



Citation: *LB v Canada Employment Insurance Commission*, 2021 SST 970

**Social Security Tribunal of Canada
General Division – Employment Insurance Section**

Decision

Appellant: L. B.
Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (437015) dated November 4, 2021 (issued by Service Canada)

Tribunal member: Linda Bell
Type of hearing: Teleconference
Hearing date: December 2, 2021
Hearing participant: Appellant (Claimant)
Decision date: December 30, 2021
File number: GE-21-2150

Decision

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

[2] The Claimant hasn't shown that she meets the availability requirements for Employment Insurance (EI) benefits from January 11, 2021, to April 20, 2021, and from September 2, 2021, indefinitely. This means she is not entitled to EI benefits during these periods.

Overview

[3] Since 2019, the Claimant has been taking university courses full-time. She has worked part-time jobs while taking courses to obtain a Bachelor of Science degree in horticulture.

[4] The Claimant says that during 2019, she worked up to three part-time jobs at the same time. As of January 2020, she was working one part-time job at KC. The Claimant lost her part-time job in March 2020. This is when KC temporarily closed during the global COVID-19 pandemic.

[5] The Claimant says she applied for the Canada Emergency Student Benefit (CESB) on April 8, 2020. The Commission states that the system processed her application to pay the EI Emergency Response Benefit (EI-ERB) starting March 15, 2020.¹

[6] When the claim for EI-ERB ended, the system used the Claimant's April 8, 2020, application to automatically set up a claim for regular EI benefits, effective September 27, 2020. The Claimant continued to submit her biweekly reports for regular EI benefits. In these reports, the Claimant reported that she was attending training courses and was ready, willing and capable of working on each workday from Monday through to Friday.

¹ In March 2020, the Government of Canada created different types of emergency benefits in response to the COVID-19 pandemic. Claimants received emergency response benefits based on their circumstances. One circumstance was whether they lost their jobs during the COVID-19 pandemic. The Commission administered one such benefit called the Employment Insurance Emergency Response Benefit (EI-ERB).

[7] On September 22, 2021, the Commission conducted a review of the Claimant's regular EI claims. It determined that the Claimant didn't meet the availability requirements while attending unapproved training. The Commission imposed a retroactive stop payment (disentitlement) from January 11, 2021, to April 20, 2021.

[8] The Commission amended its initial decision upon reconsideration. After conducting an in-depth review, the Commission imposed two periods of disentitlement because the Claimant didn't meet the availability requirements. The first disentitlement is from January 11, 2021, to April 20, 2021. The second disentitlement is from September 2, 2021, to December 23, 2021. The second disentitlement extends past the date the claim ends on September 25, 2021.² This disentitlement results in a \$7,900.00 overpayment of EI benefits.³

[9] The Claimant disagrees with the Commission. She appeals to the Social Security Tribunal (Tribunal). She says that she remained available to work, even during the COVID-19 pandemic. She says she has always worked 2 – 3 jobs while being a full-time student. She has paid into this benefit for over a decade so she should be entitled to receive it. If she wasn't entitled to EI benefits, she should have been told sooner so that she could have applied for the Canada Recovery Benefit (CRB).

Matters I have to consider first

Late and post-hearing documents

[10] I have determined that I will consider all late and post-hearing documents received on file for this appeal, as of the time of issuing this decision on December 30, 2021. Here is what I considered when making this determination.

² The periods of disentitlement were clarified in subsequent submissions from the Commission at page GD15-1.

³ See the overpayment breakdown at page GD4-3.

[11] The Tribunal has a Practice Direction outlining the procedure for dealing with late and post-hearing documents.⁴ This states that the Member will decide whether to accept post hearing or late documents.

[12] After the Tribunal notified the parties that the hearing was scheduled, the Claimant submitted additional documents with written statements (late documents). She submitted those documents via email on November 17, 2021, November 30, 2021, December 1, 2021, and December 2, 2021.⁵

[13] During the December 2, 2021, hearing, the Claimant requested clarification of the claim dates and the dates of disentitlement. There appeared to be multiple clerical errors in the documents submitted by the Commission. In addition, the Claimant requested that I ask the Commission to provide responses to her late documents, as listed above.

