



Citation: *AN v Canada Employment Insurance Commission*, 2022 SST 506

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

**Decision**

**Appellant:** A. N.

**Respondent:** Canada Employment Insurance Commission

---

**Decision under appeal:** Canada Employment Insurance Commission  
reconsideration decision (451057) dated February 4, 2022  
(issued by Service Canada)

---

**Tribunal member:** John Noonan

**Type of hearing:** Teleconference

**Hearing date:** April 4, 2022

**Hearing participants:** Appellant  
Appellant's Witness

**Decision date:** April 13, 2022

**File number:** GE-22-585

## Decision

[1] The appeal is dismissed on the issue of availability and allowed on the issue regarding penalty.

## Overview

[2] The Appellant, A. N., a worker in ON, was upon reconsideration by the Commission, notified that it was unable to pay her Employment Insurance benefits from September 27, 2020 because you could not prove your availability for work. which is , a condition of being eligible to receive benefits and we have concluded that you knowingly made false representations resulting in a non-monetary penalty The Appellant maintains that she feels it is unfair that she should have to pay back benefits because the claim was approved and she did not know she had to be looking for and willing to accept employment (GD3-163 -164, GD3-167). The Tribunal must decide if the Appellant has proven her availability pursuant to sections 18 and 50 of the Employment Insurance Act (the Act) and sections 9.001 and 9.002 of the Employment Insurance Regulations (the Regulations) and should the notice of violation issued pursuant to the Act stand?

## Issues

[3] Issue # 1: Was the Appellant available for work?

Issue #2: Was she making reasonable and customary efforts to obtain work?

Issue #3: Did she set personal conditions that might unduly limit her chances of returning to the labour market?

Issue # 4. Were there any misrepresentations made by the Appellant, either by knowingly providing false or misleading information to the Commission or by withholding correct information which should result in a penalty pursuant to section 38 and an overpayment being assessed on this claim? If so should the notice of violation issued pursuant to the Act stand?

## Analysis

[4] The relevant legislative provisions are reproduced at GD-4.

[5] In order to be found available for work, a claimant shall: 1. Have a desire to return to the labour market as soon as suitable employment is offered, 2. Express that desire through efforts to find a suitable employment and 3. Not set personal conditions that might unduly limit their chances of returning to the labour market. All three factors shall be considered in making a decision. **(Faucher A-56-96 & Faucher A-57-96)**

[6] **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 in irrelevant factor or ignored a relevant factor or acted in a discriminatory manner: **Attorney General of Canada v Purcell, A-694-94.**

### Issue 1: Was the Appellant available for work?

[7] No.

[8] In this case, by the Appellant's statements and submissions, she was not seeking full time work due to her being at home providing childcare for her son who was too young to be vaccinated and there was very limited daycare available in her area..

[9] However she testified that when things closed due to the pandemic, she received CERB which converted to regular EI.

[10] As an Early Childhood Educator there were limited opportunities for work in her field due to closures.

[11] She applied for three positions in June of 2020, and was interviewed for one but did not receive a job offer.

[12] She testified that she needed to be vaccinated to return to her former employer.

[13] She became very stressed in July of 2021 when her father passed. She had to refuse employment due to not being ready to return and she informed her employer that she would contact them when she felt ready.

[14] In the meantime her family moved into a new house and she was left to do this on her own as her husband had to deal with a family emergency. Once the move was complete in September, 2021 she sought employment and started work shortly thereafter.

[15] I find that the actions or lack thereof on the part of the Appellant during the period in question do not show a sincere desire to return to the labour market as soon as suitable full time employment is offered.

## **Issue 2: Was he making reasonable and customary efforts to obtain work?**

[16] No.

[17] As per her submissions and testimony at the hearing, the Appellant has not been conducting a comprehensive job search during the period in question.

[18] The Appellant's submissions and testimony at the hearing indicate no on-going effort on the Appellant's part to obtain employment during this period except for three applications in June of 2020.

[19] The Federal Court has ruled that a comprehensive and on-going job search is a condition of being eligible to receive EI benefits **even if such a search seems futile.**

[20] The Court held that *the burden on the claimant to prove availability is a statutory requirement of the legislation that cannot be ignored. In order to obtain employment insurance benefits a claimant must be actively seeking suitable employment, even if it*

*appears reasonable for the claimant not to do so. Canada (AG) v. Cornelissen-O'Neil, A-652-93; De Lamirande v. Canada (AG), 2004 FCA 311*

[21] I find that the Appellant has not, shown that she was making reasonable and customary efforts to obtain suitable employment.

**Issue 3: Did she set personal conditions that might unduly limit her chances of returning to the labour market?**

[22] Yes.

[23] Again, the Appellant's submissions and testimony at the hearing indicate no on-going effort on the Appellant's part to obtain employment.

[24] She decided to stay home and provide childcare for her son. Both the Appellant and her witness, her husband, mentioned that the Prime Minister asked all persons to stay home to curb the spread of the Covid virus. This applied of course to those who could work from home and those who did not have to leave their homes unnecessarily.

