



Citation: *EA v Canada Employment Insurance Commission*, 2022 SST 519

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

**Decision**

**Appellant:** E. A.

**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** Canada Employment Insurance Commission  
reconsideration decision (447273) dated January 14, 2022  
(issued by Service Canada)

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**Tribunal member:** Teresa M. Day

**Type of hearing:** Videoconference

**Hearing date:** April 12, 2022

**Hearing participant:** Appellant

**Decision date:** April 13, 2022

**File number:** GE-22-350

## Decision

[1] The appeal is dismissed.

[2] The Claimant (who is the Appellant in this appeal) has not proven that he was available for work while attending his training course. This means that the disentitlement imposed on his claim for employment insurance (EI) benefits cannot be changed.

## Overview

[3] The Claimant applied for EI benefits on March 11, 2021. He said that he would be taking a 4-month training course starting on March 20, 2021, but that he would only be spending 1-9 hours per week on his training. His claim was approved and he started receiving benefits effective March 7, 2021<sup>1</sup>.

[4] On August 7, 2021 and again on September 18, 2021, while in receipt of EI benefits, the Appellant reported that he was taking a full-time training course<sup>2</sup>, spending 25 or more hours per week on his studies, and obligated to attend scheduled classes Monday to Friday, in the morning and afternoon. He also said that he was looking for work, but would only accept a job as long as he could delay the start date until he finished the course.

[5] On October 4, 2021, the Claimant reported he had completed the course.

[6] On November 28, 2021, the Commission imposed a retroactive disentitlement on his claim from July 12, 2021 to October 1, 2021 because he was taking a training course and had not proven his availability for work. This resulted in an overpayment of EI benefits on his claim.

[7] The Claimant asked the Commission to reconsider this decision. He said that:

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<sup>1</sup> As a general rule, a claim starts on the Sunday of the week in which the claimant applies

<sup>2</sup> He said he was taking a Private Investigations Diploma course through the Canadian Institute of Private Investigations & Security (GD3-19).

- He signed up for the course and paid the tuition prior to applying for EI benefits, but it kept being postponed due to the Covid-19 pandemic. The fact that the course was delayed was not his fault.
- The course ran from July 12, 2021 to October 1, 2021, with in-person classes from 9am to 1:30 pm, Monday to Friday.
- He put a lot of money into the course and would ask to start any job after the course ended.
- He continued to look for work while he was taking the course.
- He didn't know that he wouldn't be allowed to get EI benefits if he was taking the course.

[8] The Commission maintained the disentitlement on his claim, and the Claimant appealed to the Social Security Tribunal (Tribunal).

[9] A claimant must be available for work in order to receive **regular** EI benefits. Availability is an ongoing requirement. This means that a claimant must be searching for a full-time job and cannot impose personal conditions that could unduly restrict their ability to return to work.

[10] I have to decide if the Claimant has proven that he was available for work while attending his training course. The Claimant must prove this on a balance of probabilities. This means he has to show it is more likely than not that he was available for work while he was in school.

[11] The Commission says that the Claimant wasn't available for 2 reasons: because he was taking a training course and did not prove his availability for work; and because he was restricting himself to looking for part-time employment outside of his class schedule, which limited his chances of immediately returning to the labour market<sup>3</sup>.

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<sup>3</sup> See decision letter at GD3-29.

[12] The Claimant says he repeatedly advised the Commission that he was a full-time student<sup>4</sup>, and was never told he was not entitled to EI benefits while taking the course. He also says that he continued to look for work and would have dropped the course if he was offered a job. He has 3 kids and was the sole earner in his family at that time. He was confused by the contradictions in the reporting<sup>5</sup>, but maintains that he was available for work even though he was taking the course.

[13] I am sympathetic to the Claimant's situation. But for the reasons set out below, I must agree with the Commission.

## Issue

[14] Was the Claimant available for work while he was a full-time student from July 12, 2021 to October 1, 2021?

## Analysis

[15] To be considered available for work for purposes of regular EI benefits, the law says the Claimant must show that he is capable of, and available for work and unable to obtain suitable employment<sup>6</sup>.

[16] There is no question that the Claimant was **capable** of work during this time<sup>7</sup>. Therefore, I will proceed directly to the availability analysis to assess his entitlement to regular EI benefits from July 12, 2021 to October 1, 2021.

[17] The Federal Court of Appeal has said that availability must be determined by analyzing 3 factors:

- a) the desire to return to the labour market as soon as a suitable job is offered;

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<sup>4</sup> He said that he did this on his bi-weekly claimant reports (GD2-9).

