Citation: *DT v Canada Employment Insurance Commission*, 2022 SST 572

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	D. T.
Representative:	S. T.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (451845) dated January 24, 2022 (issued by Service Canada)

Tribunal member:	Teresa M. Day
Type of hearing:	Teleconference
Hearing date:	March 24, 2022
Hearing participant:	Appellant Appellant's representative
Decision date:	March 28, 2022
File number:	GE-22-393

Decision

[1] The appeal is dismissed.

[2] The Claimant (who is the Appellant in this appeal) has not proven that she was available for work while attending high school full-time. This means that the disentitlement imposed on her claim for employment insurance (EI) benefits cannot be changed.

Overview

[3] The Claimant established a claim for regular EI benefits starting as of November 15, 2020.

[4] On November 28, 2020 and again on September 25, 2021, the Claimant reported that she was a full-time high school student, was obligated to attend scheduled classes Monday to Friday, and would finish her courses rather than accept full-time work.

[5] On December 12, 2021, the Commission imposed a retroactive disentitlement on her claim from November 16, 2020 to June 25, 2021[1] and indefinitely from September 6, 2021[2] because the Claimant was taking a training course and had not proven her availability for work. This resulted in a $14,600 overpayment of EI benefits on her claim.

[6] The Claimant asked the Commission to reconsider. She said that:

- She was working the equivalent of full-time hours between her 2 part-time jobs prior to applying for EI benefits.
- Being a high school student did not affect her ability to work.
- She was available any time after school, including overnight shifts[3].

[1] See decision letter at GD3-25.
[2] See decision letter at GD3-26.
[3] One of her jobs was at a McDonald`s restaurant which was open 24 hours/day, 7 days/week..

- She was always honest about being a student and it's unfair that she's being asked to repay the EI benefits she received.

[7] The Commission was not persuaded and maintained the disentitlements on her claim[4]. The Claimant appealed to the Social Security Tribunal (Tribunal).

[8] 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 job and cannot impose personal conditions that could unduly restrict their ability to return to work.

[9] I have to decide if the Claimant has proven that she was available for work during the period of the disentitlements – while she was attending high school full-time. The Claimant must prove this on a balance of probabilities[5].

[10] The Commission says that the Claimant wasn't available for 2 reasons: because school was her priority – ***not*** seeking and accepting full-time employment; and because she was only available to work around her school schedule, which limited her chances of immediately returning to the labour market.

[11] The Claimant says she had 2 part-time jobs while attending high school, and worked the equivalent of full-time hours between both of these jobs. This shows she was available for work while in school. She also says that she repeatedly advised the Commission that she was a full-time student, and was never told she was not entitled to EI benefits while in school. She argues that the Commission should not have approved her claim or paid her regular EI benefits if it was going to change its mind about her entitlement later on. She says she shouldn't be responsible for the overpayment on her claim because she was honest about her studies and the debt is not her fault.

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[4] The decision letters at GD3-25 and GD3-26 describe the 2 disentitlements on the Appellant's claim: one covers the specific period from November 16, 2020 to June 25, 2021 and the other is an indefinite one starting on September 6, 2021. In effect, the 2 disentitlements cover the times during the Claimant`s benefit period that she was a full-time student.

[5] This means she has to show it is more likely than not that she was available for work while she was in school.

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

Issue

[13] Was the Claimant available for work while she was a full-time high school student between November 16, 2020 to June 25, 2021, and from September 6, 2021?

Analysis

[14] To be considered available for work for purposes of regular EI benefits, the law says the Claimant must show that she is capable of, and available for work and unable to obtain suitable employment[6] .

[15] There is no question that the Claimant was ***capable*** of work during this time[7]. So I will proceed directly to the availability analysis to assess her entitlement to regular EI benefits between November 16, 2020 and June 25, 2021, and from September 6, 2021[8].

[16] 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;

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[9] .

