



Citation: *WA v Canada Employment Insurance Commission*, 2022 SST 1552

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

Decision

Claimant: W. A.

Commission: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission
reconsideration decision (454034) dated February 9, 2022
(issued by Service Canada)

Tribunal member: Audrey Mitchell

Type of hearing: Videoconference

Hearing date: May 18, 2022

Hearing participant: Claimant

Decision date: May 25, 2022

File number: GE-22-1030

Decision

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

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

Overview

[3] The Canada Employment Insurance Commission (Commission) decided that the Claimant is disentitled from receiving EI regular benefits as of October 4, 2020 because he 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.

[4] I have to decide whether the Claimant has proven that he is 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 is available for work.

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

[6] The Claimant disagrees and says that he always completed his bi-weekly reports truthfully and told the Commission that he was going to school. He said that he trusted that he was eligible for benefits like he was told.

Matter I have to consider first

The Claimant didn't send the Commission's reconsideration decision

[7] The Claimant has to send the Tribunal a copy of the Commission's decision with his notice of appeal.¹ He did not do so. I have a copy of the Commission's file that has this decision. So, I do not need the Claimant to send it.²

¹ Paragraph 24(1)(b) of the *Social Security Regulations*.

² Paragraph 3(1)(b) of the *Social Security Regulations*.

Issue

[8] Is the Claimant available for work while in school?

[9] If so, can the Commission disentitle the Claimant retroactively?

[10] Does the Claimant have to repay the overpayment?

Analysis

[11] 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.

[12] 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.³ The *Employment Insurance Regulations* (Regulations) give criteria that help explain what “reasonable and customary efforts” mean.⁴ I will look at those criteria below.

[13] 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.⁵ Case law gives three things a claimant has to prove to show that they are “available” in this sense.⁶ I will look at those factors below.

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

[15] In addition, the Federal Court of Appeal has said that claimants who are in school full-time are presumed to be unavailable for work.⁷ 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.

³ See section 50(8) of the *Employment Insurance Act* (Act).

⁴ See section 9.001 of the *Employment Insurance Regulations* (Regulations).

⁵ See section 18(1)(a) of the Act.

⁶ See *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96.

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

[16] I will start by looking at whether I can presume that the Claimant wasn't available for work. Then, I will look at whether he was available based on the two sections of the law on availability.

Presuming full-time students aren't available for work

[17] 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

[18] 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.

[19] The presumption applies to the Claimant.

– The Claimant is a full-time student

[20] 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.

[21] 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.⁸ Or, he can show that there are exceptional circumstances in his case.⁹

[22] The Claimant says he always let the Commission know that he couldn't work full-time while in school.

[23] The Commission says the Claimant said many times that he had not looked for work and that his program wouldn't allow him to work full-time while in school.

[24] I find that the Claimant hasn't rebutted the presumption of non-availability.

⁸ See *Canada (Attorney General) v Rideout*, 2004 FCA 304.

⁹ See *Canada (Attorney General) v Cyrenne*, 2010 FCA 349.

[25] The Claimant testified that he has been studying computer programming since September 2020. He said that he has a permanent part-time job, but he was laid off due to the pandemic-related lockdowns.

[26] For the 2020/2021 and 2021/2022 school years, the Claimant took six courses per semester. All of his classes were online, but he had to attend at the time they were scheduled. He said that during school, he could work evenings and weekends, and usually worked 20 to 24 hours per week. The Claimant added that there are some days that he doesn't go to school, so he could work those days as well.

[27] Given the Claimant's testimony, I don't find that he has a history of full-time work while studying. I asked him about the Commission's suggestion that his priority was school since he said he wouldn't leave his course to accept a full-time job. The Claimant agreed with this.

[28] In spite of attending classes online, I don't find that the Claimant has presented exceptional circumstances based on which he can rebut the presumption of non-availability. He says he can't work full-time while in school, but works around his studies. And he was honest in saying that he hadn't looked for work. So, I find that understandably, the Claimant's priority was completing his studies.

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

– **The presumption isn't rebutted**

[30] 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, 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.