<sup>5</sup> The Claimant explained this in his testimony at the hearing. He said that, on his bi-weekly claimant reports, he reported he was a student and was NOT available for work because he thought there was an inconsistency between being a full-time student and being available for work. He said that the forms did not allow him to explain his circumstances and that even though he was taking the course, he was available for work.

<sup>6</sup> Section 18(1)(a) of the *Employment Insurance Act* (EI Act).

<sup>7</sup> There is no indication the Claimant was medically unable to work during this period.

- b) the expression of that desire through efforts to find a suitable job; and
- c) not setting personal conditions that might unduly limit the chances of returning to the labour market<sup>8</sup> .

[18] These 3 factors are commonly referred to as the “*Faucher* factors”, after the case in which they were first laid out by the court.

[19] The court has also said that:

- a) availability is determined for **each working day** in a benefit period for which a claimant can prove that, on that day, they were capable of and available for work and unable to obtain suitable employment<sup>9</sup>; and
- b) claimants who are in school full-time are presumed to be unavailable for work<sup>10</sup> (this is commonly referred to as the presumption of non-availability).

[20] To make a decision on this appeal, I have to start by looking at whether I can presume that the Claimant wasn't available for work. Then I must look at whether he was available for work based on the legal test set out in paragraph 17 above.

### **Issue 1: Has the Claimant rebutted the presumption of non-availability?**

[21] No, he has not.

[22] The presumption that students are not available for work only applies to full-time students. Since the Claimant declared that he was a full-time student<sup>11</sup>, the presumption applies to him.

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<sup>8</sup> See *Faucher v. Canada (Employment and Immigration Commission)*, A-56-96.

<sup>9</sup> See *Canada (Attorney General) v. Cloutier*, 2005 FCA 73.

<sup>10</sup> See *Canada (Attorney General) v. Cyrenne*, 2010 FCA 349

<sup>11</sup> See the Training Questionnaires at GD3-19 and GD3-24.

[23] He can rebut the presumption by showing that he has a multi-year history of working full-time while also a full-time student<sup>12</sup>, or that there are exceptional circumstances that apply to his case<sup>13</sup>.

[24] The Claimant has not presented evidence of a multi-year history of working full-time while also attending school full-time. On his Training Questionnaires, he said he had not previously worked while taking a course<sup>14</sup>. He testified at the hearing that he previously completed a course at the same educational institution and *then* started working as a private investigator. After working in this field for a while, he decided to take another, more specialized course to improve his career prospects. He registered for this course while he was working full-time for X, but because of the Covid-19 pandemic, it didn't start until *after* he was laid off.

[25] Nor has he shown that his situation is exceptional. The fact that the Claimant was taking the course in order to further his career, and would be available for full-time work in his field upon completion of the course, is not exceptional. And while I acknowledge that the Claimant had a family to support and wanted to work while he was taking the course<sup>15</sup>, this factor is not enough to show that his situation was different from that of any other full-time student trying to juggle part-time employment and full-time studies.

[26] I therefore find that the Claimant has not overcome the presumption that he wasn't available for work while taking the course. This means he is disentitled to EI benefits while he was enrolled in his training program.

[27] But even if I am wrong about presuming that the Claimant was unavailable for work while he was a full-time student, he must still be disentitled to EI benefits. This is

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<sup>12</sup> See *Canada (Attorney General) v. Rideout*, 2004 FCA 304.

<sup>13</sup> See *Canada (Attorney General) v. Cyrenne*, 2010 FCA 349.

<sup>14</sup> See GD3-22 and GD3-27.

<sup>15</sup> The Claimant testified that he was dropping off resumes at fast-food restaurants and "random places" that he didn't think would require any "special skills".

because, for the reasons set out below, he has not proven he was available for work according to the legal test set out in paragraph 17 above.

## **Issue 2: Was the Claimant available for work according to the *Faucher* factors?**

[28] No, he was not. He has not satisfied all of the *Faucher* factors.

### **a) Wanting to go back to work**

[29] For purposes of the first *Faucher*, the Claimant must prove that he wanted to go back to work as soon as suitable employment was available.

[30] On both of his Training Questionnaires, the Claimant said that if he found full-time work that conflicted with his course, he would only accept the job if he could delay the start date to allow him to finish the course<sup>16</sup>.

[31] He had the option of saying that he would drop the course to accept the job, but he did not select that option when he completed the forms.

[32] At the start of his reconsideration interview, he said that he put a lot of money into the course and would ask to start any job after it ended<sup>17</sup>.

