[TRANSLATION]

Citation: *CD v Canada Employment Insurance Commission*, 2022 SST 1063

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	C. D.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (432334) dated September 22, 2021 (issued by Service Canada)

Tribunal member:	Josée Langlois
Type of hearing:	In person
Hearing date:	August 15, 2022
Hearing participants:	Appellant Observer
Decision date:	August 29, 2022
File number:	GE-22-671

Decision

[1] The appeal is dismissed.

[2] The Appellant didn't have good cause for the delay in submitting her claimant reports between October 26, 2020, and December 4, 2020. In other words, she hasn't given an explanation that the *Employment Insurance Act* (Act) accepts.

[3] Additionally, the Appellant hasn't shown that she was available for work within the meaning of the Act from September 28, 2020, to April 30, 2021.

Overview

[4] The Appellant applied for regular benefits on October 21, 2020. She indicated that she was a full-time student at Université X.

[5] On July 6, 2021, the Canada Employment Insurance Commission (Commission) decided that the Appellant was disentitled to Employment Insurance (EI) regular benefits as of September 28, 2020, because she was taking training on her own initiative and wasn't available for work. The Commission also decided that the Appellant wasn't entitled to benefits between October 12, 2020, and December 4, 2020, because she hadn't submitted her claimant reports on time and hadn't shown good cause for the delay.

[6] On September 22, 2021, the Commission issued a reconsideration decision. It changed the initial decision on the period of disentitlement and decided that the Appellant wasn't available for work from September 28, 2020, to April 30, 2021, because she was taking training on her own initiative. It also changed the period of disentitlement for the decision on the Appellant's delay in submitting her claimant reports. It decided that the Appellant hadn't shown good cause for the delay in submitting her claimant reports between October 26, 2020, and December 4, 2020. This means she was overpaid benefits.

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

[8] The Appellant argues that the Commission's employees told her that she met the criteria to get benefits and that, if she hadn't gotten EI benefits, she could have gotten benefits under another program. She also says that the overpayment she has to pay back is a lot of money, and she argues that she was available for work while studying full-time.

[9] I have to decide whether the Appellant was available for work within the meaning of the Act between September 28, 2020, and April 30, 2021, and whether she can get EI benefits for that period. The Appellant has to prove her availability 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.

[10] I also have to decide whether the Appellant had a reasonable explanation for the delay in submitting her claimant report during the period from October 26, 2020, to December 4, 2020.

Preliminary matter

[11] A preliminary decision was made in the Appellant's favour. The Appellant submitted her notice of appeal after the deadline for appealing to the Tribunal. She was allowed more time to appeal to give her a chance to present her case.

Issue

[12] Did the Appellant have a reasonable explanation for the delay in submitting her claimant reports between October 26, 2020, and December 4, 2020?

[13] Was the Appellant available for work from September 28, 2020, to April 30, 2021?

Analysis

Delay in submitting claimant reports

[14] The Appellant wants her claim for EI benefits to be treated as though she didn't stop submitting her claimant reports on October 6, 2020.

[15] For a claimant report to be considered as having been submitted earlier than when it was actually submitted, the Appellant has to prove that she had good cause for the delay.[1] 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 had good cause for the delay.

[16] And, to show good cause, the Appellant has to prove that she acted as a reasonable and prudent person would have acted in similar circumstances.[2] In other words, she has to show that she acted reasonably and carefully just as anyone else would have if they were in a similar situation.

[17] The Appellant also has to show that she took reasonably prompt steps to understand her entitlement to benefits and obligations under the Act.[3] This means that she has to show that she tried to learn about her rights and responsibilities as soon as possible and as best she could. If the Appellant didn't take these steps, then she must show that there were exceptional circumstances that explain why she didn't do so.[4]

[18] A claimant has three weeks to make a claim for benefits for a given week.[5] Also, they have to submit a claimant report for every week they want benefits.[6]

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[1] See *Paquette v Attorney General of Canada*, 2006 FCA 309; and section 10(5) of the *Employment Insurance Act* (Act).
[2] See *Attorney General of Canada v Burke*, 2012 FCA 139.
[3] See *Attorney General of Canada v Somwaru*, 2010 FCA 336; and *Attorney General of Canada v Kaler*, 2011 FCA 266.
[4] See *Attorney General of Canada v Somwaru*, 2010 FCA 336; and *Attorney General of Canada v Kaler*, 2011 FCA 266.
[5] Section 26(1) of the *Employment Insurance Regulations* (Regulations).
[6] Section 49 of the Act.