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[6] Section 18(1)(a) of the *Employment Insurance Act* (EI Act).
[7] There is no indication the Claimant was medically unable to work during this period.
[8] The Commission says it used ***both*** sections 18 and 50 of the EI Act to disentitle the Appellant to EI benefits. But I do not think the Commission has proven that it used section 50. I see no evidence that the Commission asked the Claimant about her job search efforts or requested proof she was making reasonable and customary efforts to find a job. There is also no evidence that the Commission told the Claimant that she wasn't making reasonable and customary efforts to find a job or explained why her efforts were insufficient. Therefore, I will not consider section 50 of the EI Act in my analysis, and will limit my consideration to whether the Claimant should be disentitled under section 18 of the EI Act.
[9] See *Faucher v. Canada (Employment and Immigration Commission)*, A-56-96.

[17] These 3 factors are commonly referred to as the "*Faucher* factors", after the case in which they were first laid out by the court. When I consider each of these factors, I have to look at the Claimant's attitude and conduct[10].

[18] 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[11]; and

b) claimants who are in school full-time are presumed to be unavailable for work[12] (this is commonly referred to as the **presumption of non-availability**). This means that decision-makers can assume that students are <u>not</u> available for work when the evidence shows they are in school full-time.

[19] 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 she was available for work based on the *Faucher* factors.

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

[20] No, she has not.

[21] The presumption that students are not available for work only applies to full-time students. Since the Claimant was a full-time student, the presumption applies to her.

[22] She can rebut the presumption by showing that he has a multi-year history of working full-time while also a full-time student[13], or that there are exceptional circumstances that apply to her case[14].

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[10] Two decisions from case law set out this requirement. Those decisions are *Canada (Attorney General) v Whiffen*, A-1472-92; and *Carpentier v Canada (Attorney General)*, A-474-97.
[11] See *Canada (Attorney General) v. Cloutier*, 2005 FCA 73.
[12] See *Canada (Attorney General) v. Cyrenne*, 2010 FCA 349
[13] See *Canada (Attorney General) v. Rideout*, 2004 FCA 304.
[14] See *Canada (Attorney General) v. Cyrenne*, 2010 FCA 349.

[23] The Claimant testified that:

- She started her first job on July 20, 2020 – the day after her 15th birthday.
- It was a part-time job as a hostess at X restaurant where her mother also worked.
- She subsequently picked up a second part-time job at a McDonald's restaurant that was open 24 hours/day, 7 days/week.
- And she started volunteering at a walk-in medical clinic, working at the reception desk and doing other administrative duties.
- She was in Grade 10 from November 16, 2020 to June 25, 2021, and started Grade 11 on September 6, 2021.
- She went to school from 9am to 3:30pm, and did her assignments and homework at lunch.
- School ended at 3:30pm, but her shifts at McDonald's started at 3pm and went to 10 or 11pm. So she "skipped school" and left early to get to work. She also occasionally worked the overnight shift at McDonalds.
- Her shifts at X were also after school and on weekends.
- When the Covid-19 lockdown happened, she temporarily lost her job at X and experienced a big reduction in her hours at McDonald's. She applied for EI benefits after that.

[24] The Claimant started working in July 2020 – during the school summer break. When school resumed in September 2020, she worked for approximately 2 months while also attending Grade 10 full-time – before applying for EI benefits on November 18, 2020. She has not presented evidence of a multi-year history of working full-time while also attending school full-time.

[25] Nor has she shown that her situation is exceptional.

[26] Attending high school was, understandably, the Claimant's main priority. Working was of secondary importance to going to school. The fact that the Claimant had 2 part-time jobs when she started Grade 10 is admirable, but not exceptional. I acknowledge that she is a hard worker and wanted to work as much as possible outside of her class schedule. But these factors are not enough to show that her situation was different from that of any other full-time high school student.

[27] I therefore find that the Claimant has not rebutted the presumption that she wasn't available for work while attending high school. This means she is disentitled to EI benefits while she was in school from November 16, 2020 to June 25, 2021, and starting from September 6, 2021.

[28] But even if I am wrong about presuming that the Claimant was unavailable for work while she was a full-time student, she must still be disentitled to EI benefits. This is because, for the reasons set out below, she has not proven she was available for work according to the legal test set out in paragraph 16 above.

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

[29] No, she was not. The Claimant has not satisfied all of the *Faucher* factors.

