Citation: *DJ v Canada Employment Insurance Commission*, 2022 SST 535

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	D. J.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (441629) dated December 3, 2021 (issued by Service Canada)

Tribunal member:	Charlotte McQuade
Type of hearing:	Videoconference
Hearing date:	February 10, 2022
Hearing participants:	Appellant
Decision date:	March 02, 2022
File number:	GE-22-91

Decision

[1] The appeal is dismissed.

[2] D. J. (Claimant) is disentitled to benefits from August 30, 2021.

[3] The Claimant hasn't shown that he was available for work while in school from October 5, 2020 to April 30, 2021. So he is disentitled to benefits for this period. The Canada Employment Insurance Commission (Commission) properly exercised its discretion in deciding to reconsider the Claimant's entitlement for this period.

Overview

[4] The Claimant was a full-time student. He applied for EI regular benefits and declared his schooling on his application. The Claimant was paid benefits from October 5, 2020 to April 10, 2021. The Commission reconsidered the Claimant's claim on October 14, 2021 and decided that the Claimant was disentitled from receiving EI regular benefits from October 5, 2020 to April 30, 2021 and also from August 30, 2021 because he wasn't available for work. The Commission's decision resulted in an overpayment of $12, 329.00 of the benefits paid from October 5, 2020 to April 10, 2021.

[5] I have to decide whether the Claimant has proven that he was available for work. The Claimant has to prove this on a balance of probabilities. This means that he has to show that it is more likely than not that he was available for work. I must also decide if the Commission has properly exercised its discretion in deciding to reconsider the Claimant's claim. If not, then I have to substitute my decision as to whether the claim should be reconsidered.

[6] The Commission says that the Claimant wasn't available because he was attending school full-time. The Claimant was not willing to abandon his course to accept employment and was only willing to accept employment around his school hours, which the Commission says unduly restricted his chances of returning to the labour market. The Commission says the law allows it to verify, at any point after benefits are paid, for a claimant who was attending school, that the claimant was entitled to benefits by

requiring proof that they were capable of and available for work on any working day of their benefit period. [1]

[7] The Claimant does not dispute the disentitlement from August 30, 2021. However, he says that he was available to work from October 5, 2020 to April 30, 2021 around his school schedule to the same extent he was prior to his hours being reduced at his workplace. He says the Commission has not acted fairly in reconsidering his claim. He says he declared his schooling situation to the Commission on his application for benefits and on all the training questionnaires. Nothing changed in that information yet the Commission changed its own decision about his entitlement to benefits, resulting in a large overpayment to him.

[8] I have decided, for the reasons set out below, that the Claimant has not proven his availability for work from October 5, 2020 to April 30, 2021. I find the Commission did exercise its discretion properly in deciding to reconsider the Claimant's entitlement. So, I cannot interfere in that decision.

Matters I have to consider first

Voluntary leaving issue

[9] In addition to the decisions about availability, the Commission also decided that the Claimant was disqualified from benefits from August 15, 2021 because he had voluntarily left his employment with an architecture firm on August 19, 2021. The Claimant says he already had resolved this issue directly with the Commission. Since that is the case and since there is no reconsideration decision on file about the voluntary leaving issue, I will not make any decision concerning that matter.

Disentitlement from August 30, 2021

[10] The Claimant said at his hearing that he was not disputing the Commission's decision to disentitle him from August 30, 2021. As such, I find the Claimant is

[1] See section 153.161 of the *Employment Insurance Act* (Act).

disentitled from August 30, 2021. The Commission's decision is maintained on this issue.

Issues

[11] I have to decide whether the Claimant was available for work while in school from October 5, 2020 to April 30, 2021. I also have to decide whether the Commission exercised its discretion properly in reconsidering the Claimant's benefits for this period. If not, I have to make my own decision about whether the Claimant's entitlement to benefits should be reconsidered.

Analysis

Available for work

[12] Two different sections of the law require claimants to show that they are available for work.