[14] On December 7, 2021, I sent the Commission a request for investigation and report requesting clarification of clerical errors and of dates listed in the Commission's documents.⁶ The Tribunal received the Commission's response (supplementary representations) on December 7, 2021.⁷ Upon review, I determined that further clarification was required. So, on December 14, 2021, I sent the Commission a letter requesting additional information.⁸ The Commission responded with additional supplementary representations on December 20, 2021.⁹

[15] The Tribunal sent the Claimant copies of the December 7, 2021, and December 20, 2021, supplementary representations. On December 13, 2021, the Claimant submitted a written response to the December 7, 2021, supplementary representations.

⁴ The practice direction is listed at <https://www1.canada.ca/en/sst/rdl/gdpd2016eiposthearing.html>

⁵ See the GD5, GD7, GD8, and GD9 documents.

⁶ See pages GD10-1 to GD10-3.

⁷ See page GD11-1.

⁸ See pages GD13-1 to GD13-4.

⁹ See page GD15-1.

[16] As of the date of this decision (December 30, 2021), the Claimant has not submitted a written response to the December 20, 2021, supplementary representations.

[17] The Commission hasn't submitted a written response to the Claimant's late documents. The Tribunal sent the Commission copies of each late document through the electronic communication system, the same day they were received from the Claimant. There is no indication that these electronic communications failed. Although I didn't specifically request that the Commission provide a written response to the late documents, I find that it had ample time to submit a response if it intended on doing so.

[18] As each party has had a fair opportunity and a reasonable amount of time to present their evidence and responses to all documents on file, I have proceeded with issuing this decision.

[19] It should also be noted that although I may not mention every document or statement in this decision, I have considered all relevant evidence when determining the merits of this appeal.¹⁰

Issues

[20] Does the Claimant meet the availability requirements for EI benefits from January 11, 2021, to April 20, 2021?

[21] Does the Claimant meet the availability requirements for EI benefits from September 2, 2021, onward?

[22] Can the Commission review previous claims even though the Claimant had reported her training on each report?

¹⁰ See documents GD2-1 to GD15-1.

Analysis

[23] Different sections of the law require claimants to show that they are available for work.¹¹ The Commission says the Claimant was disentitled under section 153.161 of the Act.¹² This is because she hasn't shown she was capable of and available for work.¹³

[24] In addition, the Federal Court of Appeal (FCA) has said that claimants who are attending full-time training are presumed to be unavailable for work.¹⁴ The presumption applies only to full-time students. The presumption can be rebutted. This means that it would not apply.

[25] I will now consider whether the presumption applies to the Claimant and if she has rebutted it. Then I will look at whether she meets the availability requirements set out in the Act.

Presumption that full-time students are not available for work

– Does the presumption apply to the Claimant?

[26] Yes. I find as fact that the Claimant was attending full-time training since August 30, 2021, and during the periods of disentitlement. The periods of disentitlement are from January 11, 2021, to April 20, 2021, and from September 2, 2021, to December 23, 2021. This means the presumption applies.

[27] The Claimant confirms that she made a personal choice to attend a four-year post-secondary training course without obtaining prior approval from the Commission.

¹¹ 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 claimant is available for work and unable to obtain suitable employment, the Commission may require the claimant to prove that he or she is making reasonable and customary efforts to obtain suitable employment.

¹² Section 153.161 states that for the purposes of applying paragraph 18(1)(a), a claimant who attends a course, program of instruction or training to which the claimant is not referred under paragraphs 25(1)(a) or (b) 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.

¹³ See the Commission's submissions on page GD4-1.

¹⁴ *Canada (Attorney General) v Cyrenne*, 2010 FCA 349.

She is working toward a bachelor degree in horticulture. She says it could take her up to six or seven years to finish her degree.

[28] The Claimant says that her school considers her a full-time student when taking 3 classes in a semester. She has been a full-time student since her claim started for regular EI benefits on September 27, 2020. She says she is always taking classes during the fall and winter semesters. She has never taken any courses during the spring or summer semesters.

[29] During the period of disentitlement, the Claimant says that she took the following courses.

- From January 11, 2021, to April 20, 2021, she took 4 university courses plus a business course through distance education.
- From September 2, 2021, to December 23, 2021, she took 3 university courses plus a distance education course in Bloodborne Pathogens.

[30] The Claimant says that since the global COVID-19 pandemic occurred in March 2020, she attends classes on-line. She says the instructors tape the lectures so her classes are “asynchronous.” This means she can attend classes on-line when she is available to do so. She admits that there are set assignment due dates and exams dates but she insists this doesn’t limit her ability to work.

