Citation: *KT v Canada Employment Insurance Commission*, 2022 SST 457

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

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

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (453949) dated February 8, 2022 (issued by Service Canada)

Tribunal member:	Gary Conrad
Type of hearing:	Videoconference
Hearing date:	March 22, 2022
Hearing participant:	Appellant
Decision date:	April 11, 2022
File number:	GE-22-605

Decision

[1] I am dismissing the appeal with modification.

[2] I find, that for the period of January 12, 2021, to April 30, 2021, the Commission made an initial decision to approve the Claimant's schooling and pay her benefits prior to their December 17, 2021, decision.

[3] I find that while they can go back and review that initial decision, their decision to do so was not done judicially, as they acted in bad faith.

[4] In making the decision they should have made, I find they should not have gone back and reviewed their initial decision, so that means the initial decision stands and the Claimant is not disentitled for the period of January 12, 2021, to April 30, 2021.

[5] For the period of September 7, 2021, to April 8, 2022, there was no initial decision made prior to their December 17, 2021, decision and in reviewing the Claimant's availability I find she is not available and therefore the disentitlement should be upheld for that period.

Overview

[6] Claimants have to be available for work in order to get regular employment insurance (EI) benefits. Availability is an ongoing requirement; claimants have to be searching for a job.

[7] A claim for regular employment insurance (EI) benefits was automatically established for the Claimant on October 4, 2020, after her EI emergency response benefits ended.

[8] During the course of receiving benefits the Claimant was going to school. She reported this to the Commission multiple times and continued to collect benefits.

[9] In September 2021, the Commission spoke with the Claimant about her schooling.

[10] After reviewing all the information the Claimant provided to them during the September 2021 call, and the information she provided previously, the Commission decided the Claimant was not available for work while attending her school and disentitled her from benefits from January 12, 2021 to April 30, 2021 and from September 7, 2021, to April 28, 2022.

[11] The Claimant questions how the Commission can disentitle her from benefits.

[12] She says she spoke to agents of the Commission multiple times and filed her reports over the phone, telling multiple agents that she was going to school and what her schedule was and they approved her training, paid her benefits, and never told her there was a problem.

[13] The Claimant says the Commission acted in bad faith when they made the decision to disentitle her as they were fully aware of her schooling for months and months, and nothing changed, yet suddenly, they decided to disentitle her.

Matters I have to consider first

50(8) Disentitlement

[14] In their submissions the Commission states they disentitled the Claimant under subsection 50(8) of the *Employment Insurance Act* (Act). Subsection 50(8) of the Act relates to a person failing to prove to the Commission that they were making reasonable and customary efforts to find suitable employment.

[15] In looking through the evidence, I did not see any requests from the Commission to the Claimant to prove her reasonable and customary efforts, or any claims from the Commission that if they did, her proof was insufficient.

[16] I further find the Commission did not make any detailed submissions on how the Claimant failed to prove to them that she was making reasonable and customary efforts; the Commission only summarized what the legislation says in regard to subsection 50(8) of the Act and what it says about reasonable and customary efforts.

[17] Based on the lack of evidence the Commission asked the Claimant to prove her reasonable and customary efforts to find suitable employment under subsection 50(8) of the Act, the Commission did not disentitle the Claimant under subsection 50(8) of the Act. Therefore, it is not something I need to consider.

Post-hearing Document

[18] At the hearing the Claimant raised the issue of how the Commission was able to make their decision to disentitle her for not being available while attending schooling after they had previously decided to pay her benefits. She also argued that the decision to disentitle her was made in bad faith.

[19] I asked the Commission to respond to those points.

[20] Specifically, I asked the Commission if they felt they had previously made a decision regarding the Claimant's availability and her schooling and if they felt their decision to review her availability was done judicially.

[21] The Commission responded on March 23, 2022,[1] and I considered their responses when making my decision.

Issues

[22] Did the Commission make an initial decision to approve the Claimant's training prior to their December 17, 2021, decision?