[25] The Appellant, as attested to by her husband, made the choice to stay at home to provide childcare. This was a personal choice on her part.

[26] She submitted that that she understood that she was supposed to search for a job during the period she received Employment Insurance Benefits; however, she decided to stay at home and not conduct an ongoing job search, again a personal restriction.

[27] I find that the Appellant has set personal conditions which unduly limited her chances of finding and accepting full time employment, a requirement of being eligible to receive benefits.

[28] By itself, a mere statement of availability by the claimant is not enough to discharge the burden of proof. **CUBs 18828 and 33717**

[29] I find the Appellant, by her submissions and actions, has not met the burden of proof required to show she was in fact available for work during the period in question.

**Issue 4: Were there any misrepresentations made by the Appellant, either by knowingly providing false or misleading information to the Commission or by withholding correct information which should result in a penalty pursuant to section 38 and an overpayment being assessed on this claim? If so should the notice of violation issued pursuant to the Act stand?**

[30] By the Appellant's admission, she was, in fact, unavailable for work due to her choice to remain at home to provide childcare for her son. She was aware of the requirement to be actively seeking employment but chose not to do so.

[31] Again, she failed to report her unavailability on her bi-weekly reports.

[32] The Appellant here read and indicated to the Commission that she did not understand her rights and obligations regarding her claim for benefits. One of these obligations was to report any period where she was unavailable for work. The Commission accepted the Appellant's reasoning regarding this issue and overturned its decision to render a penalty.

[33] I find that the Commission rendered its decision in this case in a judicial manner, as all the pertinent circumstances were considered when choosing to not assess the non monetary penalty.

[34] The Federal Court of Appeal confirmed the principle that the Commission has sole discretion to impose a penalty under section 38 of the Act. The Court further reiterated that no Court, Umpire or Tribunal is entitled to interfere with a Commission's ruling with respect to the penalty, so long as the Commission can prove that it exercised its discretion "in a judicial manner". In other words, the Commission must demonstrate that it acted in good faith, taking into account all relevant factors and ignoring any irrelevant factors. **Canada (AG) v. Uppal, 2008 FCA 388; Canada (AG) v. Tong, 2003 FCA 281**

[35] I have found that the Appellant has shown that there could be an innocent interpretation of her actions when she failed to disclose the correct information relating

to her availability while in receipt of benefits therefore the violation must be, as the Commission has indicated, overturned.

[36] Regarding the Appellant's assertion that "she feels it is unfair that she should have to pay back benefits because the claim was approved and she did not know she had to be looking for and willing to accept employment".

[37] While her claim was approved, the ongoing payment of benefits was based on the Appellant's answers to questions on her bi-weekly reports. On each she indicated that she was available for work when, in fact, it has been shown she was not. It is the fact that she was unavailable when she stated the opposite that caused the disentitlement thereby the overpayment.

[38] Regarding the Appellant's expectation that the Tribunal could cause the overpayment to be waived, this is a decision that can only be made by the Commission, The Tribunal has no jurisdiction in this matter. The Commission's decision regarding same is not appealable to the Tribunal. Only the Commission decision that caused the overpayment is subject to the reconsideration under section 112 of the Employment Insurance Act (the Act). The claimant's responsibility to repay an overpayment and the interest charged on an overpayment is not subject to reconsideration because these are not decisions of the Commission, and the claimant's liability is as a "debtor" as opposed to a "claimant". The claimant's recourse regarding these issues is to seek judicial review with the Federal Court of Canada.

[39] I do not have the authority to reduce or write off the overpayment. The Tribunal does not have the jurisdiction to decide on matters relating to debt reduction or write off. It is the Commission who holds the authority to reduce or write-off an overpayment.

[40] The Appellant requests that the overpayment be erased. I agree with the stated position of the Commission and I note that the law states that their decision regarding writing off an amount owed can't be appealed to the Social Security Tribunal. This means that I cannot determine matters relating to a request for a write-off or reduction of an overpayment.

[41] The Federal Court of Canada has the jurisdiction to hear an appeal relating to a write-off issue. This means that if the Claimant wishes to pursue an appeal regarding her request to write off the overpayment, she needs to do so through the Federal Court of Canada.

[42] As a final matter, I cannot see any evidence in the file that the Commission advised the Appellant about the debt forgiveness program through Canada Revenue Agency (CRA). If immediate repayment of the overpayment pursuant to section 44 of the EI Act will cause her financial hardship, she can call the Debt Management Call Centre of CRA at 1-866-864-5823. She may be able to make alternative repayment arrangements based on her individual financial circumstances.

[43] Neither the Tribunal or the Commission have any discretion or authority to override clear statutory provisions and conditions imposed by the Act or the Regulations on the basis of fairness, compassion, financial or extenuating circumstances.

## **Conclusion**

[44] I find that, having given due consideration to all of the circumstances, the appeal is dismissed on the issue of availability and allowed on the issue regarding penalty.

John Noonan  
Member, General Division – Employment Insurance Section