Citation: *TQ v Canada Employment Insurance Commission*, 2022 SST 295

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	T. Q.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (436235) dated December 1, 2021 (issued by Service Canada)

Tribunal member:	Amanda Pezzutto
Type of hearing:	Teleconference
Hearing date:	January 25, 2022
Hearing participant:	Appellant
Decision date:	February 3, 2022
File number:	GE-21-2559

Decision

[1] T. Q. is the Claimant. The Canada Employment Insurance Commission (Commission) decided that she wasn't entitled to Employment Insurance (EI) regular benefits. The Claimant is appealing this decision to the Social Security Tribunal (Tribunal).

[2] I am dismissing the Claimant's appeal. I find that she hasn't proven that she was available for work within the meaning of the law between January 4 and May 28, 2021. This means she isn't entitled to EI benefits.

Overview

[3] The Claimant was collecting EI regular benefits. At the same time, she was in school. She started a new term in January 2021 and gave the Commission information about her studies. The Commission continued to pay EI benefits, but then after several months, reviewed her availability. The Commission decided that the Claimant wasn't available for work from January 4 to May 28, 2021. Because it had already paid EI benefits for this period, the Commission asked the Claimant to repay benefits.

[4] The Commission says the Claimant was a full-time student. The Commission argues that the Claimant had too many personal restrictions on the days and times she could work because of her studies. So, the Commission says the Claimant hasn't proven that she was available for work.

[5] The Claimant disagrees. She says she has balanced work and school in the past. She says she was looking for a job that would allow her to work and go to school at the same time.

Matters I have to consider first

The Claimant's availability after September 6, 2021

[6] The Commission also decided that the Claimant wasn't available for work starting September 6, 2021. During the reconsideration, the Claimant told the Commission that

she wasn't asking for a reconsideration of this decision. So, the Commission didn't include this period in its reconsideration decision. At the hearing, the Claimant agreed that she wasn't trying to appeal the Commission's decision about her availability from September 6, 2021.

[7] So, I will not look at the Claimant's availability for work from September 6, 2021. I will only look at whether she has proven her availability for work between January 4 and May 28, 2021.

Documents after the hearing

[8] After the hearing, I asked the Commission for more information about its power to retroactively review decisions. The Commission responded to my request. Tribunal staff sent a copy of the Commission's submissions to the Claimant and I gave her a deadline of February 1, 2022 to respond. The Claimant responded to the Commission's submissions with questions about the Commission's processes. I didn't ask the Commission to respond to the Claimant's document because I decided that the Commission's answers weren't necessary for me to make this decision.

Issue

[9] Was the Claimant available for work between January 4 and May 28, 2021?

Analysis

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

[10] 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

[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.

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]

[11] 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]

[12] 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 September 15, 2021. During this conversation, the Commission told the Claimant that it was reviewing her availability for work. The Commission decided that the Claimant wasn't available for work and notified her of its decision by letter dated September 15, 2021.

[13] So the evidence shows me that the Commission completed its retroactive review within the time limits allowed by the law. The Commission reconsidered the Claimant's claims for benefits, made a decision, and notified her of the decision all within 36 months of the date it originally paid the benefits.

[14] 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.

[15] I understand that the Claimant gave the Commission information about her studies when she completed training questionnaires. Even though the Commission had information about the Claimant's studies, the Commission waited several months to make a decision. This has led to an overpayment for the Claimant. I am sympathetic to her circumstances, and I understand that the Commission's delay and the overpayment will cause her hardship. But I find that the law gives the Commission the authority to

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[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.
[3] Subsection 52(3) of the *Employment Insurance Act*.
[4] Subsection 153.161(2) of the *Employment Insurance Act*.

make a retroactive decision about the Claimant's availability for work. This means that I can't interfere with the Commission's decision to retroactively review its decision about the Claimant's availability.

[16] However, I note that subparagraph 56(1)(f)(ii) of the *Employment Insurance Regulations* (Regulations) allows the Commission to write off an overpayment if repayment would cause hardship, I ask the Commission to consider whether it may write off the Claimant's overpayment under this provision.

[17] I also note that the Claimant asked specific questions about the Commission's decision-making polices and procedures.[5] The Tribunal and the Commission operate at arms' length from each other. This means that I don't have information about how the Commission makes its decisions. I can't answer questions about the Commission's policies, decision-making timeframes, or messages on the Claimant's online Service Canada account. The Claimant should ask the Commission for the answers to her questions about the Commission's decision-making policies and procedures.

The Claimant's availability for work

[18] There are two different sections of the law that say you have to prove that you are available for work.

[19] First, the Employment Insurance Act (Act) says that you have to prove that you are making "reasonable and customary efforts" to find a suitable job.[6] The Regulations give criteria that help explain what "reasonable and customary efforts" mean.[7]

[20] Second, the 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.[8] Case law gives three things a

[5] GD8
[6] See section 50(8) of the *Employment Insurance Act*
[7] See section 9.001 of the *Employment Insurance Regulations*.
[8] See section 18(1)(a) of the *Employment Insurance Act*.

claimant has to prove to show that they are "available" in this sense.[9] Students have to prove their availability for work under this part of the law.[10]

[21] 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.