[13] First, the *Employment Insurance Act* (Act) says that a claimant has to prove that they are making "reasonable and customary efforts" to find a suitable job.[2] The *Employment Insurance Regulations* (Regulations) give criteria that help explain what "reasonable and customary efforts" mean.[3]

[14] The Commission says it its submissions that it disentitled the Claimant under this provision. In order to disentitle a claimant under this section, the Commission must first ask the claimant for proof and specify what kind of proof will satisfy its requirements. [4] I see no evidence on file the Claimant was asked to provide proof of reasonable and customary efforts to find a suitable job. So, I find the Commission cannot disentitle the Claimant to benefits under this provision.

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[2] See section 50(8) of the *Employment Insurance Act* (Act).
[3] See section 9.001 of the *Employment Insurance Regulations* (Regulations).
[4] See *L. D. v. Canada Employment Insurance Commission*, 2020 SST 688. I am not bound to apply other decisions of the Tribunal. However, I find the reasoning in this decision persuasive and adopt it

[15] Second, the Act says that a claimant has to prove that they are "capable of and available for work" but aren't able to find a suitable job.[5] Case law gives three things a claimant has to prove to show that they are "available" in this sense.[6] I will look at those factors below.

[16] In addition, the Federal Court of Appeal has said that claimants who are in school/taking training full-time are presumed to be unavailable for work.[7] This is called "presumption of non-availability." It means we can suppose that students aren't available for work when the evidence shows that they are in school/taking training full-time.

[17] I will start by looking at whether I can presume that the Claimant wasn't available for work. Then, I will look at whether he was available for work.

Presuming full-time students aren't available for work

[18] The presumption that students aren't available for work applies only to full-time students.

– The Claimant doesn't dispute that he is a full-time student

[19] The Claimant agrees that he is a full-time student, and I see no evidence that shows otherwise. He has been attending a full-time university architecture program from September 2019. The Claimant took five courses in both the fall and winter terms over the period from October 5, 2020 to April 30, 2021. So, I accept that the Claimant is in school full-time.

[20] Since the Claimant is a full-time student, the presumption applies to the Claimant.

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[5] See section 18(1)(a) of the Act.
[6] See *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96.
[7] See *Canada (Attorney General) v Cyrenne*, 2010 FCA 349.

[21] But the presumption that full-time students aren't available for work can be rebutted (that is, shown to not apply). If the presumption were rebutted, it would not apply.

[22] There are two ways the Claimant can rebut the presumption. He can show that he has a history of working full-time while also in school/taking training.[8] Or, he can show that there are exceptional circumstances in his case.[9]

[23] The Claimant testified that he has previously worked along with full-time schooling. He says that, while attending College full-time for three years, he worked in the paint department of a hardware store and he also worked at a dental clinic doing cleaning three times a week. The Claimant says he was working about 30 hours per week in addition to his full-time schooling.

[24] I find that the Claimant has not rebutted the presumption by showing he has a history of working full-time while in school full-time. He has a history of working part-time hours with full-time schooling. Full time hours would be a minimum of 35 hours per week.

[25] The Claimant maintains his circumstances are exceptional as he was willing and able to work up to 22 hours per week around his schooling.

[26] The Claimant described his school schedule which he says could not be changed. In the fall term, he had required in-person classes on Tuesday from 8:30 a.m. to 11:50 a.m. and from 1:00 p.m. to 4:20 p.m. He had a required online class on Wednesday from 12:30 to 3:20 p.m. On Thursday, he had a required online class from 8:30 a.m. to 11:20 a.m. and another online class for which attendance was not required from 3:30 p.m. to 6:20 p.m. On Fridays he was required to attend in person from 8:30 a.m. to 11:20 p.m. and he also had a required online class from 12:30 p.m. to 3:20 p.m. The Claimant says he spent 15 to 20 hours per week in addition to his lecture time on his schoolwork. The Clamant says he could have worked any time on Monday,

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[8] See *Canada (Attorney General) v Rideout*, 2004 FCA 304.
[9] See *Canada (Attorney General) v Cyrenne*, 2010 FCA 349.