[33] It wasn't until after the disentitlement was imposed on his claim and the reconsideration agent advised him that it would be maintained, that the Claimant said he would have dropped the course to accept employment<sup>18</sup>.

[34] At the hearing he testified that:

- He was looking for work while he was taking the course.
- If he had found something, he would have left the course to work because he needed the money.

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<sup>16</sup> See the Training Questionnaires at GD3-21 and GD3-26.

<sup>17</sup> See reconsideration interview at GD3-33.

<sup>18</sup> See reconsideration interview at GD3-33.

- He has 3 kids and was the sole earner in his family at that time.
- He signed up for the course approximately 9 months before it started. The tuition he had paid was non-refundable.
- But he was ready to speak with the instructor to ask for leniency to see if he could continue the course down the road.

[35] I believe the Claimant's original statements are more credible than his testimony at the hearing. This is because his original statements were made in response to simple, direct questions on forms that were personally completed by him, and because they were given spontaneously and before any negative decisions on his claim. I therefore give greatest weight to his early, repeated statements that he would only accept a job if he could delay the start date to allow him to finish the course.

[36] On the first *Faucher* factor, I find that the Claimant intended to complete his training course and was not prepared to give up his studies for full-time employment.

[37] While I admire the Claimant's dedication to his education, the courts have said that EI benefits are not meant to subsidize self-improvement or the acquisition of new skills<sup>19</sup>, nor are they intended to provide student aid<sup>20</sup>. The courts have also said that a claimant who is not willing to abandon their course if and when full-time employment is found is not available for work<sup>21</sup>. The Claimant was not willing to immediately accept suitable employment while he was taking the course. He wanted to delay any employment opportunities until after he had completed the course.

[38] This is not sufficient to satisfy the first *Faucher* factor.

#### **b) Making efforts to find a suitable job**

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<sup>19</sup> CUBs 18973, 18828, 18827, 18582, 24103, 23225, 20385, 23821

<sup>20</sup> CUBs 19090, 018139, 22760, 77736

<sup>21</sup> See *Floyd A-168-93*. See also the Tribunal's Appeal Division's decision in AD-21-107 (issued June 24, 2021).



[39] For the second *Faucher* factor, the Claimant must prove that he was looking for suitable employment for every day of his benefit period.

[40] When he applied for EI benefits, the Claimant checked the box stating that he accepted his rights and responsibilities for EI benefits<sup>22</sup>. His responsibilities were enumerated on the form and included the responsibility to keep a detailed record as proof of his job search efforts<sup>23</sup>.

[41] On the Training Questionnaires he completed, the Claimant was reminded that he must be looking for work while on claim<sup>24</sup>. He also checked the box confirming he had read the following statement:

“Keep a list of the employers contacted. Record the name of the person you spoke to, the date and the result of your contact.”<sup>25</sup>

[42] During his reconsideration interview, the Claimant insisted that he was seeking employment, but did not provide any particulars or examples of his job search efforts<sup>26</sup>.

[43] The Claimant testified that:

- He was actively looking for work while he was taking the course.
- But he did not keep a job search log or any record of his job search efforts.
- He was not registered with any on-line job boards or job search websites.
- He did check “Indeed”, and if he saw a company posting that interested him, he would call up the company to make enquiries.
- He also randomly telephoned “companies” to see if they were looking for anyone.

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<sup>22</sup> See GD3-11.

<sup>23</sup> See GD3-9.

<sup>24</sup> See GD3-17, GD3-22 and GD3-27.

<sup>25</sup> See GD3-21 and GD3-26.

<sup>26</sup> See GD3-33.

- He was “hustling” to find work.
- He printed resumes and handed them out at places where he saw a “Help Wanted” sign.
- But he didn’t keep track of any of this.
- He just went around and dropped off resumes at fast food restaurants and places where he didn’t think any special skills would be required.
- He was willing to do anything.
- He did not get any interviews or job offers.

[44] I asked the Claimant to name some of the places where he dropped off his resume. He could only give one name: “Burger King”, but said he also contacted “delivery companies” and “random places”.

[45] The Claimant has not presented any verifiable evidence<sup>27</sup> of an active, on-going<sup>28</sup> and wide-ranging job search directed towards full-time employment between July 12, 2021 and October 1, 2021. I cannot accept his bald, unsupported statements that he was actively looking for work while he was taking the course. He was made aware of his responsibility to both look for work **and** to keep a record of his job search efforts, yet he failed to do so.