[19] The Commission issued a reconsideration decision on September 22, 2021, indicating that it hadn't changed its decision about the Appellant's delay in submitting her claimant reports. The Appellant didn't submit her claimant reports between October 25, 2020, and December 5, 2020. According to the statements she made to the Commission to explain the delay, she was busy with her studies.

[20] The Appellant confirmed this reason at the hearing. She said she didn't know she had to submit claimant reports.

[21] The Commission argues that the Appellant hasn't given a reason for submitting her reports late, given her admission that she was busy with her studies and put her reports aside to complete them later.

[22] I agree with the Commission. Not knowing or not having the time doesn't justify a late claim.

[23] Even though I understand that the Appellant's studies were time-consuming and that she was very busy, I find that she hasn't shown good cause for submitting her claimant reports late. The Commission's file doesn't show that the Appellant tried to get information about her file between October 25, 2020, and December 5, 2020.

[24] She hasn't shown that she tried to learn about her rights and responsibilities as soon as possible. She also hasn't shown that there were exceptional circumstances that explain why she didn't do so.[7]

[25] The Appellant had to submit her claimant report by December 14, 2020. It wasn't until December 17, 2020, that she contacted the Commission asking to get benefits retroactively.

[26] It is up to the Appellant to contact the Commission or the Service Canada Centre to find out more and to properly submit her claimant reports.

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[7] See *Attorney General of Canada v Somwaru*, 2010 FCA 336; and *Attorney General of Canada v Kaler*, 2011 FCA 266.

[27] The Appellant didn't act as a reasonable person would have acted in the same circumstances. At no time between October 25, 2020, and December 5, 2020, did she contact the Service Canada office to update her file.

[28] Even though she was busy during that period, she hasn't shown that there were exceptional circumstances that explain why she didn't submit her claimant reports.[8]

[29] The Appellant hasn't shown good cause for the delay in submitting her claimant reports between October 26, 2020, and December 4, 2020.

Availability

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

[31] First, the Act says that a claimant has to prove that they are making "reasonable and customary efforts" to find a suitable job.[9] The *Employment Insurance Regulations* give criteria that help explain what "reasonable and customary efforts" means.[10]

[32] 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.[11] Case law gives three things a claimant has to prove to show that they are "available" in this sense.[12]

[33] In addition, the Federal Court of Appeal has said that claimants who are taking training full-time are presumed to be unavailable for work.[13] 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 or taking training full-time.

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[8] See *Attorney General of Canada v Somwaru*, 2010 FCA 336; and *Attorney General of Canada v Kaler*, 2011 FCA 266.
[9] See section 50(8) of the Act.
[10] See section 9.001 of Regulations.
[11] See section 18(1)(a) of the Act.
[12] See *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96.
[13] See *Attorney General of Canada v Cyrenne*, 2010 FCA 349.

[34] I will start by looking at whether it must be presumed that the Claimant wasn't available for work. If the presumption of a claimant's non-availability while in school is rebutted, then I will look at whether the Appellant was available based on the two sections of the Act on availability.

Presuming full-time students aren't available for work

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

– The Claimant is a full-time student

[36] The Commission says that the Appellant has failed to rebut the presumption that she wasn't available for work while taking non-referred training full-time, and that she limited her availability for work.

[37] The Appellant said that she was a full-time student at Université X from August 16, 2020, to April 30, 2021.

[38] On February 6, 2021, the Appellant told the Commission that she was spending 48 hours per week on her studies.

[39] I presume that the courses the Appellant is taking make her unavailable for work within the meaning of the Act.