Thursday mornings, Friday afternoons after 3:30 p.m. and full days on the weekends, up to 22 hours per week.

[27] The Claimant explained his schedule in the winter term had required in-person classes on Monday from 8:30 a.m. to 11:22 a.m. and 12:30 p.m. to 3:20 p.m. He had a required online class on Tuesday from 3:30 p.m. to 6:20 p.m. On Wednesday he was required to attend in person from 12:30 to 3:20 p.m. On Thursday, he had a required online class from 8:30 a.m. to 11:20 a.m. and another from 3:30 p.m. to 6:20 p.m. On Friday he had an online class for which attendance was not required from 8:30 a.m.to 11:20 a.m. The Claimant says he spent 15 to 20 hours per week in addition to his lecture time doing schoolwork. He says this term he could have worked up to 22 hours per week around his schooling on Tuesday mornings, Wednesdays after 3:30 p.m., Friday all day and on weekends.

[28] The Claimant confirmed he was not willing to give up his schooling to accept any job, if the job conflicted with his schooling. However, he says he would not have turned down a full-time job as an architectural technologist outright. He would see if he could work online, around his school schedule or on a part-time basis. The Claimant confirmed he was unable to change his course schedule to accept work that conflicted with the schedule.

[29] The Commission says the Claimant has failed to rebut the presumption of non-availability while attending a full-time course because of his restrictive schedule, and his intention to concentrate on his course instead of on finding full-time employment. The Commission says the Claimant has also not shown any exceptional circumstance that would have allowed him to work full-time around his schooling.

[30] I agree that the Claimant has not shown any exceptional circumstances that rebut the presumption that he was not available for work. The Claimant's pattern of part-time work around his schooling is no different than many other students so that alone does not make his case exceptional. The Claimant's schedule was very intense and restrictive. He was required to attend lectures on most weekdays and the schedule could not be adjusted. He was not willing to give up his schooling to accept a job that

conflicted with his schedule and he was unable to adjust his school schedule to allow him to do so. The Claimant did not therefore have the flexibility to accept work without restricting his availability to specific hours or days. So, I find he has not shown exceptional circumstances.

[31] The Claimant hasn't rebutted the presumption that he is unavailable for work.

– **The presumption isn't rebutted**

[32] The Federal Court of Appeal hasn't 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.

Capable of and available for work

[33] I also have to consider whether the Claimant was capable of and available for work but unable to find a suitable job.[10] Case law sets out three factors for me to consider when deciding this. The Claimant has to prove the following three things:[11]

a) He wanted to go back to work as soon as a suitable job was available.

b) He has made efforts to find a suitable job.

c) He didn't set personal conditions that might have unduly (in other words, overly) limited his chances of going back to work.

[34] When I consider each of these factors, I have to look at the Claimant's attitude and conduct.[12]

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[10] See section 18(1)(a) of the Act.
[11] These three factors appear in *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96. This decision paraphrases those three factors for plain language.
[12] Two decisions from case law set out this requirement. Those decisions are *Canada (Attorney General) v Whiffen*, A-1472-92; and *Carpentier v Canada (Attorney General)*, A-474-97.

– **Wanting to go back to work**

[35] The Claimant hasn't shown that he wanted to go back to work as soon as a suitable job was available.

[36] The Claimant says he remained employed with the hardware company he had worked at since 2017 in both the fall and winter school terms. He was going back and forth on weekends from Quebec City where he attended school and his employment in Montreal. He said before university, he had worked 20 to 22 hours per week with this employer. He explained after starting university his hours were reduced because he lost his seniority due to having to work at internships in the summer rather than work at the store. So, other employees were given more work. The Claimant said that during the school year he was only working 8 to 12 hours per week. The Claimant says he wanted to work up to 22 hours per week but he did not look for other employment to supplement these hours as his employer kept assuring him he would get more hours. He says, he had applied to three cafes in Montreal in August 2020, hoping for work during the week while he was at school, to do in addition to the work at the hardware store on weekends.