[23] If so, can they go back and review that decision?

[24] If they can review it, did they act judicially when they made their decision?

[25] Is the Claimant available for work?

[1] GD6

Analysis

Did the Commission make an initial decision?

[26] There are two periods of time for which the Claimant was disentitled, from January 12, 2021, to April 30, 2021, and from September 7, 2021, to April 28, 2022. I need to consider whether an initial decision was made for both periods

January 12, 2021, to April 30, 2021

[27] The Claimant argues that the Commission approved her schooling as she told them about it multiple times, speaking to agents on the phone, and completed reports online, and was never told there was a problem, and was paid benefits.

[28] The Commission submits that they never made an initial decision approving the Claimant's entitlement to benefits as they did not review her entitlement to benefits prior to their decision of December 17, 2021.

[29] The Commission says that due to Interim Order No. 10 they adopted a modified operational approach to handling people who were in training; they automatically allowed periods of training without review.

[30] According to the Commission, allowed means "permitted to become payable" it does not mean the Claimant's availability for work was reviewed and found to be in order.

[31] The Commission submits that while it may say at the end of the online reports when they were completed by the Claimant that her training was approved**,** this simply meant that the report was permitted to become payable, and is not a decision made regarding the Claimant's entitlement to benefits.

[32] Respectfully, I disagree with the Commission's submissions.

[33] The choice to automatically allow all training can only be called a decision.

[34] Even using the verbiage of the Commission, that ‘allowed’ only means ‘permitted to become payable’, still represents a decision, as they have decided to permit the benefits to be paid.

[35] Further support that the Commission made a decision comes from looking at the online reports the Claimant filled out.

[36] When looking at the Claimant’s earlier online reports it says at the end: “We have allowed your training period…” Again, we see a decision; the Commission allowed the training.

[37] However, at the end of the online report the Claimant completed on September 12, 2021, it says “The training details you have provided have been referred to a Service Canada Centre for review. Your payment will be delayed until a decision is made.”

[38] This wording clearly shows that in the September 12, 2021, online report they did not make a decision to allow the training and no benefits would be paid until a decision was made.

[39] So, in the previous online reports where it says training is allowed, there is no mention of a delay in payment, therefore, it means a decision was made, as according to the September 12, 2021, online report until a decision is made payment is not made.

[40] Also, in this case the Claimant did not solely file her claims online. She amended one over the phone. In the instance of the Claimant amending her report over the phone there is nothing saying that her training was not approved or needed to be reviewed in order to make a decision on payment. In fact, the information states that the Claimant was notified of the decision. Clear support of a decision being made and the Claimant approved.[2]

[2] GD03-29

[41] So, I find the Commission made an initial decision finding the Claimant was available for work prior to their December 17, 2021, decision on the Claimant's availability for the period of January 12, 2021 to April 30, 2021.

September 7, 2021, to April 28, 2022

[42] However, for the period of September 7, 2021, to April 28, 2022, I find the Commission did not make an initial decision approving the Claimant's training and finding her available for work prior to their December 17, 2021, decision.

[43] I find this as the only Claimant report that falls into that time period is the one dated September 12, 2021,[3] and this report clearly says at the end that the training details had been referred for review and no payment would be made until a decision was made.

Can the Commission go back and review a previous decision?

[44] Since I have found the Commission did not make an initial decision for the period of September 7, 2021, to April 28, 2022, prior to their December 17, 2021, decision I do not need to consider if they an go back and review a decision for that period, since there is no initial decision for them review.

[45] However, for the period of January 12, 2021, to April 30, 2021, where I find the Commission did make an initial decision prior to their December 17, 2021, decision, I find the Commission can go back and review their initial decision to approve the Claimant's training and find her availability in order for this period.

[46] There are two sections of the law that allow the Commission to go back and review a claim.[4]

[47] The Commission mentions both sections in their submissions as giving them the authority to review the Claimant's availability.