Wanting to go back to work

[30] For purposes of the first *Faucher* factor, the Claimant must prove that she wanted to go back to work as soon as suitable employment was available. To do this, she must show that she had a desire to return to work for every working day of her benefit period and that her availability was not unduly limited.

[31] I accept that the Claimant wanted to work as much as possible while also attending high school full-time. But she must demonstrate her availability during **regular business hours** for every working day, and cannot restrict herself to working

irregular hours because of a class schedule that significantly limits her availability[15]. For purposes of proving availability under section 18 of the *Employment Insurance Act* (EI Act), a working day is any day of the week **except Saturday and Sunday**[16]. The Claimant has shown that she had a desire to return to the labour market, but only to jobs that could accommodate her schedule of mandatory daily classes from 9am to 3:30pm, Mondays to Fridays. This is not sufficient to satisfy the first *Faucher* factor.

Making efforts to find a suitable job

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

[33] The Claimant testified that:

- She is a very hard worker, and was willing to work any time she was not in classes.
- Her hours were drastically reduced at McDonald's because the pandemic lockdown. McDonald's could only offer drive-thru service and so fewer workers were required. But she told her boss at McDonald's that she would take "any shifts at all".
- She was also looking for other jobs to make up for the loss of her job at X and her reduced hours at McDonald's. Every weekend she went around to fast food places and dropped off resumes, but there were no jobs.
- She also checked back with the walk-in clinic she had volunteered at. Prior to lockdown, they had actually hired her to continue working for them. But there was nothing there either.

[15] This principle is set out in the decision of *Duquet v. Canada (Employment and Immigration Commission),* 2008 FCA 313.
[16] Section 32 of the *Employment Insurance Regulations*.

- She did not keep a log of her job search efforts because she did not understand that was a requirement for benefits.

[34] I acknowledge that the Claimant's lay-off from X was temporary, and I accept that she actively kept in touch with her manager at McDonald's and expressed her on-going willingness to work.

[35] But the courts have said that maintaining the employment tie and remaining part of the work force part-time while going to school does not necessarily make a person available for work[17]. The courts have also said that waiting to be recalled to employment is not sufficient to prove availability[18]. Only claimants who are actively looking for employment can receive regular EI benefits. This is the case even if there is a possibility of recall or the period of unemployment is unknown or relatively short-term.

[36] I also accept that the Claimant was trying to find another part-time job to make up for the hours she lost due to the lockdown.

[37] But the courts have said that a claimant's job search efforts must be sufficient to prove an active, on-going[19] and wide-ranging job search directed towards finding suitable employment[20]. The Claimant's job search efforts were not directed towards finding full-time employment during regular business hours for every working day of her benefit period. This means the Appellant was not doing enough to find suitable employment while she was in school.

[38] I therefore find that the Claimant has not satisfied the second *Faucher f*actor.

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[17] *Canada (Attorney General) v. Gagnon*, 2005 FCA 321, *Canada (Attorney General) v. Loder*, 2004 FCA 18, *Canada (Attorney General) v. Rideout*, 2004 FCA, *Canada (Attorney General) v. Primard* (2003) 2003 FCA 349 (CanLII), 317 N.R. 359 (FCA), *Canada (Attorney General v. Bois*, 2001 FCA 175.
[18] *Canada Employment Insurance Commission v GS*, 2020 SST 1076; *D. B. v Canada Employment Insurance Commission*, 2019 SST 1277; *Canada (Attorney General) v Cornelissen-O'Neill*, A-652-93; *Faucher v Canada (Employment and Immigration Commission)*, A-56-96; *Canada (Attorney General) v Cloutier*, 2005 FCA 73; *DeLamirande v Canada (Attorney General)*, 2004 FCA 311; *CUB 76450; CUB 69221; CUB 64656; CUB 52936; CUB 35563.*
[19] A claimant must be searching for work for ***every working day of their benefit period***.
[20] Suitable employment is generally considered to be full-time employment.

Unduly limiting chances of going back to work

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

[40] 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[21].