[31] The Claimant says that she didn’t pay \$7,000 or \$13,000 for a single course. Instead, her entire program may add up to a total of \$13,000 to \$20,000. She explained that when she completed each training questionnaire she was estimating what her total cost might be to complete her degree over several years. She also reported consistently that she would change her course schedule to accept a job.¹⁵

[32] At the hearing, the Claimant said that while on claim she worked one shift at CM in the spring or early summer. She then returned to work part-time at KC in late August

¹⁵ See pages GD3-32 and GD3-35.

2021 or early September 2021. Then on November 5, 2021, she started working part-time at STD. She confirmed that she continued her studies on-line while working part-time hours.

[33] Based on the evidence, as set out above, I find the presumption of non-availability applies to the Claimant. I will now determine whether the Claimant has rebutted the presumption.

– **Has the Claimant rebutted the presumption?**

[34] No, I find that the Claimant hasn't rebutted the presumption of non-availability while attending training full-time.

[35] There are two ways the Claimant can rebut the presumption. She can show that she has a history of working full-time while attending full-time training.¹⁶ Or she can show that there are exceptional circumstances in her case.¹⁷

[36] At the hearing, the Claimant explained her work history in detail. Prior to starting her degree in horticulture, she worked 3 part-time jobs as a server or bartender. She says that prior to the COVID-19 pandemic she worked an average of 24 to 35 hours per week. She stopped working in March 2020, during the COVID-19 shutdowns. She returned to work for one shift in the late spring. In late August 2021 or early September 2021, she returned to work part-time for a short period at KC. Then on November 5, 2021, she started working part-time at STD.

[37] The Commission says that the Claimant has failed to rebut the presumption of non-availability while attending a full-time course. This is because when prompted for clarification about her intent while attending the course, the claimant provided vague, anecdotal information as to her job search while in school, which the Commission can't reasonably verify. The Commission submits that the Claimant repeatedly expressed a

¹⁶ See *Canada (Attorney General) v Rideout*, 2004 FCA 304.

¹⁷ See *Canada (Attorney General) v Cyrenne*, 2010 FCA 349.

willingness to accept full-time work from 11:00a.m. to 3:00a.m., but this was when she was in full-time training for a four-year degree.

[38] The Claimant disputes the Commission's submissions. She says she has always been available to work while attending her courses. At the hearing, she provided a list of employers where she submitted her resume for server and bartender jobs. She says she went back to these locations multiple times, which is how she was able to get her current part-time job at STD. The Claimant also says that since January 2021, her "main focus" was on starting her own tattoo business by spending her free time creating her tattoo portfolio.

[39] I find that the Claimant hasn't rebutted the presumption of non-availability. The Claimant doesn't have a history of full-time work while in full-time schooling so can't rebut the presumption that way. Although she may have worked various part-time jobs at one time, there is insufficient evidence to prove she consistently worked full-time hours while in full-time attendance at school.

[40] Also, the Claimant hasn't shown exceptional circumstances that would rebut the presumption. The Claimant's pattern of part-time work along with schooling is no different than many other students, so this case is not an exception.

[41] Although the Claimant states her school schedule is asynchronous, I am not convinced that she is available every day during typical business hours. In addition, she repeatedly says that since January 2021, she has been focusing her efforts on starting her own business, not on securing a job full-time.

[42] While the Claimant clearly has a good reason for wanting to stay in school, I am not convinced that she was available to work outside of irregular hours or after normal classroom sessions occurred. This is because her job search consists of server and bartender jobs that are primarily available afternoons, evenings and weekends.

[43] The Federal Court of Appeal has said that availability must be demonstrated during regular hours for every working day (Monday through Friday) and cannot be

restricted to irregular hours resulting from a course schedule that significantly limits availability.¹⁸ This principle has recently been confirmed by the Federal Court.¹⁹

[44] Based on the evidence as set out above, I find the Claimant hasn't rebutted the presumption that she is unavailable for work while in full-time attendance in training.

– **The presumption isn't rebutted**

[45] 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 to decide whether the Claimant has proven her availability, even though I have already found that the Claimant is presumed to be unavailable.

Reasonable and customary efforts to find suitable employment

[46] In their submissions to the Tribunal, the Commission references a disentitlement under subsection 50(8) of the Act.²⁰ This provision requires the Claimant to prove that she is making reasonable and customary efforts to obtain suitable employment by providing details of her job search.