[40] This presumption of non-availability can be rebutted based on four principles related specifically to return-to-school cases.[14]

[41] These principles are:[15]

- the attendance requirements of the course
- the claimant's willingness to give up their studies to accept employment

[14] *Landry*, A-719-91; *Lamonde*, 2006 FCA 44; *Gagnon*, 2005 FCA 321 (CanLII); *Floyd*, A-168-93.
[15] This principle is explained in the following decision: *Gagnon*, 2005 FCA 321 (CanLII).

- whether the claimant has a history of being employed at irregular hours
- the existence of "**exceptional circumstances**" that would enable the claimant to work while taking courses

[42] 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.

[43] There are two ways the Claimant can rebut the presumption. She can show that she has a history of working full-time while also in school.[16] Or, she can show that there are exceptional circumstances in her case.[17]

[44] The Appellant's statements at the hearing are a little different from her earlier statements, both about the way she attended her courses and about her return to work at the restaurant X.

[45] On September 7, 2021, the Appellant told the Commission that she was spending 48 hours per week on her training, which was very time-consuming.[18] Despite this, she mentioned being available to work for her father's business or in restaurants and stores, but she said that it wasn't possible because of some closures during the COVID-19 pandemic. If the presumption of non-availability is rebutted, then, in the next section, I will look at the Appellant's job search efforts as described since her reconsideration request to the Commission. But it is still appropriate to assess the Appellant's statements for credibility to properly weigh the situation.

[46] The Commission's file indicates that the Appellant was working 7 hours per week before she stopped working in March 2020.[19] During the 2020 summer season, she worked 20 hours per week on average at the restaurant X.

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[16] See *Attorney General of Canada v Rideout*, 2004 FCA 304.
[17] See *Attorney General of Canada v Cyrenne*, 2010 FCA 349.
[18] GD3-41.
[19] GD4-6.

[47] I readily accept that the Appellant might have been available to work more hours per week during the summer season, but the work/school history criterion has to help determine that the Appellant was steadily combining work with school. Even though I understand from her explanations that this was possible in her eyes, I can't accept her explanations on this point.

[48] As she indicated at the hearing, the Appellant says that it was possible for her to work Mondays, Thursdays, and Sundays during the fall 2020 term and that she was also available for work on Fridays starting at noon. For the winter 2021 term, she says she was available for work on Mondays, Saturdays, and Sundays and that she was also available on Wednesdays, Thursdays, and Fridays starting at 11:20 a.m.

[49] At the hearing, the Appellant indicated that she had previously worked at irregular hours while studying. In other words, if it hadn't been for the pandemic, she would have continued working a few hours per week at the restaurant X. Initially, she mentioned working weekends because she works in food service. At the hearing, she also said that she worked 40 hours per week.

[50] The Appellant's statements differ a little on this point too. At the hearing, she argued that she had ample time to work 40 hours per week even though she was studying. I understand from her explanations that she believes she would be able to work while studying.

[51] Although I understand that the Appellant considers herself available for full-time work, the history submitted shows that, in reality, she worked 20 hours per week during the summer season and a lot less at the start of the winter 2020 [*sic*] term.

[52] On the topic of willingness to drop courses to work, the Appellant told the Commission a few times that she would not withdraw from her training if offered a work schedule that conflicted with her courses.

[53] Finally, the last criterion for the presumption of a claimant's non-availability while studying full-time involves showing the existence of "**exceptional circumstances**" that

would enable the Appellant to work while taking courses. Although the COVID-19 pandemic alone isn't an exceptional circumstance under this criterion, the fact that courses are available virtually for a while because of the COVID-19 pandemic can be an exceptional circumstance that would enable a claimant to work while taking courses.

[54] But, in the Appellant's case, this explanation came late. In addition, she initially explained that this was an option she had for just one course.

[55] The Appellant argues that it is unlawful to apply the presumption of non-availability and a serious error given that she can rebut it only if there are exceptional circumstances and that the Commission's decision doesn't take the "Covid" reality into account.[20] She says that, contrary to what the Commission argues, she didn't put herself in a situation that prevented her from working.

[56] So, she explains that one of her courses (X) was pre-recorded and that, for another course (X), she had to attend in person only every other week during the fall 2020 term.

[57] At the hearing, the Appellant also mentioned attending all her courses remotely.

