Citation: *JS v Canada Employment Insurance Commission*, 2022 SST 1234

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

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

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (451822) dated January 19, 2022 (issued by Service Canada)

Tribunal member:	Leanne Bourassa
Type of hearing:	Teleconference
Hearing date:	March 8, 2022
Hearing participants:	Appellant
Decision date:	March 22, 2022
File number:	GE-22-403

Decision

[1] The appeal is dismissed. The Tribunal disagrees with the Claimant.

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

Overview

[3] The Claimant was laid off from her job. After a few months of looking for a job, she learned that the diploma program she had begun but not completed was offering courses completely online. She started classes in January 2021 and continued to claim regular EI benefits, reporting that she was in school. When her benefits decreased, she contacted Service Canada and was told to mark in her reports that she was "Available" for work despite being in school.

[4] The Canada Employment Insurance Commission (Commission) decided in November 2021, that the Claimant was disentitled from receiving EI regular benefits from January 19, 2021 to December 31, 2021 because she wasn't available for work. 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.

[5] I have to decide whether the Claimant has proven that she was available for work while she was in school. The Claimant 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.

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

[7] The Claimant disagrees and says that she reported her school information honestly and was given benefits, so she must have been entitled to them. She filed her

reports the way the service agent told her to and she should not pay a penalty for the Commission's errors.

I will accept the documents sent in after the hearing

[8] During the hearing, the Claimant said that she had been looking for jobs, but that the Commission never asked her to provide a job search report. She said she had a list that would show her efforts. I allowed her 5 days to submit the list and the Claimant sent it to the Tribunal. I offered the Commission the opportunity to respond to the document but they did not provide any additional comments.

[9] I have decided to accept this document sent in after the hearing. Since a claimant's efforts to find a job are relevant to the test for availability and the document shows her job search activities, it is relevant in this case.

Issue

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

Analysis

Preliminary questions

- ***No penalty has been imposed on the Claimant***

[11] In her submissions to the Tribunal, the Claimant argued that a penalty can be withdrawn if it was given based on a mistake. She refers to section 41 of the Employment Insurance Act (Act).

[12] Section 41 of the Act deals with situations when a claimant has been imposed a penalty. This is different from being asked to repay benefits that you received that you were not entitled to. In this case, the Claimant has only been asked to repay the benefits the Commission says she is not entitled to because she was not available for work. There is no evidence that a penalty has been imposed on her.

[13] Since there has not been a penalty imposed on the Claimant, there is no penalty to be withdrawn. So section 41 of the Act does not apply to this case.

- ***The Commission is the only party that can make the decision to write off a debt***

[14] During the hearing, the Claimant mentioned that the Commission had the right to cancel a debt from an overpayment if it is uncollectable or would cause undue hardship.[1] This is called a write-off.

[15] The issue in the reconsideration decision before the Tribunal is not based on a request for a write-off. If the Claimant wants to ask for this, she would have to ask the Commission. Only the Commission can make a decision to write-off an overpayment and the law does not allow the Tribunal to review such a decision.[2]

[16] What that means is that, if I decide that the Claimant was not available for work while in school and she was disentitled for benefits, I do not have the authority to cancel any debt because of an overpayment. So I will not be looking at why a debt should be cancelled.

- ***Did the Commission have the authority to review the Claimant's entitlement to EI benefits?***

[17] The Commission's reconsideration decision centers on the question of the Claimant's availability for work. The Claimant told the Tribunal that her application was open and honest about being in school so the Commission should not have paid her benefits if she was not entitled to them. To her, the situation is the result of negligence and mistakes on the part of the Commission. Asking her to repay money paid to her because of their mistakes is malicious.

[18] I do have to review the Claimant's availability for work, but I will start by explaining why the Commission had to power to review the Claimant's claim.

[1] She referenced paragraph 153.1306(1)(f) of the Employment Insurance Act. (Act)
[2] This is set out in section 153.1307 of the Act.