[37] The Commission says the Claimant hasn't show he wanted to go back to work as soon as a suitable job was available because he had no intention of abandoning his course in order to accept work. His primary concern was to finish his university degree, which imposed restrictions on his work.

[38] I find the Claimant has not shown an intent to return to the labour force as soon as a suitable job was available from October 5, 2020 to April 30, 2021. The Claimant was working only 8 to 12 hours per week, which was less than his prior hours of 20 to 22 hours a week. He applied for three jobs in August, 2020 but he did not search for work from October 5, 2020 to April 30, 2021 to supplement the 8 to 12 hours he was working. While waiting for additional hours from his existing employer shows an intent to return to work, it does not show an intent to return work "as soon as" a suitable job was available. The Claimant could have sought out other work, while waiting to see if his employer supplemented his hours.

[39] I agree with the Commission that the Claimant was also prioritizing his schooling over accepting suitable employment. In that regard, he was not willing to abandon his schooling for employment and was only willing to accept work around his schooling.

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

[40] The Claimant hasn't made enough efforts to find a suitable job.

[41] The Claimant did not make any efforts to find a suitable job beyond waiting for additional hours with his existing employer. Although he applied for three jobs at a café in August, 2020, this was outside the period of disentitlement.

[42] The Commission makes no submissions on this factor.

[43] I recognize that the Claimant was working part-time with his existing employer and was willing to work more hours. However, claimants must be actively trying to find suitable work and cannot simply wait until they are recalled or their hours are increased. [13] The Claimant did not conduct any job search to try to find additional work. There is more the Claimant could have done to try to find work. He could have registered with online search tools. He could have applied for some jobs.

[44] The Claimant's efforts do not show an active and sustained job search. He has not made enough efforts to find a suitable job.

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

[45] The Claimant has set personal conditions that might have unduly limited his chances of going back to work.

[46] The Claimant says he hasn't done this because he was willing to work up to 22 hours per week around his course schedule.

[13] See *Canada (Attorney General) v. Cloutier*, 2005 FCA 73; *De Lamirande v Canada (Attorney* General), 2004 FCA 311; *Canada (Attorney General) v Cornelissen-O'Neill*, A-652-93;

[47] The Commission says the Claimant has set the personal condition of only being available to work around his course schedule and this unduly restricts his chances of going back to work.

[48] I find the Claimant set a personal condition of only being willing to accept work around his school schedule. While the Claimant was wiling to work up to 22 hours per week around his schedule, he was unwilling to abandon his program, if a job was offered that conflicted with his program and he was not able to change his schedule.

[49] The Claimant's schedule was such that he would have been unable to accept a job that occurred during regular working hours during the week. Although each term, he had one weekday where he was not required to attend school, he was required to attend for certain hours on the rest of the week days. The Claimant was eliminating a pool of potential employers that might have had full-time or part-time work available during the weekdays.

[50] While the Claimant clearly has a good reason for wanting to stay in school, the Federal Court of Appeal has said that availability must be demonstrated during regular hours for every working day and cannot be restricted to irregular hours resulting from a course schedule that significantly limits availability. This principle has recently been confirmed by the Federal Court. [14] The Claimant's school schedule was such that it did unduly restricted his chances of obtaining suitable employment.

- **So, was the Claimant capable of and available for work from October 5, 2020 to April 30, 2021?**

[51] Based on my findings on the three factors, I find that the Claimant hasn't shown that he was capable of and available for work but unable to find a suitable job.

[52] The Claimant says he should not be penalized for the life he wishes to build for himself. He points out that a combination of work during the year and in the summer he

[14] See *Horton v. Canada (Attorney General)*, 2020 FC 743.

earned an average of $20,000.00 per year. He says to compensate the lack of working hours he had in prior years, he was collecting EI benefits.

[53] It is commendable that the Claimant is attending school and trying to improve his employability. However, the Claimant's good intentions do not negate the requirement to prove availability for work while attending school. Availability is an objective question and does not depend on a claimant's particular reasons for restricting his availability, even if they are sympathetic or admirable.

Reconsideration of entitlement

[54] I have to decide whether the Commission can reconsider the Claimant's entitlement for the period October 5, 2020 to April 30, 2021.