[58] Even though I understand that the situation is disappointing for the Appellant and that she has anxiety, her statements need to be consistent to be credible.

[59] On this point, the Appellant initially said that she could have worked but that stores and restaurants were closed because of the pandemic. Later, she submitted to the Commission and the Tribunal a list of many job search efforts she says she made both in the city of Québec and in X during that period. When questioned at the hearing, she said that she hadn't attended job interviews or gotten calls from employers. This exhaustive list represents her job search efforts.

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[20] GD6-1.

[60] In my view, the Appellant has failed to rebut the presumption that she wasn't available for work while studying full-time.

[61] The facts show that she was a full-time student at Université X during the fall 2020 and winter 2021 terms. Even though she had the option of attending her X course remotely, giving her the flexibility to work, this reality accounts for just a small part of her schedule. So, I accept her written statements about her pre-recorded course, not that she attended all her courses remotely during both of her academic terms. Even considering the course she says she attended every other week, the fact is that, placed in a broader context, this reality doesn't apply to all of her courses. This situation isn't an exceptional circumstance that would enable the Appellant to work while studying.

[62] I also note that the Appellant explained that she sometimes lived in the city of Québec, sometimes in X, and sometimes in X. So, she provided a list of employers she says she approached in different places in Quebec.

[63] Still, I find that the Appellant stopped working because of the pandemic and would have otherwise stayed on. She would have continued working part-time while working [*sic*] full-time. Her employer, the restaurant X, reopened in March 2021. The Appellant told the Commission that she went back to work for that employer on May 28, 2021. And, at the hearing, she explained that she didn't work between March 2021 and May 2021 because the employer didn't have many hours to offer.[21] When speaking with the Commission on September 8, 2021, she said that she hadn't worked for another employer since September 28, 2020, and that she would go back to work for that employer the following week. But, at the hearing, she also said she had gone back to work in March 2021.

[64] The Appellant explained that she had anxiety, and I understand that providing evidence might be stressful for her and explain certain inconsistencies in her statements.

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[21] GD3-42.

[65] But, despite this, the Appellant hasn't shown that exceptional circumstances enabled her to work while studying. She said she was focusing on her studies, which were very time-consuming. She even explained that she didn't have time to contact the Commission for part of her fall 2020 term for this reason.

[66] On this point, the Appellant told the Commission that she was prepared to drop a course, but not to withdraw from her training. Even though there is evidence that she was able to work weekends or some days of the week and that she had the option of attending one or two courses differently at a time that worked best for her, when this evidence is considered against her overall situation, I can't find that she has rebutted the presumption that she wasn't available for work while studying full-time.

[67] The facts show that the Appellant was spending over 25, if not 48 hours per week on her studies. Even though she considers herself available and made a list of potential employers she says she approached, availability doesn't come down to such a list. In her case, the Appellant was a full-time student who attended most of her courses in person, and despite her inconsistent statements on this point, I am of the view that all the evidence and her statements show that it is more likely than not that she wasn't available within the meaning of the Act while studying full-time.

[68] The situations the Appellant has described aren't exceptional circumstances that would have enabled her to work while taking courses. She was busy with her courses, and she didn't intend to withdraw from her training, which was her priority at the time. The Tribunal's Appeal Division has made a number of decisions on this issue and, while I understand the impact a large overpayment has on her financial situation, I sadly can't find otherwise, given the facts presented.[22]

[69] The Appellant hasn't rebutted the presumption that she was unavailable for work between September 28, 2020, and April 30, 2021.

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[22] See, for example, the Tribunal's decision in *Canada Employment Insurance Commission v AG*, AD-22-4, July 25, 2022.

– The presumption isn’t rebutted

[70] Since the presumption isn’t rebutted, this means that the claimant is presumed unavailable. The Appellant was a full-time student, and I find that she wasn’t available for work between September 28, 2020, and April 30, 2021.

[71] However, I note that the Appellant has also argued that the legal test to be applied is whether she was available, not whether she was available enough.

[72] The Act says that a claimant has to show that they made efforts to find a job, and those efforts have to be directed toward finding a job. To show your availability for work, it isn’t enough to list businesses or make an exhaustive list of employers you say you approached.