The Commission's authority to review its decisions

[19] The Commission has broad powers under the law to review any of its decisions about EI benefits.[3] There are certain timelines they have to respect when doing this. Usually they have a maximum of three years to go back and review decisions.[4] If the Commission finds that it paid benefits that a claimant wasn't entitled to receive, they ask the claimant to repay the benefits.[5]

[20] The law specifically gives the Commission the power to review students' availability for work. They can do this, even if EI benefits have already been paid.[6]

[21] The Claimant testified that she had given the Commission information about her studies when she filled in several Training Questionnaires. She had filled in her bi-weekly reports in the way she was told to by a Service Canada agent. Even though the Commission had information about her studies, they paid her benefits, then waited several months to review her claim.

[22] From the evidence, I see that the Commission reconsidered the Claimant's claims for benefits, made a decision, calculated the overpayment and notified her of the decision and overpayment within 36 months of the date it originally paid the benefits.

[23] On November 19, 2021, the Commission wrote to the Claimant to tell her they are able to pay her benefits from January 19, 2021 to December 31, 2021 and she would have to repay the benefits she had already received. The Commission was within its timeline to do a retroactive review of the Claimant's entitlement to benefits. So, I find

[3] This power is given by section 52 of the Employment Insurance Act. This provision allows the Commission to retroactively reconsider a claim for benefit and to make a new decision on its own initiative about an entitlement to benefit. They can withdraw previous approvals and require claimants to repay what had been validly paid based on a previous approval. They can do this within three or six years. This power is discussed *in Briere v. Canada Employment and Immigration Commission,* A-637-86.
[4] This is set out in subsection 52(1) of the Employment Insurance Act. This subsection says the Commission has 36 months. This was also confirmed by the Federal Court of Appeal in Canada (Attorney General) v. Laforest, A-607-87.
[5] See subsection 52(3) of the Employment Insurance Act.
[6] See subsection 153.161(2) of the Employment Insurance Act.

that the Commission used its power to retroactively review the Claimant's entitlement to EI benefits in a way that respects the authority given to them in the law.

[24] I find that the law does clearly give the Commission the authority to make a retroactive decision about a Claimant's availability for work while she is in full-time studies. This review can conclude that a Claimant who was paid benefits was not entitled to them.

Did the Commission exercise its authority judicially?

[25] The sections of the law allowing the Commission to reconsider a claim for benefits or a claimant's availability state that the Commission may reconsider the claim. The law does not say the Commission is obligated to take this step.

[26] Since the Commission does have the choice to review a claimant's entitlement to benefits, the decision to do this is discretionary. Case law has told us that the Commission's decision can only be interfered with if it is shown that the Commission did not act judicially when exercising its discretionary authority.[7]

[27] Acting "non-judicially" can mean acting in bad faith, with an incorrect aim, considering non-relevant factors, not considering relevant factors or acting in a discriminatory manner.[8]

[28] I find that the Commission considered relevant factors when it decided to exercise its discretionary authority to review its prior decision to pay the Claimant benefits. The Commission paid the Claimant quickly under temporary measures put in place to facilitate access to benefits during the COVID-19 pandemic. They then had the authority to review that decision.

[29] Subsection 153.161(1) of the EI Act and even the articles of the law that are not related to temporary measures are clear about this issue though. A claimant is not entitled to receive benefits when they are studying full-time, unless they refute the

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[7] See for example the decision in *Canada (Attorney General) v. Purcell*, A-694-94

[8] This is outlined in the Federal Court of Appeal decisions Dunham, A-708-95 and Purcell, A-694-94.

presumption of non-availability and satisfy the obligation to be looking for work. This is not the case in the Claimant's situation.

[30] The Commission considered the following aspects: the Claimant's course schedule, her statements on her training questionnaires, the statements she made that she was only looking for part-time work and she was only looking for work that she could do from home, around her school schedule.

[31] I do not see any evidence that the Claimant was treated in a discriminatory manner. There is no evidence that her particular case was singled out because of any factors related to her personally.

[32] When reviewing the Claimant's availability for work, the Commission did not consider that a penalty could be withdrawn if it was given based on a mistake. This was appropriate, because there was no penalty imposed on the Claimant.

[33] The Claimant mentioned in her notice of appeal that her reports were made based on mistaken information that was provided by the EI agent. The Commission did not base its decision only on the Claimant's bi-weekly reports. Rather, their decision was based on the information the Claimant gave on her training questionnaires and the legal presumptions that full time students were unavailable for work. The Claimant's statements were consistent with what she put in the training questionnaires. I see no evidence that she was penalized because of the way she filled in her reports.

