Citation: *LH v Canada Employment Insurance Commission*, 2022 SST 497

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	L. H.
Representative:	Christine Zaraa
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (452599) dated February 22, 2022 (issued by Service Canada)

Tribunal member:	Sylvie Charron
Type of hearing:	Teleconference
Hearing date:	April 13, 2022
Hearing participant:	Appellant ’s representative
Decision date:	May 17, 2022
File number:	GE-22-798

Decision

[1] The appeal is dismissed. The Appellant hasn't shown that she was available for work while in school. This means that she can't receive Employment Insurance (EI) benefits.

Overview

[2] The Canada Employment Insurance Commission (Commission) decided that the Appellant was disentitled from receiving EI regular benefits from March 28, 2021 to June 23, 2021 because she wasn't available for work, and from September 1, 2021 onwards for the same reason, because she is in school full time. The Appellant was retroactively disentitled from receiving EI benefits, creating an overpayment.

[3] An Appellant has to be available for work to get EI regular benefits. Availability is an ongoing requirement. This means that an Appellant has to be searching for a job.

[4] The Appellant does not agree with the overpayment of $6,588.00. She says that the Commission should not have paid her if they knew that she was not eligible.

[5] I have to decide whether the Appellant has proven that she available for work. The Appellant has to prove this on a balance of probabilities. This means that she has to show that it is more likely than not that she was available for work.

Matter I have to consider first

The Appellant wasn't at the hearing

[6] The Appellant wasn't at the hearing. The hearing went ahead without the Appellant, with the Appellant's Representative giving evidence in the matter.

Issue

[7] Was the Appellant available for work while in school?

Analysis

[8] Two different sections of the law require appellants to show that they are available for work. The Commission decided that the Appellant was disentitled under both of these sections. So, she has to meet the criteria of both sections to get benefits. As well, the Federal Court of Appeal has said that Appellants who are attending school full time are presumed to be unavailable for work.

[9] First, the *Employment Insurance Act* (Act) says that an Appellant has to prove that they are making "reasonable and customary efforts" to find a suitable job.[1] The *Employment Insurance Regulations* (Regulations) give criteria that help explain what "reasonable and customary efforts" mean.[2]

[10] Second, the Act says that an Appellant has to prove that they are "capable of and available for work" but aren't able to find a suitable job.[3] Case law gives three things an Appellant has to prove to show that they are "available" in this sense.[4]

[11] The Commission decided that the Appellant was disentitled from receiving benefits because she wasn't available for work based on these two sections of the law.

[12] In addition, the Federal Court of Appeal has said that Appellants who are in school full-time are presumed to be unavailable for work.[5] This is called "presumption of non-availability." It means we can suppose that students aren't available for work when the evidence shows that they are in school full-time.

[13] I will start by looking at whether I can presume that the Appellant wasn't available for work. Then, I will look at whether she was available based on the two sections of the law on availability.

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[1] See section 50(8) of the *Employment Insurance Act* (Act).
[2] See section 9.001 of the *Employment Insurance Regulations* (Regulations).
[3] See section 18(1)(a) of the Act.
[4] See *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96.
[5] See *Canada (Attorney General) v Cyrenne*, 2010 FCA 349.

Presuming full-time students aren't available for work

[14] The presumption that students aren't available for work applies only to full-time students.

The Appellant doesn't dispute that she is a full-time student

[15] The Appellant agrees that she is a full-time student, and I see no evidence that shows otherwise. She had stated this fact on her application for benefits and in all her interactions with the Commission. So, I accept that the Appellant is in school full-time.

[16] The presumption applies to the Appellant.

[17] Documents in the file confirm that the Appellant is studying full time. She does not have a history of working full time while in high school. The Appellant has looked for part-time work for after school hours and on weekends.[6] This was confirmed by the Appellant's Representative in testimony.

[18] The Appellant does not dispute that she is not available for full-time work; there is no need to examine the factors related to sections 18 and 50 of the law, or the regulations or the case law flowing from them.

[19] The Appellant says that she was honest in providing all the required information to the Commission that confirmed that she is not available for a full-time job. She was only 15 at the time she applied for benefits and was in high school.

[20] The Appellant also submits that the Commission should not have given her benefits when it knew that she was not entitled to them. It is the Commission's error that caused the Appellant to be overpaid; she should not be penalized for the fact that the Commission made a mistake.

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[6] See GD3-23, 28, 35 and 44.

[21] The Commission says that the Appellant has not proven her availability for work. As a result, she is disentitled from receiving EI benefits for the periods referred to above in paragraph 2.

[22] The Commission also says that as part of the PART VIII.5 of the Temporary Measures to Facilitate Access to Benefits, section 153.161 of the Act 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 the benefit period.

[23] I find that there is no dispute as to whether the Appellant was available for full-time work. She was not. The Appellant has stated many times that she was in school full-time and was not willing to interrupt her studies to work full-time. There is no need to analyse the factors provided in the Regulations or in case law. The availability question is not the real basis of the problem; the Commission was informed from the beginning that the Appellant was **not** available.

[24] The Appellant maintains that the issue is that the Commission knew she was not available and paid her benefits nevertheless. Now, she has an overpayment and she feels it is not her fault but the Commission's.

[25] I find that there is also no dispute that the Commission has the power to go back to an Appellant and request proof of availability retroactively, as stated in section 153.161 of the Act. Again, that is not the issue here; the Commission **knew** that the Appellant was not available for full-time work from the day the Appellant filed her claim. Yet, the Commission paid benefits anyways, even with all the correct information provided by the Appellant. There is in fact no need to invoke the application of section 153.161; there was no new information to uncover as regards availability.

[26] The issue is that the Commission established this claim without adjudicating whether the Claimant was actually entitled to benefits. This caused her to receive money she was not entitled to get and put her into a state of financial hardship because the Commission now wants the money back.

[27] I note that the Commission has internal policies to address situations where an overpayment was caused by its error. It appears that establishing this claim was an error. The Commission is encouraged to consider its policies and how they may apply to the Appellant's case

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

[28] Based on my findings above, I find that the Appellant hasn't shown that she was capable of and available for work but unable to find a suitable job.

[29] While I sympathize with the Appellant who now faces a large overpayment, I do not have the power to erase it, no matter how compelling the circumstances. The law does not allow me to do so, even if I find that the circumstances are unfair. This means that even though the Appellant was honest with the Commission and acted in good faith from the start, I cannot remove the overpayment. The overpayment remains the Appellant's liability.[7]

[30] The Appellant might want to consider the following options:

- She can appeal this decision to the Appeal Division of the Tribunal. While the Appeal Division cannot erase the debt, they can ask the Commission to attend a settlement conference;

- She can ask the Commission to consider writing off the debt because of undue hardship.[8] Should the Commission's response not be positive, the Appellant can appeal to the Federal Court of Canada;

- She can contact the Debt Management Call Centre at CRA at 1-866-864-5823 about a repayment schedule or other debt relief measure.[9]

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[7] Sections 43 and 44 of the *Employment Insurance Act* state that a claimant bears the responsibility for an overpayment.
[8] Section 56 of the *Employment Insurance Regulations* gives the Commission broad powers to write off an overpayment when it would cause undue hardship were a Claimant to repay it.
[9] That's the phone number found on the Notice of Debt that was sent to the Appellant.

Conclusion

[31] The Appellant hasn't shown that she was available for work within the meaning of the law. Because of this, I find that the Appellant can't receive EI benefits.

[32] This means that the appeal is dismissed.

Sylvie Charron
Member, General Division – Employment Insurance Section