



Citation: *MS v Canada Employment Insurance Commission*, 2022 SST 791

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

**Decision**

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

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**Decision under appeal:** Canada Employment Insurance Commission reconsideration decision (459784) dated March 17, 2022 (issued by Service Canada)

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**Tribunal member:** John Noonan  
**Type of hearing:** In person  
**Hearing date:** June 23, 2022  
**Hearing participants:** Appellant  
Appellant's Husband  
**Decision date:** July 15, 2022  
**File number:** GE-22-1277

## Decision

[1] The appeal is dismissed.

## Overview

[2] The Appellant, M. S., a former Home Care worker in NL, was upon reconsideration by the Commission, notified that it was unable to pay her Employment Insurance benefits from July 11, 2021 through to February 7, 2022 because she had not proven her availability for work because she was not seeking and available for full time employment, which means she had not proven her availability for work, a condition of being eligible to receive benefits. The Appellant maintains she did not have any option but to indicate sickness on her application as there was no option for “retirement”. 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).

## Issues

[3] Issue # 1: Was the Appellant available for work from July 11, 2021 through to February 7, 2022?

Issue #2: Was she, during that period, 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 during the period in question?

## 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)**

**Issue 1: Was the Appellant available for work from July 11, 2021 through to February 7, 2022?**

[6] No.

[7] In this case, by the Appellant's statements and submissions, she was not seeking full time work due to having retired.

[8] She explained that she in no way intended to be dishonest when filing her EI. She is a senior citizen who is very unfamiliar with online and over the phone services, so when she left her job (retired), she went to the Service Canada office in St. John's to apply for EI. She did not know that she couldn't claim EI once retired and when she passed in her ROE to the person at Service Canada, she explained that she was retiring, and opening an EI claim. At no time during this meeting was she told she was not permitted to draw EI. Her ROE clearly stated retired. Although the person at Service Canada was very nice, she should have told her right then and there that she was ineligible to receive EI.

[9] Her next misunderstanding was reporting EI. She has very rarely filed EI, and in a total mistake on her part, she pressed the wrong option when reporting. She now knows she should have said other, but hit the wrong button. However, this continued for 15 weeks. She never realized she was doing anything wrong. She was never told she was not eligible. She thought she was following the rules. She has worked most of her adult life. She is now 70 years old and sadly back looking for a job to pay this bill. She has no extra income, just her old age pension. She cannot return to home care, as the work is too hard at her age. She has been searching local businesses to find employment but had no luck.

[10] Whether in error or not, the fact is that benefits were paid based on the information supplied by the Appellant regarding sickness and availability from July 11,

2021 through to February 7, 2022 and she was not eligible to receive regular benefits during that period which is the cause of the overpayment.

[11] I find that the actions or lack thereof on the part of the Appellant regarding her seeking employment do not show a sincere desire to return to the labour market as soon as suitable full time employment is offered.

**Issue 2: Was she, during that period, making reasonable and customary efforts to obtain work?**

[12] No.

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

[14] The Appellant's submissions indicate no on-going effort on the Appellant's part to obtain employment.

[15] I find that the Appellant has not shown that she was making reasonable and customary efforts to obtain suitable employment throughout the period in question.

[16] It is noted that the Commission has accepted the Appellant's availability as of February 7, 2022 having determined she was available and seeking employment.

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

[17] Yes.

[18] Again, the Appellant's submissions indicate no on-going effort on the Appellant's part to obtain employment.

[19] She was retired during the period in question, a personal choice on her part.

[20] 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.

[21] At her hearing it came to light that the Appellant here had very limited literacy skills which would normally account for the errors in her reporting but for the fact she was assisted in her reporting by her husband who confirmed same at the hearing.

[22] Everyone has the right to leave / quit an employment but that decision does not automatically qualify one to receive EI benefits. It is inevitable that a person who has the right to receive benefits will be called upon to come forward and prove that he or she satisfies the conditions of the Act.

[23] In this case benefits were allowed by the Commission in error but the Federal Court has ruled that a mistake by the Commission cannot be used as justification for a claimant to receive benefits to which they are not entitled.

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

[25] 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 from July 11, 2021 through to February 7, 2022.

[26] The Appellant is asking that we the Commission reconsider the repayment. This was a mistake, on several levels, but a mistake that will now put her in a position that she will have to choose between repayment or eating.

[27] 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.

[28] Regarding the Appellant's request that the overpayment 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.

[29] 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.

[30] **Application for the Commission to consider a write off must be done by the Appellant.**

[31] 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.

[32] 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.

[33] 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

## **Conclusion**

[34] I find that, having given due consideration to all of the circumstances, the Appellant has not successfully rebutted the assertion that she was not available for work From July 11, 2021 through to February 7, 2022 and as such the appeal regarding availability is dismissed.

John Noonan  
Member, General Division – Employment Insurance Section