[73] In this case, given that the presumption of non-availability isn’t rebutted, it isn’t relevant to look at the next criterion.

[74] The Appellant wasn’t available for work within the meaning of the Act between September 28, 2020, and April 30, 2021.

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

[75] I have to apply the criteria for determining whether the Appellant was available for work within the meaning of the Act and whether she can receive benefits for the period from September 28, 2020, to April 30, 2021.

[76] Although it isn’t necessary to look at this criterion, the Appellant has presented some arguments, including the fact that she was available for work six days per week during the winter 2021 term because her classes ended at 11:20 a.m. on Wednesdays, Thursdays, and Fridays.

[77] The Appellant should know that restricting hours of work based on school hours is a situation that unduly limits a claimant’s chances of finding a job. To be able to get EI benefits after successfully rebutting the presumption that they aren’t available for work while studying full-time, a claimant also has to show that they are available for

work each working day of their benefit period. In the Appellant's case, she was a full-time student, she was available for work based on her course schedule, and she was spending 48 hours per week on her studies.

[78] In other words, to be entitled to benefits when the presumption of non-availability while in school full-time is rebutted, the Appellant still has to show that there were no personal conditions that unduly limited her chances of finding a job.

[79] I have to make this decision on a balance of probabilities. Based on the criteria set out in the Act and case law, it is more likely than not that the Appellant wasn't available for work while taking training full-time. The presumption of non-availability isn't rebutted.

[80] But it is obvious that the benefit overpayment the Commission is asking the Appellant to pay back is a lot of money for her. As her father—who was with her—said at the hearing, having such a large debt to repay while in school is significant.

[81] Also, I do understand that, through the evidence, the Appellant wants to show that the Commission made an error when it said she was entitled to benefits when she is now being asked to pay back the money she received. The Appellant explains that she might have been able to get the CRB instead of EI benefits.

[82] At the hearing, the Appellant insisted, as she provided a document that contains a transcript of a recording, that a Commission employee told her that she met all the criteria. As I explained at the hearing, although I understand that this situation is disappointing and I understand the potential impacts of such a decision, my role is to determine whether she was available for work under the Act and whether she had a reason for submitting her reports late in accordance with section 113 of the Act. I have to determine whether she was entitled to EI benefits during that period. As the Commission argues, the Tribunal doesn't have jurisdiction to make a decision on a request for write-off, but the Appellant can make such a write-off request directly to the Commission for the overpayment she owes.

[83] I also note that the Appellant argued at the hearing that she hadn't been able to present her case before the Commission before it made a decision. The Commission's file shows that an employee tried to contact the Appellant but wasn't successful. On July 5, 2021, a Commission employee asked the Appellant to contact her to finalize her file. On September 7, 2021, a Commission employee indicated that the line had suddenly gone dead. The Appellant explains that she would have liked to receive proper notice. However, as I said at the hearing, the Commission's file shows that there were telephone conversations between her and a Commission employee before the reconsideration decision was made. The Appellant also made several statements to the Commission.[23]

[84] Additionally, I note that the Commission was justified in looking into the Appellant's benefit period.[24] Even though I understand the Appellant's arguments that the Commission made an error when it granted her benefits, during that period, measures had been introduced to facilitate the payment of benefits. Benefits were paid quickly, but the Commission was justified in verifying the Appellant's entitlement to benefits after the fact. Still, I agree that other programs might have been better suited to her situation, like student aid. But I can't determine her eligibility for another program.

Conclusion

[85] The Appellant hasn't proven that she had good cause for the delay in submitting her claimant reports throughout the entire period of the delay. This means that her claim can't be treated as though it was made earlier.

[86] The Appellant hasn't shown that she was available for work within the meaning of the Act as of [*sic*] between September 28, 2020, and April 30, 2021. Because of this, I find that he [*sic*] isn't entitled to receive benefits as of that time.

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[23] GD3.
[24] Section 153.161(2) of the Act.

[87] The appeal is dismissed.

Josée Langlois
Member, General Division – Employment Insurance Section