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[3] GD03-51
[4] See sections 52 and 153.161(2) of the *Employment Insurance Act*

[48] I find I agree with the Commission's submissions. Whichever section they chose to use to review a claim both sections of the law are clear that the Commission has that power.

[49] Both sections give the Commission broad powers of review.

[50] Neither of the sections sets any limits on why the Commission can review a claim. There are no circumstances that must be fulfilled in order to allow the review of a claim; if the Commission feels like reviewing a claim, the law allows it.

[51] The only limitation set out in either of those sections is a time limit stated to be 36 months after benefits have been paid. That is not at issue here as the Commission is well within that timeline as the benefits were paid in early 2021 and they did their review and made their decision by December 17, 2021.

Did they act judicially when they made their decision?

[52] While the Commission can go back and review their decision for the period of January 12, 2021, to April 30, 2021, their decision to do so is discretionary.

[53] This means they are not obligated or required to do a review, but they can choose to do so if they want to. Both sections that allow the Commission to review a claim say they "may" review a claim, not that they must review a claim.

[54] What this means is that I can only interfere with, in other words change their decision, if they did not exercise their discretion properly when they made the decision.[5]

[55] In order for the Commission to have used their discretion properly they must not have acted in bad faith, or for an improper purpose or motive, took into account an irrelevant factor or ignored a relevant factor or acted in a discriminatory manner when

[5] *Canada (Attorney General) v Kaur*, 2007 FCA 287. The Commission's decision can only be interfered with if it exercised its discretionary power in a non-judicial manner or acted in a perverse or capricious manner without regard to the material before it: *Canada (Attorney General) v Tong*, 2003 FCA 281. Discretion is exercised in a non-judicial manner if the decision-maker acted in bad faith, or for an improper purpose or motive, took into account an irrelevant factor or ignored a relevant factor or acted in a discriminatory manner: *Attorney General of Canada v Purcell*, A-694-94.

they made the decision to review their initial decision for the period of January 12, 2021, to April 30, 2021.

[56] The Claimant says the Commission did act in bad faith as they failed to tell her being a student meant she could not collect EI. The Claimant says it is their responsibility to catch these things when people provide them with the proper information, which she did.

[57] The Claimant says the Commission acted for an improper purpose or motive as they simply gave out money without taking any of the proper steps necessary to ensure whether that was the correct decision and that the people were actually qualified to get the money.

[58] The Claimant says the Commission ignored the relevant fact that she had told them she was a full-time student as everyone she talked to at the Commission just ignored it.

[59] The Claimant testified she did not think the Commission discriminated against her in any way.

[60] The Commission says there is no evidence they acted in bad faith when they exercised their authority to reconsider this claim as they did not make a decision about the Claimant's availability and then reverse the decision using the same facts on which the original decision was based.

[61] With respect, I find this is exactly what they did.

[62] The Claimant reported her schooling on all her report cards and at the end of every online report it says her training was approved and she was paid benefits.

[63] She also completed a training questionnaire on January 16, 2021, detailing her schooling and availability.[6]

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[6] GD03-23

[64] Not only that, she spoke to an agent on the phone regarding her report card and yet the agent never said anything to her about not being eligible or not being able to pay her benefits due to her schooling and she continued to be paid.

[65] Initially saying the Claimant was approved for benefits, and paying said benefits, when she reported all her schooling, filled out a training questionnaire and spoke to an agent on the and phone, and then later, deciding to go back and review that decision then change it based on the same information as the initial approval, is bad faith on the part of the Commission.

[66] A finding of bad faith is a high bar to meet.

[67] The mere fact the Commission reviewed a claim they had initially approved and paid out is not bad faith in itself.

[68] The difference in the case of the Claimant is that even ignoring the fact of whether an automatic approval is a decision, (which I have found above that it is) she spoke with an agent of the Commission. This person, working for the Commission, who spoke to the Claimant about her report card when the Claimant called to amend it, never said there was any issue with the Claimant's entitlement to benefits, or that there may be a problem with paying out benefits.