[47] The law sets out criteria for me to consider when deciding whether the Claimant's efforts were reasonable and customary.²¹ I have to look at whether her efforts are sustained and whether they are directed toward finding suitable employment (a suitable job).²² In other words, the Claimant has to have kept trying to find a suitable job.

[48] I also have to consider the Claimant's efforts to find a job. The Regulations list nine job search activities I have to consider. Some examples of those activities are the following:

- assessing employment opportunities

¹⁸ See *Canada (Attorney General) v Gagnon*, 2005 FCA 321 and *Duquet v Canada (Employment and Immigration Commission)*, 2008 FCA 313.

¹⁹ See *Horton v. Canada (Attorney General)*, 2020 FC 743.

²⁰ See page GD4-5.

²¹ See section 9.001 of the *Employment Insurance Regulations* (Regulations).

²² Section 6 of the Act defines what type of employment is not suitable. Section 9.002 of the Regulations lists the criteria for determining what suitable employment is.

- preparing a resume or cover letter
- contacting prospective employers
- networking

[49] The Commission submits that the requested job search was absent of any detailed proof that could be verified. This is because the dates of the job contacts and employer contact information were not provided. The Commission would not consider this type of narrative response to be sufficient to prove availability because it can't be verified by Commission to support her stated intentions.

[50] The Claimant disputes the Commission's submissions that she was asked to provide a list of job search efforts showing she was actively seeking work while in school full-time. She says this isn't entirely true, because she was asked to prove she could work.²³ Specifically, she says that the Commission's agent left her a voice mail giving her only two hours to submit a list.

[51] The Claimant says that since January 11, 2021, she remained available to return to work for KC and CMC. She also says that she continued to look for other serving or bartending jobs. She named four pubs where she says she stopped in several times to apply for a job. She says this is how she got a job at STD on November 5, 2021, where she is currently working an average of 5 hours per week. She also applied for one horticultural job but realized she did that too late in the season.

[52] The Claimant says that server and bartending jobs were suitable for her. This is because she has work experience in these types of jobs. Also, the horticulture job application is suitable because this is a field in which her studies are in. The Claimant says she also has experience working in retail sales, painting houses, fast food restaurants, at a gas station, and with cleaning houses.

²³ See page GD7-5.

[53] In addition to seeking a part-time job, the Claimant says that in January 2021, her “main focus” was becoming self-employed in the tattoo business. She says she spent her spare time creating a tattoo art portfolio. Upon further clarification of her self-employment efforts, the Claimant says she entered into discussions with an existing tattoo artist in July 2021. By October 2021, he agreed to mentor her. She took a bloodborne pathogens course in September 2021.²⁴ Then in November 2021, she signed a lease to set up a commercial tattoo place.

[54] Based on the evidence, as set out above, I find that the Claimant has shown she made reasonable and customary efforts to find suitable part-time jobs.

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

[55] I must consider whether the Claimant has shown she was capable of and available for work and unable to find suitable employment.²⁵ The Claimant 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
- c) No personal conditions that might unduly limit their chances of returning to the labour market²⁶

[56] I have to consider each of these factors to decide the question of availability,²⁷ looking at the attitude and conduct of the Claimant.²⁸

²⁴ See the certificate at page GD8-3.

²⁵ Paragraph 18(1)(a) of the Act.

²⁶ *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96.

²⁷ *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96.

²⁸ *Canada (Attorney General v Whiffen*, A-1472-92 and *Carpentier v The Attorney General of Canada*, A-474-97.

– **Desire to return to the labour market as soon as a suitable job was available?**

[57] Yes. The Claimant has shown a desire to return to the labour market as soon as a suitable job was available.

[58] The Claimant says that since January 11, 2021, she continued to look for other serving or bartending jobs. She named four pubs where she says she stopped in several times to apply for a job. She says this is how she got a job at STD on November 5, 2021, where she is currently working an average of 5 hours per week. She also applied for one horticultural job but realized she did that too late in the season.

[59] The Claimant also says that in January 2021, her “main focus” was becoming self-employed in the tattoo business. She spent her spare time creating a tattoo art portfolio. Upon further clarification of her self-employment efforts, the Claimant says she entered into discussions with an existing tattoo artist in July 2021. By October 2021, he agreed to mentor her. She took a bloodborne pathogens course in September 2021.²⁹ Then in November 2021, she signed a lease to set up a commercial tattoo place.

