



[TRANSLATION]

Citation: *SF v Canada Employment Insurance Commission*, 2022 SST 1096

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant: S. F.
Representative: I. G.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (439560) dated November 22, 2021 (issued by Service Canada)

Tribunal member: Charline Bourque

Type of hearing: Videoconference
Hearing date: January 25, 2022
Hearing participants: Appellant
Appellant's representative

Decision date: January 27, 2022
File number: GE-21-2562

Decision

[1] The appeal is dismissed.

[2] The Claimant hasn't shown that he was available for work while in school. This means that he can't receive Employment Insurance (EI) benefits.

[3] Also, I don't have jurisdiction to decide the issue of write-off. Still, I find that the Commission should make a decision on this issue, taking into account that it had all the study-related information from the moment the claim was filed. Lastly, making a decision would allow the Claimant to appeal to the Federal Court if he wants.

Overview

[4] The Canada Employment Insurance Commission (Commission) decided that the Claimant was disentitled from receiving EI regular benefits from September 28, 2020, to December 18, 2020, and from January 4, 2021, to August 16, 2021, because he wasn't available for work.

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

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

[7] The Commission says that the Claimant wasn't available because he was in school full-time.

[8] The Claimant agrees that he was in school full-time. But he disagrees with the time it took the Commission to make its decision, and he wants the debt written off.

[9] The Claimant says that the Commission knew that he was a full-time student from the moment he applied for benefits. He filled out a questionnaire attesting to his situation several times and contacted the Commission to make sure that his file was in

order and that he was entitled to benefits. But, despite his dealings with the Commission and the forms he completed, it took the Commission over a year to make its decision.

Issue

[10] Was the Claimant available for work while in school?

[11] Can the debt be written off?

Analysis

Issue 1: Was the Claimant available for work while in school?

[12] Two different sections of the law require claimants to show that they are available for work. The Commission decided that the Claimant was disentitled under both of these sections. So, he has to meet the criteria of both sections to get benefits.

[13] First, the *Employment Insurance Act* (Act) says that a claimant 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” means.²

[14] Second, the Act says that a claimant 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 a claimant has to prove to show that they are “available” in this sense.⁴

[15] The Commission decided that the Claimant was disentitled from receiving benefits because he wasn’t available for work based on these two sections of the law.

[16] In addition, the Federal Court of Appeal has said that claimants who are in school full-time are presumed to be unavailable for work.⁵ This is called “presumption of

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.

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.

[17] I will start by looking at whether I can presume that the Claimant wasn’t available for work. Then, I will consider the issue of availability.

Presuming full-time students aren’t available for work

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

– The Claimant doesn’t dispute that he is a full-time student

[19] The Claimant agrees that he is a full-time student, and I see no evidence that shows otherwise. So, I accept that the Claimant is in school full-time.

[20] The presumption applies to the Claimant.

– The Claimant is a full-time student

[21] The Claimant is a full-time student. But the presumption that full-time students aren’t available for work can be rebutted (that is, shown to not apply). If the presumption were rebutted, it would not apply.

[22] There are two ways the Claimant can rebut the presumption. He can show that he has a history of working full-time while also in school.⁶ Or, he can show that there are exceptional circumstances in his case.⁷

[23] The Claimant confirms that he doesn’t work full-time. His employer arranges his schedule around his studies. He confirms that he can work only Friday to Sunday, since he is studying full-time. He confirms that he told the Commission about being a student from the moment he applied for EI, and he doesn’t deny it.

⁶ See *Canada (Attorney General) v Rideout*, 2004 FCA 304.

⁷ See *Canada (Attorney General) v Cyrenne*, 2010 FCA 349.

[24] The Claimant hasn't rebutted the presumption that he is unavailable for work.

Capable of and available for work

[25] I also have to consider whether the Claimant was capable of and available for work but unable to find a suitable job.⁸ Case law sets out three factors for me to consider when deciding this. The Claimant has to prove the following three things:⁹

- a) He wanted to go back to work as soon as a suitable job was available.
- b) He made efforts to find a suitable job.
- c) He didn't set personal conditions that might have unduly (in other words, overly) limited his chances of going back to work.