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

[42] I cannot ignore the fact that the Appellant was required to attend daily classes between 9:00am and 3:30pm, 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 she was only available for work to the extent that it did not conflict with her school schedule. This significantly reduced the jobs she could apply for or accept, because an employer would have to be willing to allow her to work around her school schedule.

[43] I therefore find that the Claimant has not satisfied the third *Faucher* factor.

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

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

[45] Based on my findings, she has not satisfied any of them. I therefore find that the Claimant has not shown that she was capable of and available for work, but unable to find a suitable job from November 16, 2020 to June 25, 2021, and starting from

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[21] *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)*.

September 6, 2021. This means she is not entitled to EI benefits while she was in school.

Issue 3: The Overpayment

[46] The Claimant has a large overpayment due to the retroactive disentitlement imposed on her claim[22].

[47] She has expressed her frustration about this[23], pointing out that she checked with Service Canada about her eligibility prior to applying and never hid the fact that she was a full-time student when she completed her bi-weekly claimant reports.

[48] The Claimant testified at the hearing that:

- Her mother was "on EI" and friends told her mother that she (the Claimant) could get EI as well.
- She and her mother called Service Canada to ask about the Claimant's eligibility. They were on the call together. Her mother asked "6 or 7 times" if a high school student could get EI. The answer was "yes" every time.
- Based on this assurance, they decided the Claimant would apply for EI benefits.
- She was always honest about her hours of school and the type of work she had prior to lockdown.
- Her whole family suffered during lockdown and experienced financial difficulties.
- The money she received was used for family expenses.
- She's 16 years old and cannot repay a $14,600 debt.

[49] The Claimant does not understand why she was approved for (and continued to receive) EI benefits if she was not entitled to them while she was in school. She believes it is unfair to make her repay the EI benefits she received.

[50] It's easy to understand why the Claimant is unhappy with how her claim was managed. The Commission's failure to raise any concerns about her availability and communicate them to her in a timely fashion was both problematic and prejudicial. She now owes a large overpayment, and repaying this debt will be a significant hardship – if not an impossibility for her.

[51] Unfortunately, the fact that the Commission failed to put a stop on her benefits does not affect her rights or duties under the EI Act. This includes the obligation to prove her availability for work while in receipt of regular EI benefits. And while I admire the Claimant's initiative, work ethic and dedication to her studies, none of these exemplary qualities eliminate the need for her to satisfy the requirements in the EI Act in order to receive EI benefits.

[52] I sympathize with the Claimant about the large overpayment, but I do not have any discretion to waive it – no matter how compelling I find her argument or circumstances to be. The law simply does not empower the Tribunal to relieve her from liability for the overpayment[24], and I cannot ignore the law, even if the outcome may seem unfair[25]. This means that, even though she was honest and acted with good faith from the beginning, I cannot reduce or remove the overpayment on her claim.

[53] Unfortunately for the Claimant, she has not proven that she was available for work within the meaning of the law from November 16, 2020 and June 25, 2021, and starting from September 6, 2021. This means she was not entitled to EI benefits during these periods and must repay the benefits she received.

[54] The Claimant is left with 2 options:

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[22] She testified she that she has received a Notice of Debt for $14,600.
[23] In her Notice of Appeal.
[24] Sections 43 and 44 of the *Employment Insurance Act* establish liability for an overpayment on a claimant.
[25] *Granger v. Canada (CEIC)*, [1989] 1 S.C.R. 141

a) She can ask the Commission to consider writing off the debt because of undue hardship[26]. If she doesn't like the Commission's response, she can appeal to the Federal Court of Canada.

or

b) She can contact the Debt Management Call Centre at CRA at 1-866-864-5823 about a repayment schedule or for other debt relief[27].

Conclusion

[55] The Claimant has not proven that she was available for work within the meaning of the law from November 16, 2020 and June 25, 2021, and starting from September 6, 2021. I therefore find that she is disentitled to EI benefits because she has not proven her availability for work while she was attending high school full-time.

[56] This means that the disentitlement imposed on her claim between November 16, 2020 and June 25, 2021, and starting from September 6, 2021, must remain.

[57] The appeal is dismissed.

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

[26] 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.
[27] The telephone number is found on the Notice of Debt and account statements sent to the Claimant for the overpayment.