[69] This means this agent had to turn their mind to the issue of whether the information the Claimant was giving them would have any impact on her entitlement to benefits, if there was anything that needed to be reviewed. They decided there was nothing, and moved forward with allowing benefits to be payed to the Claimant.

[70] Then, at a later, date, with the Claimant already having been approved and paid benefits, a decision was made to go back and review the initial decision to pay the Claimant benefits and change the initial decision to deny the Claimant benefits based on the same information used to allow benefits.

[71] Let me be clear. There is no need for a condition to be fulfilled to allow the Commission to go back and review the Claimant's claim. It is not necessary that new

information come to light in order for them to have the power to go back and review the claim. If they feel like they want to review a claim, they can.

[72] But, even though they have the power to go back and review a claim on a whim, this decision still must be done judicially.

[73] Deciding to go back and review the decision and change it simply based on a whim though is bad faith, and is not a judicial exercise of discretionary power.

[74] An initial decision was made, facts were reviewed, the Claimant's training was allowed, and benefits were paid out. Then, at a later date, someone else at the Commission decided they would have done the decision differently with the same set of and decided to invoke the Commission's review power so they could go back and change it in order to get a different outcome.

[75] I note the Commission has also not argued that they were trying to correct a mistake, which supports that the initial decision to pay the Claimant benefits was properly decided, they just determined at a later date they did not like it.

[76] The decision to go back represents a bad faith decision as there was nothing informing the decision to go back and change the decision other than an apparent dislike of the original decision.

[77] Having found the Commission acted in bad faith, I find it is not necessary for me to consider all of the Claimant's other arguments for why the Commission failed to act judicially.

[78] Since the Commission failed to act "judicially" when making its decision I will give the decision the Commission should have given pursuant to subsection 54(1) of the *Department of Employment and Social Development Act*.

[79] In making the decision the Commission should have made I find the initial decision to approve the Claimant's training and find her availability in order, and that she was entitled to benefits for the period of January 12, 2021 to April 30, 2021, should not have been reviewed.

[80] I see nothing that would support going back to review and change the decision already made on the Claimant's availability and entitlement to benefits. The fact someone else would have decided the initial decision differently is not sufficient grounds.

[81] As it should not have been reviewed, this means the original decision would remain unchanged and the Claimant is therefore not disentitled from benefits for the period of January 12, 2021, to April 30, 2021.

[82] However there is still the issue of the disentitlement for the period of September 7, 2021, to April 28, 2022, and since I have found there was no initial decision made for this period prior to the December 17, 2021, decision, there is no issue with the Commission making a decision on the Claimant's availability for this period.

[83] So, I will continue with the standard availability analysis for this period of disentitlement.

Is the Claimant available for work for the period of September 7, 2021 to April 28, 2022?

[84] The law requires claimants to show that they are available for work.[7] In order to be paid EI benefits, claimants have to be capable of and available for work and unable to find suitable employment.[8]

[85] In considering whether a student is available pursuant to section 18 of the Act, the Federal Court of Appeal, in 2010, pronounced that there is a presumption that claimants who are attending school full-time are unavailable for work.

[86] The Act was recently changed and the new provisions apply to the Claimant.[9] As I read the new provisions the presumption of unavailability has been displaced. A full-

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[7] Paragraph 18(1)(a) of the *Employment Insurance 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.
[8] Paragraph 18(1)(a) of the *Employment Insurance Act*.
[9] Subsection 153.161(1) of the *Employment Insurance Act*

time student is not presumed to be unavailable, but rather must prove their availability just like any other claimant.

[87] However, these provisions expired after a certain time; September 25, 2021, at the latest.[10]

[88] Not all of the period the Claimant is disentitled falls into the period where these provisions apply. But, since the start of the Claimant's disentitlement falls into these provisions and the Commission has looked at the disentitlement through the lens of these provisions,[11] I will consider them as well.