[60] I found the Claimant’s statements about her self-employment activities to be contradictory to her earlier statements when she says she was putting her efforts into finding another job. When I asked her to clarify this contradiction, she says she was working on her self-employment parallel to her efforts to find another job, while in full-time attendance at school.

[61] The Claimant then explained in detail how her car was broken down so she was relying on her boyfriend, the bus, or a cab for transportation. This was provided in the context of why she only applied for one or two jobs a month since January 2021.

[62] Based on the Claimant’s efforts, as set out above, I find that she has shown she had a desire to return to the labour market as soon as a suitable job is available, while attending full-time training and establishing her self-employment.

²⁹ See the certificate at page GD8-3.

Has the Claimant made efforts to find a suitable job?

[63] Yes. The Claimant did make efforts to find a suitable job. She says she continued to look for a job, which is how she got the bartender job at STD on November 5, 2021.³⁰ She also focused her efforts on becoming self-employed since January 2021.

[64] 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.

[65] As stated above, the Regulations lists nine job-search activities I have to consider.³¹ Some examples of those activities are

- assessing employment opportunities
- networking and dropping off a resume
- applying for a job

[66] 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.³²

[67] The Commission submits that in the appeal submitted by the claimant, she provided no detailed job search information such as who those industries were, who was contacted and on what date, or for what employment opportunity and what the result of the contact might have been.

[68] The Claimant consistently says that since January 2021, she applied for approximately 9 different jobs. She explained in detail how she decided which bars or pubs she wanted to work at and she kept going back until STD hired her on November

³⁰ Section 6 of the Act defines what type of employment is not suitable. Section 9.002 of the Regulations lists the criteria for determining suitable employment.

³¹ See section 9.001 of the Regulations.

³² See section 10.4.1.4 of the Digest of Benefit Entitlement Principles.

5, 2021. She also says that she continues to be available to work as a server or bartender if called by any of the places she previously applied or worked at.

[69] I find that the Claimant's efforts were enough to meet the requirements of this second factor. She has shown that she was seeking suitable part-time employment, while attending full-time training and setting up her self-employment in the tattoo business.

– **Did the Claimant set personal conditions that might unduly limit her chances of returning to the labour market?**

[70] Yes. I find that the Claimant set personal conditions by restricting her availability to work at pubs or restaurants, while focusing on her training and setting up her self-employment in the tattoo industry. This unduly limited her chances of returning to the labour market from January 11, 2021, to April 20, 2021, and from September 2, 2021, indefinitely.

[71] The Commission submits that the Claimant can't prove her availability for work during the periods of disentitlement because she has not been looking for full-time work while attending school on her own initiative. I disagree with this statement because the law does not stipulate that the Claimant must be seeking full-time work. Rather, the law states that she has to prove she is available for and seeking suitable employment during typical business hours on Monday through Friday.

[72] I am not convinced that the Claimant would have accepted a job during normal business hours (Monday through Friday) while in full-time attendance at school. Nor am I convinced that she would have dropped her courses if offered a job during those times. Instead, I find the Claimant's efforts to find a job were restricted to part-time bartending or serving jobs that primarily occur after typical business hours, while focusing on her self-employment.

[73] I find the Claimant's statements that since January 2021, her main focus was to set up her self-employment in the Tattoo business while attending full-time training, to be credible, as supported by the evidence. That evidence includes the fact that she was

enrolled in 3 or 4 university courses plus completed correspondence courses in business and Bloodborne Pathogens. At the same time, she was working on her tattoo artwork portfolio, seeking out and securing a mentor, and spending time to find a location to lease for space to operate her business. During this time she only worked part-time at STD, for an average of 5 hours per week.

[74] I recognize that the Claimant limited her job applications to server and bartending jobs. This is despite her having previous experience working in retail sales, painting houses, fast food restaurants, at a gas station, and cleaning houses. She also consistently states that since January 2021, her main focus was on establishing her self-employment in the tattoo business.

[75] The evidence, as set out above, supports a finding that the Claimant set personal conditions that unduly limited her chances of returning to the labour market fully, from January 11, 2021, to April 20, 2021, and from September 2, 2021, indefinitely.

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

[76] After considering my findings on each of the three factors together, I find that the Claimant hasn't shown that she was capable of and available for work and unable to find suitable employment, from January 11, 2021, to April 20, 2021, and from September 2, 2021, indefinitely.³³ This means she is not entitled to EI benefits during these periods.