[55] The Claimant says it is unfair that the Commission pay him benefits and then later, with the same information, change their entitlement decision.

[56] The Commission says that the law allows it to verify, at any point after benefits are paid to a claimant who was attending school, that the claimant was entitled to benefits by requiring proof that they were capable of and available for work on any working day of their benefit period.[15]

[57] The Commission's reconsideration powers are set out in section 52 of the Act. This section provides that the Commission may reconsider a claim for benefits within 36 months of the benefits having been paid or payable. However, in situations where the Commission is of the opinion that a false or misleading statement has been made or representation has been made, then the Commission has 72 months to reconsider a claim.[16]

[58] So, even if cases where no false or misleading information has been provided by the Claimant, the Commission has up to 36 months to reconsider a claim.

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[15] See section 153.161 of the Act.
[16] See section 52(1) of the Act.

[59] If the Commission decides that a person has received benefits to which they are not entitled, the Commission must calculate the amount of money and notify the claimant of its decision. [17]

[60] For the purpose of mitigating the economic effects of the pandemic, the government made various Interim Orders amending the Act. A new provision, section 153.161, was added to the Act by way of Interim Order No. 10 and came into effect on September 27, 2020.[18] This provision provides that a claimant who attends a course, program of instruction or training to which the claimant is not referred to by the Commission or one of its delegates, 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. The provision also says that the Commission may, at any point after benefits are paid to a claimant, verify that the claimant is entitled to those benefits by requiring proof that they were capable of and available for work on any working day of their benefit period. [19] The explanatory note included with Interim Order No. 10 provides that this new provision to the Act says that it "enables a modified operational approach to the assessment of availability to work for claimants who are in training. " [20]

[61] The Commission says it disentitled the Claimant under section 153.161 of the Act and section 18 of the Act which requires a claimant to prove they are capable of and unable to obtain suitable employment.

[62] It is clear that, when reading section 52 and section 153.161 of the Act together, the Commission has the authority to reconsider an entitlement decision even after benefits have been paid and even if there has been no false or misleading information provided by a claimant.

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[17] Section 52(2) of the Act.
[18] See section 3 of *Interim Order No. 10, Amending the Employment Insurance Act*, effective September 25, 2020.
[19] Section 153.161 of the Act.
[20] See Explanatory Note to Interim Order No. 10.

[63] However, the decision to reconsider a claim under section 52 of the Act and to see verification under section 153.161 are discretionary decisions. This mean that although the Commission has the power to reconsider a claim and to seek verification of entitlement, it does not have to do so. [21]

[64] The law says that discretionary powers must be exercised in a judicial manner. This means that when the Commission decides to reconsider a claim, it cannot act in bad faith or for an improper purpose or motive, take into account an irrelevant factor or ignore a relevant factor or act in a discriminatory manner.[22]

[65] The Commission has developed a policy to help guide how it exercises its discretion to reconsider decisions under the Act. The Commission says the reason for the policy is "to ensure a consistent and fair application of section 52 of the EIA and to prevent creating debt when the claimant was overpaid through no fault of their own." The policy provides that a claim will only be reconsidered when:

- benefits have been underpaid;
- benefits were paid contrary to the structure of the EIA;
- benefits were paid as a result of a false or misleading statement;
- the claimant ought to have known there was no entitlement to the benefits received.[23]

[66] The policy says that non-availability is not a situation were benefits were paid contrary to the structure of the Act. [24]

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[21] See *GP v Canada Employment Insurance Commission*, 2021 SST 791. See also *Minister of Employment and Social Development v CB*, 2021 SST 765, a recent decision of the Appeal Division of this Tribunal, which discusses the discretionary nature of the Minister's authority to reconsider decisions under the O.A.S. Act. The Appeal Division comments on the discretionary nature of the Commission's decision to reconsider under the EI Act (see para. 48 and para. 86.).
[22] See *(Attorney General) v Purcell*, 1995 CanLII 3558 (FCA).
[23] See *Digest of Benefit Entitlement Principles* Chapter 17 - Section 17.3.3.
[24] See *Digest of Benefit Entitlement Principles* Chapter 17 – Section 17.3.3.2.

