Citation: *SS v Canada Employment Insurance Commission*, 2022 SST 750

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	S. S.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (437323) dated October 28, 2021 (issued by Service Canada)

Tribunal member:	Amanda Pezzutto
Type of hearing:	Teleconference
Hearing date:	February 1, 2022
Hearing participant:	Appellant
Decision date:	February 10, 2022
File number:	GE-21-2535

Decision

[1] S. S. is the Claimant. The Canada Employment Insurance Commission (Commission) says he isn't entitled to Employment Insurance (EI) regular benefits because he hasn't proven that he was available for work. The Claimant is appealing this decision to the Social Security Tribunal (Tribunal).

[2] I am allowing the Claimant's appeal in part. I find that he hasn't proven that he was available for work while he was in school. This is because he had personal conditions that unduly limited his chances of returning to work. But I find that he has proven that he was available for work during school breaks.

Overview

[3] The Claimant was a full-time student with a study permit. He started collecting EI regular benefits on October 4, 2020. He gave the Commission information about his studies and the Commission paid EI benefits. Then, in May 2021, the Commission reviewed his entitlement. The Commission decided that the Claimant wasn't available for work starting October 4, 2020 and asked the Claimant to repay benefits.

[4] The Commission says the Claimant isn't available for work because he is a full-time student. The Commission says he hasn't overcome the presumption that full-time students aren't available for work. The Commission also says the Claimant's study permit limits the number of hours he can work in a week.

[5] The Claimant disagrees with the Commission's decision. He says he has a history of working while going to school. He says he was looking for work and was willing to work as much as his study permit allowed. He says he was honest with the Commission about his studies and doesn't understand why the Commission wants him to repay benefits.

Matter I have to consider first

I will accept the documents sent in after the hearing

[6] At the hearing, the Claimant spoke about his job search efforts. I asked him to send proof of his job search efforts after the hearing. The Claimant provided this evidence after the hearing.

[7] I am accepting this evidence and using it to make my decision because I asked the Claimant for this evidence. Tribunal staff sent a copy of the Claimant's documents to the Commission, and so I don't think it would be unfair to the Commission if I rely on the Claimant's evidence.

Issue

[8] Was the Claimant available for work?

Analysis

Does the Commission have the power to review the Claimant's entitlement to EI benefits?

[9] The law gives the Commission very broad powers to revisit any of its decisions about EI benefits.[1] But the Commission has to follow the law about time limits when it reviews its decisions. Usually, the Commission has a maximum of three years to revisit its decisions.[2] If the Commission paid you EI benefits you weren't really entitled to receive, the Commission can ask you to repay those EI benefits.[3]

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[1] See *Briere v Canada Employment and Immigration Commission*, A-637-86 on the broad power given by section 52 of the Employment Insurance Act:

> This provision authorizes it to amend a posteriori within a period of three or six years, as the case may be, a whole series of claims for benefit and to make a fresh decision on its own initiative as to entitlement to benefit, and in appropriate cases to withdraw its earlier approval and require claimants to repay what had been validly paid pursuant to such approval.

[2] Subsection 52(1) of the Employment Insurance Act. The law says the Commission has 36 months. See also *Canada (Attorney General) v Laforest*, A-607-87. In this decision, the Federal Court of Appeal held that the Commission has 36 months to reconsider a claim for benefits, make a decision, calculate the overpayment, if any, and notify the claimant of the overpayment.

[3] Subsection 52(3) of the *Employment Insurance Act*.

[10] The law specifically gives the Commission the power to review students' availability for work. The law gives the Commission this review power even if it already paid EI benefits.[4]

[11] In this case, the Commission looked at the EI benefits it paid to the Claimant starting October 3, 2020. According to the Commission's evidence, the Commission started its review on May 13, 2021. The Commission decided that the Claimant wasn't available for work and notified him of its decision by letter dated May 13, 2021. The Commission sent the Claimant a notice about the overpayment on September 15, 2021.

[12] So the evidence shows me that the Commission completed each part of the retroactive review within the time limits allowed by the law. The Commission reconsidered the Claimant's claims for benefits, made a decision, calculated the overpayment, and notified him of the decision and overpayment all within 36 months of the date it originally paid the benefits.

[13] So, I find that the Commission used its power to retroactively review the Claimant's entitlement to EI benefits in a way that respects the law. The law gives the Commission the authority to make a retroactive review, and the Commission followed the guidelines and time limits described in the law when it did its retroactive review.