[89] In order to be paid EI benefits, claimants have to be capable of and available for work and unable to find suitable employment.[12] The Claimant has to prove three things to show she was available:

1. A desire to return to the labour market as soon as a suitable job was available
2. That desire expressed through efforts to find a suitable job
3. No personal conditions that might have unduly limited their chances of returning to the labour market[13]

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

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[10] Subsection 153.196(1) says they expire on September 25, 2021, at the latest.
[11] GD4-1 where they say that they disentitled the Claimant under 153.161(1) of the *Employment Insurance Act* and GD4-5 where they reference the requirements under this section again.
[12] Paragraph 18(1)(a) of the *Employment Insurance Act*.
[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.

Does the Claimant have a desire to return to the labour market as soon as a suitable job is available?

[91] I find the Claimant has shown she has a desire to return to the labour market as soon as a suitable job is available.

[92] The Claimant testified that she wanted to work and was looking for work and applied to places in-person in an effort to boost her chances, but due to COVID lockdowns almost no place was hiring. So, despite continuously looking for a job she never managed to find anything.

[93] I can accept the Claimant wants to work, and her extra effort of going in-person to locations to try and find a job supports her desire to return to the labour market.

Has the Claimant made efforts to find a suitable job?

[94] The Claimant is making enough efforts to find a suitable job.

[95] The Claimant testified that she was and is continuously looking for work.

[96] The Claimant says that she has been applying to places on and off campus, and usually goes in-person to try and find work.

[97] She has been applying at all sorts of retail locations and fast food locations but was not able to find anything due to COVID restrictions.

[98] I find the Claimant's efforts to look for work, whether in-person or online, at a large variety of locations, represents sufficient and ongoing efforts to find employment.

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

[99] I find the Claimant has set personal conditions that might unduly limited her chances of returning to the labour market; that condition being her schooling.

[100] The Claimant says that while she was taking five classes her classes were usually done by noon so she had the whole afternoon and evening free to work and she was always free on weekends.

[101] The Claimant says that while she was a student athlete her training takes place in the middle of the day so it is not a problem for her to work around it.

[102] I find the Claimant's schooling is a personal condition that would overly limit her ability to return to the labour market.

[103] I find the Claimant having to attend her classes at set times on set days, means that her availability was restricted to certain times on certain days which would limit her chances of finding employment.[16]

[104] Her chances of finding employment would be limited as she could only takes jobs that would work around her school schedule.

[105] While she might be available on the weekends, I am only looking at her availability for working days and the law says that weekends are not working days.[17]

Is the Claimant capable of and available for work and unable to find suitable employment for the period of September 7, 2021, to April 8, 2022?

[106] Considering my findings on each of the three factors together, I find that the Claimant is not available for work for the period of September 7, 2021, to April 8, 2022.

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[16] See *Duquet v Canada (Employment and Immigration Commission)*, 2008 FCA 313 which supports this.
[17] Section 32 of the *Employment Insurance Regulations*

Conclusion

[107] I am dismissing the appeal with modification.

[108] I find, that for the period of January 12, 2021, to April 30, 2021, the Commission made an initial decision to approve the Claimant's schooling and pay her benefits prior to their December 17, 2021, decision.

[109] I find that while they can go back and review that initial decision, their decision to do so was not done judicially, as they acted in bad faith.

[110] In making the decision they should have made, I find they should not have gone back and reviewed their initial decision, so that means the initial decision stands and the Claimant is not disentitled for the period of January 12, 2021, to April 30, 2021.

[111] For the period of September 7, 2021, to April 8, 2022, there was no initial decision made prior to their December 17, 2021, decision and in reviewing the Claimant's availability I find she is not available and therefore the disentitlement should be upheld for that period.

Gary Conrad
Member, General Division – Employment Insurance Section