[67] However, this policy does not address section 153.161 of the Act, and how that informs the Commission's exercise of discretion.

[68] In a recent decision under the *Old Age Security Act*, the Appeal Division of this Tribunal noted that a proper purpose for reconsidering entitlement decisions is so that only those who are entitled to benefits should receive them. However, balanced against that is the importance that claimants be able to rely on entitlement decisions without fear of having to later return the benefits. The Appeal Division points out that in the absence of new information likely to change the original result, reopening a decision that turned on the judgment of the decision-maker would be an improper exercise of discretionary power. The Appeal Division says that reconsideration should be done where the benefit of reopening the original decision outweighs the importance of that decision being final. [25]

[69] Absent section 153.161 of the Act, I would agree that the Commission should consider the factors noted above, and its own policy, when exercising its jurisdiction to decide whether to reconsider a claim under section 52 of the Act.

[70] However, I find that the exercise of discretion under section 52 of the Act to reconsider entitlement for students, must consider the legislative intent of section 153.161 of the Act in deciding whether the benefit of reopening outweighs the importance of a decision being final.

[71] Section 153.161 of the Act makes clear that students who are attending non-referred training are 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. The provision also says that the Commission may, at any point after benefits are paid to a claimant, verify that the claimant is entitled to those benefits by requiring proof that they were capable of and available for work on any working day of their benefit period.

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[25] See *Minister of Employment and Social Development v CB,* 2021 SST 765.

[72] The specific addition of this provision to the Act, allowing the Commission to verify at any time after the payment of benefits, whether a clamant attending school is entitled to the benefits they were paid, suggests a legislative acknowledgment of the fact that, in the context of the pandemic and the desire to issue benefits without delay, a verification of entitlement by the Commission prior to paying benefits may not have been possible. In that regard, the explanatory note to Interim Order No. 10 says that section 153.161 enables a modified operational approach to the assessment of availability to work for claimants who are in training.

[73] Indeed the comment by the Commission's reconsideration agent to the Claimant about why his claim was reconsidered reflects that operational approach of initially paying benefits and then verifying later. The Claimant was told that "he was originally paid benefits even though he had reported he was in school as it was a measure input by the government in order to get people into pay during the pandemic. It was later decided that the decision to allow benefits while attending school full time does not meet the availability criteria according to the legislation and he would have to pay back these monies."[26]

[74] Having regard to the legislative intent of section 153.161 of the Act, the benefit of reopening an initial decision about a student's availability, even on the same facts, may outweigh the importance of a decision being final. I find the Commission's discretion in deciding whether to reconsider a claim must consider the legislative intent of section 153.161 of the Act.

So, did the Commission exercise its discretion judicially?

[75] Yes. I find it did.

History of the claim

[76] The Commission says the claim was initially established as a claim for Canada Emergency Response Benefit (CERB) benefits from March 15, 2020 and the Claimant's

[26] GD3-34.

application for CERB benefits was used to establish an initial claim for the Claimant for regular EI benefits on October 4, 2020.

[77] The Claimant declared in his application of March 30, 2020 that he was attending full-time school in a non-referred program at Université Laval from September 2019 to May 2020. He was attending for more than 25 hours per week and he was obligated to attend classes. He said he was capable of and available for work under the same conditions as he had been prior to starting school and his course obligations occurred outside his normal work hours. He said he was unable to change his schedule and only could drop classes. He also said if he found full-time work that conflicted with his program, he would finish his program. The cost of the program was noted to be $14,500.00 and the Claimant said he had made efforts to find work since the start of his program. [27]

[78] On December 9, 2020, the Claimant completed a training questionnaire for Service Canada for the period September 1, 2020 to April 30, 2021. He reiterated the same information previously provided. He noted a cost of $15,000.00. He also described having worked 15 hours per week along with full-time schooling in the past. [28]

[79] Based on this information, the Claimant was paid regular EI benefits from October 4, 2020 to April 10, 2021.