[46] On the second *Faucher* factor, I find that the Claimant has not proven he was making sufficient efforts to find work for every day during his benefit period.

[47] I acknowledge the Claimant’s desire to focus on the course and wait until he had completed it so he could improve his career prospects in his chosen field. However, only those who are actively seeking work can receive regular EI benefits. This means

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<sup>27</sup> With the names and contact information of the employers contacted ***and*** the dates he made enquiries and/or submitted an application.

<sup>28</sup> The Claimant must be searching for work for ***every day of his benefit period***. There is no evidence he was looking for work for every day between July 12, 2021 and October 1, 2021.

the Claimant needed to be looking for a job for every day of his benefit period in order to be entitled to the EI benefits he was receiving. The lack of any **verifiable** evidence of his job search efforts means he cannot prove that he was doing enough to find suitable employment, namely full-time work, for every working day of his benefit period.

[48] This means he has not satisfied the second *Faucher* factor.

**c) Unduly limiting chances of going back to work**

[49] To satisfy the third *Faucher* factor, the Claimant must prove that he did not set personal conditions that could have unduly limited his chances of returning to work for every working day of his benefit period.

[50] As stated above, availability must be demonstrated during regular working hours for every working day. It cannot be restricted to irregular hours, such as evenings, nights, weekends and/or school holidays, in order to accommodate a course schedule that significantly limits availability<sup>29</sup>.

[51] The Claimant's schooling was a personal condition that restricted and could have overly limited his chances of returning to the labour market.

[52] I cannot ignore the fact that the Claimant was required to attend daily classes between 9:00am and 1:30pm, Mondays to Fridays. Having to be present for daily classes at set times in the mornings and afternoons was a personal condition that could have unduly limited the Claimant's return to the labour market. It meant he was only available for work to the extent that it did not conflict with his course schedule. This significantly reduced the jobs he could apply for or accept, because an employer would have to be willing to allow him to work around his mandatory, in-person classes.

[53] This means he has not satisfied the third *Faucher* factor.

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<sup>29</sup> *Bertrand (1982), 1982 Carswell Nat 466 (CA)*. See also the recent decision of the Social Security Tribunal's Appeal Division in AD-21-107 (issued June 24, 2021).

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

[54] The Claimant must satisfy all 3 of the *Faucher* factors to prove availability pursuant to section 18 of the *Employment Insurance Act*.

[55] Based on my findings, he has not satisfied any of them. I therefore find that the Claimant has not shown that he was capable of and available for work, but unable to find a suitable job between July 12, 2021 and October 1, 2021. This means he is not entitled to EI benefits while he was taking his course.

**Issue 3: The Overpayment**

[56] The Claimant owes an overpayment due to the retroactive disentitlement imposed on his claim.

[57] I cannot waive the overpayment on his claim. The law simply does not empower the Tribunal to relieve him from liability for the overpayment<sup>30</sup>, and I cannot ignore the law, even if the outcome may seem unfair<sup>31</sup>.

[58] Unfortunately for the Claimant, he has not proven that he was available for work within the meaning of the law from July 12, 2021 to October 1, 2021. This means he was not entitled to EI benefits during this periods and must repay the benefits he received.

[59] The Claimant is left with 2 options:

- a) He can ask the Commission to consider writing off the debt because of undue hardship<sup>32</sup>. If he doesn't like the Commission's response, he can appeal to the Federal Court of Canada.

*or*

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<sup>30</sup> Sections 43 and 44 of the *Employment Insurance Act* establish liability for an overpayment on a claimant.

<sup>31</sup> *Granger v. Canada (CEIC)*, [1989] 1 S.C.R. 141

<sup>32</sup> Section 56 of the *Employment Insurance Regulations* gives the Commission broad powers to write off an overpayment when it would cause undue hardship for a claimant to repay it.

- b) He can contact the Debt Management Call Centre at CRA at 1-866-864-5823 about a repayment schedule or for other debt relief<sup>33</sup>.

## **Conclusion**

[60] The Claimant has not proven that he was available for work within the meaning of the law from July 12, 2021 to October 1, 2021. I therefore find that he is disentitled to EI benefits because he has not proven his availability for work while he was taking his training course.

[61] This means that the disentitlement imposed on his claim from July 12, 2021 to October 1, 2021 must remain.

[62] The appeal is dismissed.

**Teresa M. Day**  
**Member, General Division – Employment Insurance Section**

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<sup>33</sup> The telephone number is found on the Notice of Debt and account statements sent to the Claimant for the overpayment.