[34] In reviewing the Claimant's case, the Commission exercised its power in a judicial manner because it considered all the relevant elements before making a decision, and did not consider non-relevant factors.

[35] I find that the Commission exercised its discretionary authority in a judicial manner when it reviewed its prior decision to pay benefits to the Claimant.

Availability for work

[36] 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.

- ***The Claimant was not disentitled under subsection 50(8) of the Employment Insurance Act***

[37] In their submissions the Commission states they disentitled the Claimant under subsection 50(8) of the Act. Subsection 50(8) of the Act relates to a person failing to prove to the Commission that they were making reasonable and customary efforts to find suitable employment.[9]

[38] In looking through the evidence, I did not see any requests from the Commission to the Claimant to prove she was making reasonable and customary efforts to find a job. The Claimant testified that the Commission did not ask for a job search report.

[39] The Commission says that they did not ask for a job search since, while speaking to the Commission, the Claimant had confirmed her full time engagement in courses and that she was only looking for part-time jobs because most available jobs conflicted with her school schedule.

[40] In the context of the conversation, this does not seem to be anything more than confirming the Commission's presumption that the Claimant was restricting her search to jobs that worked around her school schedule. A request for a job search must be more specific and include what the Claimant would need to provide to the Commission for it to be a satisfactory job search.

[41] I further find the Commission did not make any detailed submissions on how the Claimant failed to prove to them that she was making reasonable and customary efforts; the Commission only summarized what the legislation says in regard to subsection 50(8) of the Act and what it says about reasonable and customary efforts.

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[9] See section 9.001 of the Employment Insurance Regulations (Regulations).

[42] Based on the lack of evidence the Commission asked the Claimant to prove her reasonable and customary efforts to find suitable employment under subsection 50(8) of the Act, the Commission did not disentitle the Claimant under subsection 50(8) of the Act. Therefore, it is not something I need to consider.

- ***The Claimant was disentitled under paragraph 18(1)(a) of the Employment Insurance Act***

[43] 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.[10] Case law gives three things a claimant has to prove to show that they are "available" in this sense.[11] I will look at those factors below.

[44] In addition, the Federal Court of Appeal has said that claimants who are in school full-time are presumed to be unavailable for work.[12] 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.

[45] I will start by looking at whether I can presume that the Claimant wasn't available for work. Then, I will look at whether she was available based on the three factors set out in the case law about availability.

Presuming full-time students aren't available for work

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

– ***The Claimant doesn't dispute that she was a full-time student***

[47] The Claimant did not argue that she was not a full-time student. From the evidence, in particular the Training Questionnaires that she says she filled out truthfully, I see that the Claimant said she was in school full-time.

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[10] See section 18(1)(a) of the Act.
[11] See *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96.
[12] See *Canada (Attorney General) v Cyrenne*, 2010 FCA 349.

[48] I find that the Claimant was in school full-time. So, the presumption would apply to her.

– ***The Claimant is a full-time student without exceptional circumstances***

[49] 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.

[50] 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.[13] Or, she can show that there are exceptional circumstances in her case.[14]

[51] The Claimant says that she was in a unique position because her program was fully online and the work she was looking for could be done from home. Her schooling was not a hindrance to her being available for work. She was looking for a job she could do while going to school and she could do work while following lectures.

[52] The Commission says the Claimant did not rebut the presumption because she repeatedly stated in her questionnaires her partial availability outside her courses' schedule and her preference of courses over a full-time job.

[53] I find that the Claimant has not rebutted the presumption that full-time students are not available for work.

[54] The Claimant has not shown that she has a history of working full-time while in school. She has also not convinced me that there were exceptional circumstances that applied to her.

[55] While I do accept that the Claimant's school program was entirely online, this is not exceptional. She was still doing 5 classes and outside of class work. Some of her lectures were at a set time and attendance was required. She reported this on her

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[13] See *Canada (Attorney General) v Rideout*, 2004 FCA 304.
[14] See *Canada (Attorney General) v Cyrenne*, 2010 FCA 349.

training questionnaires. She also said that she was remaining available for school from 9-5 everyday.

[56] I also understand that the Claimant was looking for a job she could do from home so she could work while in school. This is also not something that would be unique to her. Her willingness to work while in school is not exceptional.