[80] The Claimant then filed a renewal claim effective August 28, 2021 in which he completed a questionnaire about his courses from August 30, 2021 to December 10, 2021. He repeated information previously provided. He noted the cost of $7500.00 for the program and provided a more detailed schedule of his classes from Monday to Friday.[29]

[81] On October 14, 2021 the Commission issued a decision disentitling the Claimant from benefits from October 5, 2020 to April 30, 2021 for reason he was taking a training

[27] GD3-3 to GD3-13.
[28] GD3-14 to GD3-17.
[29] GD3-18 to GD3-28.

course on his own initiative and had not proven his availability for work." The Commission did not speak to the Claimant before making the initial decision.[30]

[82] The Claimant filed a reconsideration request. The reconsideration agent obtained information from the Claimant consistent with what he had reported in his application for benefits and subsequent training questionnaires. The Claimant confirmed he was attending school full-time, on his own initiative. He confirmed he would not quit his training if he was offered a permanent full time job and it interfered with his training. He would finish university but ask if he could delay the start date. He confirmed that his hours were restricted due to his classes. [31] The Commission confirmed its October 14, 2021 initial decision on reconsideration.

Exercise of discretion

[83] The Commission agrees that the Claimant has been consistent in his information that he had no intention of abandoning his course in order to accept a full-time position, and that his primary concern was to concentrate and finish his university degree which imposes restrictions on his work time possibilities. [32] However, the Commission relies on section 153.161 of the Act in reconsidering the Claimant's entitlement. The Commission says they sought to verify the Claimant's entitlement after he was paid benefits and the Claimant was not able to prove his availability.

[84] I find the Commission exercised its discretion properly. The Commission has considered all the relevant information in deciding to reconsider the claim. There were no new relevant facts provided at the hearing that the Claimant had not already provided to the Commission. There is no indication that the Commission considered irrelevant information or acted in bad faith or in a discriminatory manner. The Commission also acted for a proper purpose in reconsidering the claim, that being verification of entitlement to benefits. Claimants are obligated to repay benefits paid to

[30] GD3-29.
[31] GD3-44.
[32] GD4-4 referring to GD3-14 to GD3-18 and GD3-19 to GD3-23 and GD3-44.

the Commission to which they are not entitled. [33]So, reconsidering a claim where it appears a claimant may not be entitled to benefits is a proper purpose.

[85] There is no question the Claimant acted in good faith and declared his schooling repeatedly to the Commission. The Commission reconsidered the claim on facts that were available to it when the initial entitlement decision was made and benefits were paid. As above, generally speaking, the principal of finality would outweigh reconsidering an availability decision on the same facts. However, I find the Commission properly exercised its discretion, having regard to the legislative intent of section 153.161 of the Act. The Commission was entitled to exercise its discretion to find that the benefit of re-opening the initial decision, even on the same facts, outweighed the importance of the decision being final, having regard to the intent of section 153.161 of the Act. This provision was added to the Act as an acknowledgment that verification of entitlement may not be possible at the time benefits are initially paid, and to allow for subsequent verification even after benefits have been paid.

[86] I note, there is no evidence that the delay in reconsidering the claim compromised the Claimant's ability to be able to prove his availability for work and the Commission is within its allowable 36 months to reconsider the claim.

[87] Having regard to the factors noted above, I find the Commission properly exercised its discretion in reconsidering the claimant's entitlement to benefits. This means I cannot interfere in the Commission's decision to reconsider the Claimant's entitlement.

[33] See section 43 of the Act.

Conclusion

[88] The Claimant has not shown that he was available for work within the meaning of the law from October 5, 2020 to April 30, 2021 so he is disentitled to benefits for this period. The overpayment of $12, 329.00 remains. The Commission exercised its discretion properly in reconsidering the claim.

[89] The disentitlement from August 30, 2021 was not disputed by the Claimant and so remains.

[90] This means that the appeal is dismissed.

Charlotte McQuade
Member, General Division – Employment Insurance Section