension fund or a needs-based program. Like other insurance plans, claimants have to meet the entitlement requirements in order to receive payment of benefits.[19] So, even though the Appellant paid EI premiums, she doesn't meet the availability requirements to receive regular benefits. This means she is not entitled to the EI benefits she received.

The period the Commission may review previous claims

[46] I find that the Commission has the authority to review previous claims even though the Appellant may have reported training information on her application and biweekly reports.[20]

[47] The law states that the Commission may, at any point after benefits are paid to a claimant who is taking unapproved training, verify that they are entitled to those benefits by requiring proof that they were capable of and available for work on any working day of their benefit period.[21]

[48] The law also states that the Commission has 36 months after paying EI benefits, to reconsider a claim for benefits.[22] This period is extended to 72 months in cases where, if

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[18] See section 18(1)(a) of the Act.
[19] See *Canada (Attorney General) v Lesiuk*, 2003 FCA 3; and *Tanguay v Canada (Unemployment Insurance Commission)*, [1985] F.C.J. No. 910.
[20] See sections 52 and 153.161 of the Act.
[21] See section 153.161 of the Act.
[22] Section 52 of the Act.

in the opinion of the Commission, a false or misleading statement or representation has been made in connection to a claim.[23]

[49] The Federal Court of Appeal recognizes that the Commission can't review changes to claims at the exact time they happen. It is precisely for that reason that the Act allows the Commission time to rescind or amend any decision given in any particular claim for EI benefits.[24]

[50] I recognize that, there are two sections in the Appellant's application for EI benefits that states her requirements to be available for and looking.[25] However, when the Appellant asked the Commission's agents questions about her training, it didn't tell her there was a possibility she wouldn't be entitled to those benefits. Instead, it simply paid her the benefits. Any person would reasonably assume in these circumstances that they were entitled to the benefits they were receiving.

[51] I commend the Appellant for taking the initiative to increase her knowledge, skills, and abilities to make herself more employable. However, this doesn't change the requirements that she has to meet to be entitled to the EI benefits she received.

[52] This is truly an unfortunate situation. I recognize that the Commission's lengthy delay (8 months) when reviewing the Appellant's availability has created a large overpayment. The Appellant disclosed that she was attending training in her application and on her biweekly reports. So had the Commission conducted their review sooner, the overpayment may not have been as large. This said, the Commission conducted its assessment in accordance with the law so the overpayment is valid.

Can I reduce or write off the overpayment?

[53] No. The law states that a claimant is responsible (liable) to repay EI benefits that they are not entitled to receive.[26]

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[23] See subsection 52(5) of the Act.
[24] *Canada (Attorney General) v Landry*, A-532-98.
[25] See pages GD3-23 and GD3-21.
[26] See section 43 of the Act.

[54] I don't have any authority to reduce or waive the overpayment.[27] That authority rests with the Commission.

[55] I also don't have any authority to order the Commission to waive an overpayment. This said, I would ask that the Commission consider reducing or waiving the overpayment in this case, given the lengthy delay in reconsidering the claim. Some delay is reasonable. However, even when considering the pandemic circumstances, a delay of 8 months is not reasonable. The overpayment would likely not have been as large as it is, had the Commission reviewed the Appellant's training information and availability sooner.

[56] I sympathize with the Appellant given the circumstances she presented. Although the Appellant may perceive this as an unjust result, my decision is not based on fairness or financial hardship. Instead, my decision is based on the facts before me and the application of the EI law. There are no exceptions and no room for discretion. I can't interpret or rewrite the Act in a manner that is contrary to its plain meaning, even in the interest of compassion.[28]

Conclusion

[57] I am dismissing the appeal with modification to the end date of the disentitlement.

[58] The Appellant is disentitled from receiving EI benefits from October 5, 2020, to July 16, 2021.

Linda Bell
Member, General Division – Employment Insurance Section

[27] See sections 112.1 and 113 of the Act.
[28] *Canada (Attorney General) v Knee*, 2011 FCA 301