[14] I understand that the Claimant gave the Commission information about his studies when he completed his biweekly reports. Even though the Commission had information about the Claimant's studies, the Commission waited several months to make a decision. This has led to a large overpayment for the Claimant. I am sympathetic to his circumstances, and I understand that the Commission's delay has caused him financial problems. But I find that the law gives the Commission the authority to make a retroactive decision about the Claimant's availability for work. This means that I can't interfere with the Commission's decision to retroactively review its decision about the Claimant's availability.

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[4] Subsection 153.161(2) of the *Employment Insurance Act*.

The Claimant's availability for work

[15] There are two different sections of the law that say you have to prove that you are available for work.

[16] First, the *Employment Insurance Act* (Act) says that you have to prove that you are making "reasonable and customary efforts" to find a suitable job.[5] The *Employment Insurance Regulations* (Regulations) give criteria that help explain what "reasonable and customary efforts" mean.[6]

[17] Second, the Act says that you have to prove that you are "capable of and available for work" but aren't able to find a suitable job.[7] Case law gives three things you have to prove to show that you are "available" in this sense.[8] Students have to prove their availability for work under this part of the law.[9]

[18] You have to prove that you are available for work on a balance of probabilities. This means that you have to prove that it is more likely than not that you are available for work.

[19] The Commission says it used both sections of the law to refuse EI benefits. So, I must look at both sections of the law when I decide if the Claimant has proven his availability for work.

Reasonable and customary efforts to find a job

[20] There is a section of the law that says that you have to prove that your efforts to find a job were reasonable and customary.[10]

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[5] See section 50(8) of the *Employment Insurance Act* (Act).
[6] See section 9.001 of the *Employment Insurance Regulations* (Regulations).
[7] See section 18(1)(a) of the Act.
[8] See *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96.
[9] Subsection 153.161(1) of the *Employment Insurance Act*.
[10] Section 50(8) of the *Employment Insurance Act* and section 9.001 of the *Employment Insurance Regulations*.

[21] The Commission says it used this section of the law to disentitle the Claimant from receiving benefits.

[22] I disagree. I don't think the Commission has proven that it used this section of the law. I won't use this section of the law when I make my decision about the Claimant's availability for work.

[23] The Commission made its original decision without speaking to the Claimant. The Commission didn't ask the Claimant for a job search record, and the decision letter says the Commission decided that the Claimant wasn't available for work because he was a full-time student. The decision letter doesn't say the Commission made any decisions about the Claimant's job search efforts. During the reconsideration, the Commission didn't ask for a job search record. The Commission didn't warn the Claimant that it decided his job search efforts weren't reasonable and customary.

[24] The Appeal Division has a decision that says I should be careful when I am looking at this section of the law. The Appeal Division says that I should look for evidence showing that the Commission asked the Claimant for proof of reasonable and customary job search efforts. Also, I should look for evidence explaining whether the Commission ever told the Claimant it was using this section of the law to make a decision about his availability.[11]

[25] I am choosing to follow the Appeal Division's decision. This is because it is important for each Tribunal Member to make decisions that are consistent with other decisions from the Tribunal. Following Appeal Division decisions is one way to be sure the Tribunal makes consistent decisions. In this case, I think the Appeal Division decision is helpful. I don't think there is enough evidence showing that the Commission used this part of the law to disentitle the Claimant.

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[11] *LD v Canada Employment Insurance Commission*, 2020 SST 688.

[26] So, I am not going to look at whether the Claimant made reasonable and customary efforts to find a job. I don't think the Commission has proven that it used this section of the law to disentitle the Claimant.

[27] This doesn't mean that I am allowing the Claimant's appeal. I still have to look at the other part of the law that talks about availability for work.

Capable of and available for work

[28] The second part of the law that talks about availability says that you have to prove that you are capable of and available for work but unable to find a suitable job.

[29] Case law gives me three factors to consider when I make a decision about availability for work. This means I have to make a decision about each one of the following factors:

1. You must show that you wanted to get back to work as soon as someone offered you a suitable job. Your attitude and actions should show that you wanted to get back to work as soon as you could;

2. You must show that you made reasonable efforts to find a suitable job;

3. You shouldn't have limits, or personal conditions, that could have prevented you from finding a job. If you did set any limits on your job search, you have to show that the limits were reasonable.[12]

[30] Students have to prove that they are available for work, just like anyone else asking for EI benefits.[13]

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[12] In in *Faucher v. Canada Employment and Immigration Commission*, A-56-96, the Federal Court of Appeal says that you prove availability by showing a desire to return to work as soon as a suitable employment is offered; expressing your desire to return to work by making efforts to find a suitable employment; and not setting any personal conditions that could unduly limit your chances of returning to the labour market. In *Canada (Attorney General) v. Whiffen*, a-1472-92, the Federal Court of Appeal says that claimants show a desire to return to work through their attitude and conduct. They must make reasonable efforts to find a job, and any restrictions on their job search should be reasonable, considering their circumstances. I have paraphrased the principles described in these decisions in plain language.
[13] Section 153.161 of the *Employment Insurance Act*.