[57] The Claimant asked me to consider a decision by another Tribunal member that found that the claimant had shown exceptional circumstances, in part because she her classes were distance learning and recorded.[15]

[58] While I am not bound by this decision, I have reviewed and considered it for guidance. I find that it is different from the Claimant's case in two key ways: First, in that case the claimant would adjust her class schedule around her employer's needs. In the present case, the Claimant would have done the opposite, adjusting her work schedule around her school schedule. She indicated on her training questionnaires that she was not able to work a job with 9-5 hours because that is when her classes are. This shows that her priority was her schooling.

[59] Second, in the other case, the Tribunal member noted that the claimant had been working while she was in school in the past. This is not the case in the matter before me. So, I have no evidence to show that the Claimant was used to working irregular hours while going to school.[16]

[60] The Claimant hasn't rebutted the presumption that she was unavailable for work.

– ***The presumption isn't rebutted***

[61] The Federal Court of Appeal hasn't yet told us how the presumption and the sections of the law dealing with availability relate to each other. Because this is unclear,

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[15] A.P. v. C.E.I.C, 2021 SST 690
[16] The Claimant also asked me to consider SST decision W.P. v. C.E.I.C, 2021 SST 803. I have reviewed this decision and note that it has been overturned by the SST Appeal Division (W.P. v. C.E.I.C, 2021 SST 802) . The Appeal Division found that contrary to the General Division decision, the claimant was not available and unable to find a job while attending a training course.

I am going to continue on to decide the sections of the law dealing with availability, even though I have already found that the Claimant is presumed to be unavailable.

Capable of and available for work

[62] I have to consider whether the Claimant was capable of and available for work but unable to find a suitable job.[17] Case law sets out three factors for me to consider when deciding this. The Claimant has to prove the following three things:[18]

a) She wanted to go back to work as soon as a suitable job was available.

b) She has made efforts to find a suitable job.

c) She didn't set personal conditions that might have unduly (in other words, overly) limited her chances of going back to work.

[63] When I consider each of these factors, I have to look at the Claimant's attitude and conduct.[19]

– ***Wanting to go back to work***

[64] The Claimant has shown that she wanted to go back to work as soon as a suitable job was available.

[65] The Claimant said that the reason she was going back to school was to improve her job prospects. The fact that the program was entirely online was attractive to her because she could go to school and still work from home.

[66] The Claimant also testified that she had done about a year and half of her diploma program some time ago. The reason she had stopped was because she took a job. If she had not lost her job, she would still be working.

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[17] See section 18(1)(a) of the Act.
[18] 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.
[19] Two decisions from case law set out this requirement. Those decisions are *Canada (Attorney General) v Whiffen*, A-1472-92; and *Carpentier v Canada (Attorney General)*, A-474-97.

[67] While I find the Claimant wanted to get back to work, to meet the next part of the test, she needs to have demonstrated this desire by making efforts to find a suitable job.

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

[68] The Claimant did not make enough efforts to find a suitable job.

[69] The Claimant's efforts to find a new job included; having her resume professionally reviewed, subscribing to job banks and online job sites, attending networking events, trying to meet people at a professional service firm, applying for jobs and attending interviews.

[70] The Claimant was straightforward and honest when describing her job search efforts. She explained that she was looking for jobs in the marketing field where she had been working, but that it was difficult because most jobs in the field asked for a degree or diploma that she did not have.

[71] Unfortunately, the job search information that the Claimant submitted does not show applications for many jobs. For the period between January and December 2021, the job report shows only 4 job applications were submitted.

[72] The job search information does show that the Claimant did attend 5 to 7 job interviews during the period. However, I note that these jobs appear to be with law firms. The Claimant's studies were in paralegal services, but she had not completed them. This is not consistent with the Claimant's statement that she was looking for marketing positions.

[73] Also, the Claimant said that she was having trouble finding a job that required a degree or diploma. I find that that looking for jobs in the marketing or legal fields when she did not yet have a degree or diploma does not show that the Claimant was looking for suitable jobs.

[74] The Claimant did say at the hearing that after a while she started looking for other types of jobs. She decided she should consider an overhaul because the jobs she was looking at were not considered essential, so there were fewer of them available

because of the COVID-19 pandemic. However, this is not supported by her job search report.