[77] The Employment Insurance scheme is not a pension fund or a needs-based program. Like other insurance plans, claimants have to meet terms in order to receive payment of benefits. In other words, the Employment Insurance system is an insurance scheme that provides benefits to those who meet the entitlement requirements set out in the Act.³⁴

³³ See section 18(1)(a) of the Act.

³⁴ See *Canada (Attorney General) v Lesiuk*, 2003 FCA 3; and *Tanguay v Canada (Unemployment Insurance Commission)*, [1985] F.C.J. No. 910.

[78] Although the Claimant was making efforts to find a job, her intentions during the periods of disentitlement (January 11, 2021, to April 20, 2021, and September 2, 2021, onward), were not to find a suitable job during typical business hours Monday through Friday. Instead, the evidence supports a finding that her intentions were focused on her schooling, her efforts to set up her self-employment business in the tattoo industry, while working reduced part-time hours.

[79] Also, the Claimant's personal restriction of only being available for serving or bartending work, outside of typical business hours and normal school hours, unduly restricted her chances of returning to the labour market.

[80] I find that the Claimant didn't unduly restrict her availability from April 21, 2021, to September 1, 2021. I recognize that the Claimant consistently states that her main focus since January 2021 was to set up her self-employment. However, I find that her self-employment efforts were minor in extent from April 21, 2021, to September 1, 2021. I also find that she presented sufficient evidence to prove her availability and efforts to find a suitable job from April 21, 2021, to September 1, 2021. This is the period she was not in full-time attendance at school and was available to work during typical business hours Monday through Friday.

[81] In addition, I find that the Claimant unduly restricted her availability again from September 2, 2021, indefinitely. This is when she commenced her full-time studies and increased her self-employment activities by working with a mentor and seeking places to lease for her business. She subsequently entered into a building lease for her tattoo business on November 29, 2021, which supports that her self-employment is no longer minor in extent.³⁵

[82] When considering the period starting on September 2, 2021, I find that the Claimant remains disentitled from EI benefits indefinitely. Her claim ended September 25, 2021, so this means she remains disentitled indefinitely. If she establishes a new

³⁵ See page GD9-2.

claim for benefits, she will be required to prove that she meets the availability requirements at that time.

[83] I commend the Claimant on her efforts to try and establish her own business. However, the employment insurance program is not intended to help people set up their own business. Rather, it is a program intended to assist claimants who are available for and actively seeking suitable employment.

Can the Commission review previous claims?

[84] Yes. The law states 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.³⁶

[85] 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.³⁷

[86] There is no dispute that the Claimant reported her attendance in full-time training when she submitted her application for benefits on April 8, 2020. She completed the training course questionnaires stating she would change her course schedule or drop her courses to accept a job.

[87] This is truly an unfortunate situation. I recognize that the Commission's lengthy delay (52 weeks) in reviewing the claims has created a large overpayment. The Claimant disclosed her training and spoke with agents about her entitlement to benefits.

[88] In this case, the Commission didn't tell her there was a possibility she wouldn't be entitled to these benefits. Instead, it simply paid her the benefits and is now asking that she repay them. Any person would reasonably assume in these circumstances that they were entitled to the benefits they were receiving.

³⁶ See section 153.161 of the Act.

³⁷ *Canada (Attorney General) v Landry*, A-532-98.

[89] The Commission's assessment was conducted in accordance with the law so the overpayment is valid. I do not have any authority to waive the overpayment.³⁸ That authority rests with the Commission.

[90] I also don't have any authority to order the Commission to waive an overpayment. This said, I would ask that the Commission consider waiving the overpayment, given the lengthy delay in reconsidering the claim. Some delay is reasonable. However, even when considering the pandemic circumstances, a delay of one year (52 weeks) is not reasonable. The overpayment would likely not have reached the amount it did, had the Commission made its decision earlier.

[91] I sympathize with the Claimant given the circumstances she presented. Although she may perceive this as an unjust result, my decision is not based on fairness. Rather, my decision is based on the facts before me and the application of the 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.³⁹

Conclusion

[92] The Claimant is disentitled from receiving EI benefits from January 11, 2021, to April 20, 2021, and indefinitely from September 2, 2021, onward. The second disentitlement is indefinite and remains in effect until such time that the Claimant proves she meets the availability requirements.

[93] This means I am dismissing the appeal with modification.

Linda Bell

Member, General Division – Employment Insurance Section

³⁸ See section 112.1 and 113 of the Act.

³⁹ See *Canada (Attorney General) v Knee*, 2011 FCA 301.