– **Wanting to go back to work**

[31] The Claimant has always said that he wanted to work. At the hearing, he said he found a job and started working in March 2021. He said he is still working now.

[32] I believe the Claimant. I find that his statements and his actions show that he wanted to return to work.

– **Making efforts to find a suitable job**

[33] The Claimant says he was trying to find a job. He says he looked for work by applying for jobs in-person and looking online. He provided a job search record showing that he applied for jobs online and in-person.

[34] The Commission says the Claimant hasn't proven that he was doing enough to find a job. But the Commission didn't point to any specific statements or evidence showing that the Claimant wasn't doing enough to find a job. I also note that the Commission didn't ask the Claimant for details about his job search efforts.

[35] So, I disagree with the Commission. I think the Claimant's evidence of his job search efforts is reliable. I find that the Claimant looked for work by contacting employers and applying for jobs. His evidence shows that he started looking for work in October 2020 and continued to make regular job search efforts until March 2021. So, I find that the Claimant has proven that he was making reasonable efforts to find a job.

– **Unduly limiting chances of going back to work**

[36] I find that the Claimant's study permit put serious limits on his chances of returning to work. I also find that his course schedule was a personal condition that unduly limited his chances of returning to work.

[37] The Claimant gave the Commission information about his school schedule. He said he had classes Monday, Tuesday, and Wednesday, from 8:00 a.m. until 2:15 p.m. He told the Commission that he wouldn't change his school schedule for work. He also said that he was only looking for work outside of his class schedule.

[38] At the hearing, the Claimant agreed that he had classes Monday through Wednesday, from 8:00 a.m. until 2:15 p.m. He said his classes were online, but he had to attend classes as scheduled. He said he was available for work outside of class times.

[39] The Claimant said he worked 20 hours a week and went to school full-time in 2019. He said he successfully balanced work and school.

[40] I believe that the Claimant has a history of working while going to school, but I am not convinced that this is enough to show that his studies didn't unduly limit his chances of returning to the labour market. The Claimant was in school for several hours a day, three days a week. This is a significant course load and he wasn't willing to change his schedule if he found a job. He was only looking for work outside of class times. So, I find that his studies were a personal condition that unduly limited his chances of returning to the labour market.

[41] I also have to consider the Claimant's study permit. At the hearing, the Claimant agreed that the conditions of his study permit limited him to working a maximum of 20 hours a week, if he worked off-campus. He said he didn't look for work on campus because everything on campus was closed. He said he didn't want to leave his studies and he wasn't trying to get a work permit that would let him work without any restrictions.

[42] So, I find that the study permit and its restriction to 20 hours a week seriously limited the Claimant's chances of returning to the labour market.[14]

[43] I find that the Claimant's school schedule and study permit both unduly limited his chances of returning to the labour market. But neither of these conditions existed during the Claimant's school breaks. He didn't have classes and his study permit allowed him to work full-time during school breaks. At the hearing, he said the winter break ran from December 23, 2020 to January 10, 2021, and summer break started on

[14] I find the Appeal Division's decision in *IK v Canada Employment Insurance Commission*, 2017 SSTADEI 337 persuasive on the issue of study permits and availability for work.

May 1, 2021. So, I find that the Claimant had no personal conditions that would unduly limit his chances of returning to work during his school breaks.

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

[44] The Claimant has proven that he wanted to work. I find that he made reasonable efforts to find a job. But I find that his school schedule and the limitations of his study permit were conditions that unduly limited his chances of returning to work. He hasn't proven that he was available for work while school was in session.

[45] But I find that the Claimant had no personal conditions that limited his chances of returning to work during school breaks. So, I find that he has proven his availability for work from December 23, 2020 to January 10, 2021, and then again from May 1, 2021.

Conclusion

[46] I am allowing the Claimant's appeal in part. I find that he hasn't proven his availability for work while he was in school. This means he isn't entitled to EI benefits while school was in session. But I find that he has proven that he was available for work during school breaks.

Amanda Pezzutto
Member, General Division – Employment Insurance Section