Reasonable and customary efforts to find a job

[31] The first section of the law that I am going to consider says that claimants have to prove that their efforts to find a job are reasonable and customary.¹⁰

[32] The law sets out criteria for me to consider when deciding whether the Claimant's efforts are reasonable and customary.¹¹ I have to look at whether his efforts are sustained and whether they are directed toward finding a suitable job. In other words, the Claimant has to have kept trying to find a suitable job.

[33] I also have to consider the Claimant's efforts to find a job. The Regulations list nine job-search activities I have to consider. Some examples of those are the following:¹²

- assessing employment opportunities
- contacting employers who may be hiring
- applying for jobs

[34] The Commission says that the Claimant isn't doing enough to try to find a job.

[35] As noted above, the Claimant was honest about saying that he hadn't looked for work because of the pandemic lockdowns. He testified that there weren't really any jobs available, so he was trying to get more hours at the place where he worked.

[36] The Commission asked the Claimant to provide a job-search record. The Claimant told them he had dropped off a résumé at a grocery store, looking for any job that was available. He applied for another job in May 2021, which he got, but left when his old job offered him steady part-time hours. At the hearing, the Claimant named another company where he applied for a job.

[37] I'm satisfied that the Claimant did some of the job-search activities listed in the Regulations. But by his own admission, he didn't keep trying to find a job. I understand that this is because of the pandemic, and also because he knew that he couldn't work

¹⁰ See section 50(8) of the Act.

¹¹ See section 9.001 of the Regulations.

¹² See section 9.001 of the Regulations.

full-time while going to school. However, this means that I can't find that his efforts to find a job were sustained. I accept that he looked for work between April and July 2021, but that isn't enough from October 4, 2020 to show that he is making reasonable and customary efforts to find work.

[38] The Claimant hasn't proven that his efforts to find a job are reasonable and customary.

Capable of and available for work

[39] I also have to consider whether the Claimant is capable of and available for work but unable to find a suitable job.¹³ Case law sets out three factors for me to consider when deciding this. The Claimant has to prove the following three things:¹⁴

- a) He wants to go back to work as soon as a suitable job is available.
- b) He has made efforts to find a suitable job.
- c) He hasn't set personal conditions that might unduly (in other words, overly) limit his chances of going back to work.

[40] When I consider each of these factors, I have to look at the Claimant's attitude and conduct.¹⁵

– Wanting to go back to work

[41] The Claimant has shown that he wants to go back to work as soon as a suitable job is available.

[42] The Claimant had been working on a permanent part-time basis for a retailer while in school. Due to the pandemic, he received Emergency Response Benefits and was then transferred to EI benefits. Although he testified that he hadn't really been

¹³ See section 18(1)(a) of the Act.

¹⁴ 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.

¹⁵ 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.

looking for work, he said that because of the pandemic-related lockdowns, there weren't any jobs available. He added that he was trying to get more hours at his part-time job.

[43] The Claimant did apply for and get another job. He has since left this job to return to his part-time job.

[44] I find that the Claimant's attitude and actions are that of someone who wants to work. He was honest about saying that he couldn't work full-time while in school. However, this didn't prevent him from applying for a few jobs and continuing with his part-time job once the store re-opened. So, I find that the Claimant has proven that he wanted to return to work.

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

[45] The Claimant hasn't made enough effort to find a suitable job.

[46] I have considered the list of job-search activities given above in deciding this second factor. For this factor, that list is for guidance only.¹⁶

[47] The Claimant's efforts to find a new job included applying for four jobs between April and July 2021. I explained these reasons above when looking at whether the Claimant has made reasonable and customary efforts to find a job.

[48] Those efforts aren't enough to meet the requirements of this second factor. I don't find that applying to four jobs since October 4, 2020 is enough. Again, I understand that the Claimant is in school and that's where his focus is. For part of the time, he had a part-time job, but says he wasn't looking for other work.

[49] I accept the Claimant's testimony that he didn't know that he had to be looking for work even though he was a student. But, this means I don't find he has made enough effort to find a suitable job.

¹⁶ I am not bound by the list of job-search activities in deciding this second factor. Here, I can use the list for guidance only.

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

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

[51] The Commission says the Claimant's responses to questions about his availability show that school was of primary importance to him.