[22] 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 her availability for work.

Reasonable and customary efforts to find a job

[23] The first section of the law that says that you have to prove that your efforts to find a job were reasonable and customary.[11]

[24] The Commission refers to this section of the law in its submissions. But it isn't clear if the Commission really used this part of the law to disentitle the Claimant.

[25] The Commission hasn't given me evidence showing that it ever asked the Claimant for a job search record. The Commission didn't warn the Claimant that her job search efforts weren't reasonable and customary. The original decision letter says that the Commission based its decision on the fact that the Claimant was in school, not her job search efforts. Most importantly, in its submissions, the Commission says it agrees that the Claimant was looking for work.

[26] So, I am not going to look at whether the Claimant made reasonable and customary efforts to find a job. I don't think the Commission has proven that it used this section of the law to disentitle the Claimant.

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[9] See *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96.
[10] Subsection 153.161(1) of the *Employment Insurance Act*.
[11] Section 50(8) of the *Employment Insurance Act* and section 9.001 of the *Employment Insurance Regulations*.

[27] This doesn't mean that I am allowing the Claimant's appeal. I still have to look at the other part of the law that talks about availability for work.

Capable of and available for work

[28] 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.

[29] 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]

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

– Wanting to go back to work

[31] The Claimant has always said that she wanted to work. The Commission agrees that she wanted to work.

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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*.

[32] Both parties agree on this point and nothing in the appeal file makes me doubt the Claimant's desire to work. I find the Claimant has proven that she wanted to return to work.

– **Making efforts to find a suitable job**

[33] The Claimant says she was looking for work. In its submissions, the Commission agrees that the Claimant was trying to find a job.

[34] The Claimant provided a job search record with her notice of appeal. According to her job search record, the Claimant submitted job applications January through May 2021. At the hearing, the Claimant described her job search efforts. She said she looked for work by looking online and using online job banks. She applied for jobs in her field of study and also in retail stores. She said she applied to more jobs than she listed in her job search record, but she didn't keep details of these applications.

[35] I believe the Claimant's job search record and her statements at the hearing. I also note that the Commission hasn't made any arguments about her job search efforts. So, I find that the Claimant has proven that she made enough efforts to find a job. I find that her job search efforts were reasonable.

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

[36] The Commission focused its arguments on this factor. The Commission says the Claimant had too many personal conditions because she was a full-time student. The Commission says the Claimant's school schedule unduly limited her chances of returning to work.

[37] The Claimant disagrees. She says that she has a history of working and going to school. She says that she wanted to find a job that would let her balance work and school.

[38] I agree with the Commission. I find that the Claimant's studies were a personal condition that unduly limited her chances of returning to work.

[39] The Claimant gave conflicting information about whether she was a full-time student. She originally told the Commission that her studies were full-time. Then, when she asked for a reconsideration, she said that her studies were part-time.

[40] At the hearing, the Claimant said her school considered her a full-time student because of the number of classes and credits she took between January and May 2021. She also said her student loan was based on being a full-time student. But she said that she considered her schedule more like a part-time schedule because some of her classes were flexible.

[41] I choose to rely on the Claimant's earlier statements to the Commission and her school's classification. I find that the Claimant was a full-time student.

[42] At the hearing, the Claimant described her class schedule. She said her classes were online. She had to attend scheduled classes during the day on Mondays, Wednesdays, and Thursdays from January 4 to April 1, 2021. Then from April 2 to May 28, 2021, she had to attend classes during the day on Tuesdays, Wednesdays, and Thursdays. She also had two evening classes on Wednesday and Thursday evenings. These classes were flexible and she didn't have to attend the evening classes at scheduled times.

[43] The Claimant said she couldn't change her daytime class schedule. She told the Commission that she didn't want to leave her studies in favour of a job. Instead, she wanted to find a job that would work around her school schedule.

[44] The Claimant said she had a history of working while going to school. From September 2019 until March 2020, the Claimant said she worked part-time at a clothing store while she went to school.

[45] I give some weight to the fact that the Claimant has a history of working and going to school, but I don't think this is enough to show that her school schedule didn't unduly limit her chances of returning to the labour market.

[46] This is because the Claimant had to attend scheduled classes over several weekdays. She couldn't change her school schedule and she wasn't willing to leave school in favour of a job. She was only looking for a job that would schedule her around her class times.

[47] For these reasons, I find that the Claimant set significant personal conditions on her job search. I find that these personal conditions unduly limited her chances of returning to the labour market.

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

[48] I find that the Claimant wanted to return to work. She made reasonable efforts to find a job. But she set personal conditions that unduly limited her chances of returning to the labour market. This is because she was only looking for work outside of her class schedule. So, I find that the Claimant hasn't proven that she was available for work between January 4 and May 28, 2021.

Conclusion

[49] I am dismissing the Claimant's appeal. She hasn't proven that she was available for work within the meaning of the law. This means that she isn't entitled to EI benefits from January 4 to May 28, 2021.

Amanda Pezzutto
Member, General Division – Employment Insurance Section