[26] When I consider each of these factors, I have to look at the Claimant's attitude and conduct.¹⁰

– Wanting to go back to work

[27] The Claimant hasn't shown that he wanted to go back to work as soon as a suitable job was available.

[28] The Claimant is in school, and he is available for work Friday to Sunday so that he can continue studying full-time.

– Making efforts to find a suitable job

[29] The Claimant didn't make enough efforts to find a suitable job.

[30] The Claimant said that he hadn't gone back to work, since he continued his studies during the summer term.

⁸ See section 18(1)(a) of the Act.

⁹ These three factors appear in *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96. This decision paraphrases those three factors for plain language.

¹⁰ See *Canada (Attorney General) v Whiffen*, A-1472-92; and *Carpentier v Canada (Attorney General)*, A-474-97.

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

[31] The Claimant has set personal conditions that might unduly limit his chances of going back to work.

[32] The Claimant is in school full-time, and he hasn't rebutted the presumption that he is unavailable for work.

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

[33] Based on my findings on the three factors, I find that the Claimant hasn't shown that he was capable of and available for work but unable to find a suitable job.

Issue 2: Can the amount payable be written off?

[34] The Claimant says that he told the Commission about his request not to have to pay back the overpayment, since the Commission had all the information related to his studies from the beginning. He also says that he gave this information again several times through the education form and that he repeatedly contacted the Commission to make sure he was entitled to benefits.

[35] First, I note that the Commission hasn't made a decision on the issue of write-off, which would allow the Claimant to appeal this decision to the Federal Court if he wants.

[36] Second, I am of the view that I don't have jurisdiction to decide the issue of write-off.

[37] A party who is dissatisfied with a reconsideration decision of the Commission may appeal the decision to the Social Security Tribunal.¹¹

[38] But a decision of the Commission made under the Regulations respecting the writing off of any penalty owing, amount payable, or interest accrued on any penalty owing or amount payable isn't subject to review.¹²

¹¹ See section 113 of the Act.

¹² See section 112.1 of the Act.

[39] So, I find that I don't have jurisdiction to decide the issue of write-off, as requested by the Claimant, because the Act says that the issue of write-off isn't subject to review. This means that the Claimant has to appeal to the Federal Court, since it has jurisdiction to hear this issue.

[40] I understand the Claimant's confusion over the Commission's delay and the hardship it has caused. But my role is to apply the Act; I can't change it just to please the Claimant, who is dissatisfied. The Act sets out specific criteria a claimant has to meet to be entitled to benefits.¹³

[41] Lastly, as the Claimant points out, I wonder why the Commission put a claimant in a financially difficult situation by asking him to pay back amounts that it awarded him when it had all the relevant information needed to make its decision.

[42] The Claimant filled out the questionnaire about his training several times (October 2020,¹⁴ January 2021,¹⁵ July 2021,¹⁶ and October 2021¹⁷). He says that he repeatedly discussed his situation with the Commission. After he sent the education form, the Commission reactivated his claim for benefits each time. The Commission also told him that he would be able to get benefits because rules had been eased for students. Yet it wasn't until October 2021 that the Commission made a decision about the Claimant's non-availability because of his training.

[43] I understand that the Commission can reconsider its decision, but I find it difficult to understand why it took so long to do so when it had all the relevant information needed from the beginning. This has major consequences for a claimant who finds himself having to repay a debt. In my view, the Commission has to consider these points when making its decision on the issue of write-off.

¹³ See *Granger v Commission (CEIC)*, FCA, A-684-85.

¹⁴ See the Claimant's application for benefits (GD3-16).

¹⁵ See the Commission's Supplementary Record of Claim (GD3-17 and GD3-18).

¹⁶ See the Commission's Supplementary Record of Claim (GD3-19 and GD3-20).

¹⁷ See the Commission's Supplementary Record of Claim (GD3-21 and GD3-22).

Conclusion

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

[45] Also, I don't have jurisdiction to decide the issue of writing off the overpayment. But, I encourage the Commission to make a decision on this issue, taking into account the points mentioned earlier.

[46] This means that the appeal is dismissed.

Charline Bourque
Member, General Division – Employment Insurance Section