[75] While the Claimant may have made more job search efforts than I can see on her job search report, to meet the test, she would still have had to have been looking for a job without setting any personal conditions that would have limited her chances at finding a suitable job. I will look at that now.

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

[76] The Claimant did set personal conditions that might have unduly limited her chances of going back to work.

[77] The Claimant says she didn't do this because her program was online and she could have worked a remote job while following her lectures. Her thinking was that she could work from home and do schooling and work at about the same time.

[78] The Commission says the Claimant repeatedly stated in her questionnaires her partial availability outside of her courses' schedule and her preference of courses over a full-time job.

[79] I find that the Claimant did limit her chances of going back to work for several reasons. First, she was limiting herself to jobs that could fit with or around her studies. Second, her expectation was to find a job that would have been done from home. Finally, since she was living with someone older, she was avoiding jobs that would have increased her exposure to COVID-19.

[80] The Claimant insists that she could work while doing her studies full-time. However, in all three of her training questionnaires, and in her discussion with the Commission, she said that she could not work the same hours as she did previously because all her courses took place during the 9-5 time period. In her discussion with the Commission, she specifically said that she was looking for part-time work. She told the Commission a 9-5 job was not feasible because of her school schedule. This shows that she was limiting her job search to jobs that could be done outside of school hours.

[81] In her training questionnaires, the Claimant was also asked what she would do if she found full time work but the job conflicted with her course or program. The Claimant never responded that she would drop her course to accept the job. Instead, she would either finish her program or accept the job so long as she could delay the start to allow her to finish the program. This is a condition that would have limited available jobs.

[82] I asked the Claimant about her training questionnaires and she said that she would have put that she could work anytime, but there was no where to say that on the form. She completed it as best as she could. Her expectation was that she could find a marketing job that she could do from home.

[83] Looking for a job that could be done from home, or even partially remotely would limit the Claimant's chances of going back to work. While I understand her objective was to work and finish her program, jobs that would allow her to tailor her work time to her school schedule would be more difficult to find.

[84] Finally, I asked the Claimant if she had looked at jobs outside of the professional sphere. She did consider retail jobs but decided not to pursue them. This was influenced by the global pandemic. She was living with someone who was older and at higher risk, so she did not feel that a retail job would be safe for her.

[85] I understand the Claimants concerns and can even see them as reasonable. But, it was still the Claimant's choice not to consider retail jobs and this choice limited the jobs available to her.

[86] So, since she did have conditions that limited her job search, the Claimant does not meet the third factor of the test.

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

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

Case law referred to by the Claimant – misinformation by the Commission

[88] The Claimant asked me to consider that she only received EI because of misinformation she was given by the EI representative over the phone. She mentions a Tribunal decision where the Appeal Division found that a Claimant was not able to make a deliberate choice between the options available to her because of confusing and incomplete information from the Commission.[20] While I am not bound by other Tribunal decisions, I did review this decision for guidance.

[89] I find that the reasoning in this decision is not applicable to the Claimant's case. In that case, the Appeal Division was considering whether the information on the benefit application form led to the claimant choosing the wrong type of benefits which denied them of benefits they were entitled to. The claimant's entitlement to benefits was not in question, only the type of benefits she had actually elected.

[90] In the case before me, the question is whether or not the Claimant is entitled to benefits. There is no debate that when she first lost her job she was entitled to benefits. When she started school, her situation changed. She did not make a mistake on her original application. It was a change of circumstances that changed her entitlement, not a mistaken choice on her application form.

[91] The Claimant wanted to receive full EI benefits, not the reduced benefits she was paid once she started school. The EI representative told her she would have to be available for work to be entitled to full benefits. So that is what she put on her bi-weekly reports.

[92] Even if the EI representative gave the Claimant misinformation, this does not mean that the Claimant does not have to meet the entitlement rules under the act.[21] As I

[20] K.K. v. C.E.I.C, *2021 SST 182*

[21] The Federal Court of Appeal case *Canada (Attorney General) v. Shaw*, 2002 FCA 325 says that misinformation by the Commission is no basis for relief from the Act.

have analysed above, regardless of what she said in her reports, the Claimant was not available for work while attending school full time.

Conclusion

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

[94] This means that the appeal is dismissed.

Leanne Bourassa

Member, General Division – Employment Insurance Section