[52] As noted above, I asked the Claimant about the Commission's suggestion that school was a priority for him since he wouldn't leave school to take a full-time job. The Claimant agreed. He said that he didn't realize that he was expected to give up his studies to look for full-time work, especially since he always told the Commission that he couldn't do full-time work while in school.

[53] I have already found that the Claimant hasn't rebutted the presumption of non-availability. I find that in this case, the Claimant's attendance at school was a personal condition that might unduly limit his chances of going back to work. The law doesn't specifically say that claimants have to look for full-time work. But, by giving priority to his studies and being available for work only outside his school schedule, I find that the Claimant limited the pool of jobs available to him to work.

[54] Again, it's understandable that the Claimant would prioritize his studies. However, I find that this means that he set personal conditions that might unduly limit his chances of going back to work.

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

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

Can the Commission disentitle the Claimant retroactively?

[56] The Claimant said that he was told that he would be transitioned from the CERB to EI benefits if he was eligible. So, he thought he was eligible when he got EI benefits. He added that he completed every single report truthfully, reported his availability for work, and said that he was going to school full-time. However, he was never told that

he wasn't eligible. He said that he believed that he was getting benefits that he was entitled to.

[57] The Commission says that the law allows them to impose a disentitlement retroactively for non-availability due to training. The law allows them to verify availability at any time after they pay a claimant benefits.¹⁷

[58] The section of the law the Commission cites is a pandemic-related temporary measure. It says how to apply the normal availability provision for claimants who are in school. I understand the Claimant's belief that the Commission paid him benefits because he was eligible to receive them. However, I find that the law allows the Commission to verify the Claimant's availability by asking him to prove that he was available for work in the period that they had paid him benefits. This is what they did.

[59] The Commission's decision to disentitle the Claimant retroactively is a discretionary one. This kind of decision should not be disturbed unless the Commission failed to act in a judicial manner. This means acting in good faith, having regard to all the relevant factors and ignoring any irrelevant factors.¹⁸

[60] I find from the Commission's file and their representations that they considered the Claimant's application for benefits, his training questionnaire, and statements he made about school and efforts to return to work. The Claimant's testimony was consistent with evidence he gave to the Commission. So I find that the Commission considered only factors relevant to their decision. I do not find that they acted in bad faith. As a result, I don't see any reason to disturb the Commission's decision.

Does the Claimant have to repay the overpayment?

[61] The Claimant said in his notice of appeal that he tried to do the right thing, and is now being punished with an overpayment of \$21,166. He would like to work something out that is reasonable.

¹⁷ See section 153.161 of the Act.

¹⁸ *Canada (AG) v. Purcell* [1996] 1 FC 644.

[62] I asked the Commission about the Reconsideration Policy in their Digest of Benefit Entitlements. This policy is related to a retroactive decision that results in an overpayment. They state that the policy I asked about doesn't apply to this section of the law. They also say that overpayments created using the section of the law referred to above are not subject to write off.

[63] The Commission is right that the law allows them to verify availability of claimants who are going to school, even after they have paid benefits. But in a case where the Claimant was upfront about going to school full-time, it is difficult to understand how or why the Commission would pay him more than \$20,000 in EI benefits, and take more than a year to verify entitlement.

[64] The Commission is also correct that I don't have the authority to deal with any write-off decision. And I have found that the Claimant isn't available for work. So he has to repay the benefits to which he isn't entitled.

[65] The Claimant says that he has no financial means to repay the \$21,166 debt. In the circumstances, I suggest that he do one of two things. The Claimant can formally ask the Commission to consider writing off his debt for reason of undue hardship.¹⁹ If he doesn't like the Commission's response, he can appeal to the Federal Court of Canada.

[66] The second thing the Claimant can do is to arrange a repayment schedule or ask about other debt relief by calling the Debt Management Call Centre at the Canada Revenue Agency at 1-866-864-5823.

¹⁹ Section 56 of the Employment Insurance Regulations gives the Commission broad powers to write off an overpayment when it would cause undue hardship for a claimant to repay it.

Conclusion

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

[68] This means that the appeal is dismissed.

Audrey Mitchell

Member, General Division – Employment Insurance Section