



Citation: *RV v Canada Employment Insurance Commission*, 2022 SST 1544

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

Decision

Appellant:	R. V.
Representative:	D. M.
Observer:	Leanne Hynes, MP's Office
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (456398) dated February 11, 2022 (issued by Service Canada)
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Tribunal member:	John Noonan
Type of hearing:	Teleconference
Hearing date:	April 21, 2022
Hearing participants:	Appellant Appellant's representative
Decision date:	April 29, 2022
File number:	GE-22-827

Decision

[1] The appeal dismissed.

Overview

[2] The Appellant, R. V., a worker / student in, NL, was upon reconsideration by the Commission, notified that it was unable to pay him Employment Insurance benefits from January 4, 2021 because he is taking a training course on his own initiative and has not proven his availability for work. The Appellant maintains that this decision is wrong and unfair to him as he was told by agents before that he was doing everything right in his claim and was entitled to these benefits. (GD3-30 -31) The Tribunal must decide if the Appellant has proven his 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?

Issue #2: Was he making reasonable and customary efforts to obtain work?

Issue #3: Did he set personal conditions that might unduly limit his chances of returning to the labour market?

Analysis

[4] The relevant legislative provisions are reproduced at GD-4.

[5] There is a presumption that a person enrolled in a course of full-time study is not available for work. This presumption of fact is rebuttable by proof of exceptional circumstances (**Cyrenne 2010 FCA 349**)

[6] This presumption applies to an individual who is not available for work when he is taking a full-time course on his own initiative. To rebut this presumption, the Appellant must demonstrate that his main intention is to immediately accept suitable

employment as evidenced by job search efforts, that he is prepared to make whatever arrangements may be required, or that he is prepared to abandon the course. He must demonstrate by his actions that the course is of secondary importance and does not constitute an obstacle to seeking and accepting suitable employment.

[7] A person who attends a full-time course without being referred by an authority designated by the Commission must demonstrate that he is capable of and available for work and unable to obtain suitable employment, and must meet the availability requirements of all claimants who are requesting regular employment insurance benefits. He must continue to seek employment and must show that course requirements have not placed restrictions on his availability which greatly reduce chances of finding employment.

[8] The following factors may be relevant to the determination regarding availability for work:

- (a) the attendance requirements of the course;
- (b) the claimant's willingness to give up his studies to accept employment;
- (c) whether or not the claimant has a history of being employed at irregular hours;
- (d) the existence of "exceptional circumstances" that would enable the claimant to work while taking courses;
- (e) the financial cost of taking the course.

[9] 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?

[10] No.

[11] In this case, by the Appellant's statements and submissions, he was attending a full time Power Engineering program of studies since January 4, 2021.

[12] He confirmed at his hearing was not approved by a designated authority to attend this program.

[13] As per his submissions the Appellant is available upon completion of his daily course schedule as well as on weekends.

[14] I find that the Appellant has not, as per the requirements of the Act, shown that he is / was available for full time employment.

Issue 2: Was he making reasonable and customary efforts to obtain work?

[15] No.

[16] Initially the Appellant stated on more than one occasion that he wished to complete his studies rather than find employment.

[17] The Commission submits that the Appellant stated his previous statement was true he was attending his course and knew he had to be available for and looking for full time work. He confirmed that he had stated in his questionnaire that he would accept a full time job if he could delay the start until his course was completed and he had not applied for any jobs prior to November 2021. It was explained the meaning of immediate availability and the requirements to be looking for full time work. The agent stated that his statements proved his education was his main priority and after his course, he had not looked for work until November 25, 2021. The Appellant's lack of any reasonable job search activity since his school term began could not be considered a reasonable and customary job search as per section 9.001 of the Regulations.

[18] However, testimony at the hearing differs greatly from that interpretation in that the job application referred to was at X in Labrador. At the time, the Appellant was employed on a full time basis since October 1, 2021 but the X position would have paid considerably more had he been successful.

[19] Testimony showed that he was, in fact, seeking employment and had been successful in his efforts albeit upon his course completion. There is no evidence before me that would show a continued effort to obtain employment throughout the entire period whereby the Appellant would leave his course of instruction to accept such employment.

[20] I find that the Appellant has, throughout the entire period of this process, not shown that he was making reasonable and customary efforts to obtain suitable employment.

[21] I find that these actions, or lack thereof, on the part of the Appellant do not show, effective January 4, 2021, a sincere desire to return to the labour market as soon as suitable employment is offered

Issue 3: Did he set personal conditions that might unduly limit his chances of returning to the labour market?

[22] Yes.

[23] The Appellant now states that he would not abandon his course to accept employment and based on his lack of reasonable job search activity and the fact he has invested \$10,000 into his program of studies, I find this to be consistent with the facts before me.

[24] He testified that he sought and found employment immediately upon completion of his program of studies.

[25] This condition combined with the Appellant's initial statement to Service Canada that he was only available outside his required course schedule must be seen as

placing serious restrictions on his availability. **(Duquet 2008 FCA 313) (Gauthier 2006 FCA 40).**

[26] I find that the Appellant in this case was not following a course of instruction approved by an authority designated by the Commission. He was taking the course as a result of his personal decision to attend this program and thus be more eligible for full time employment in his chosen field.

[27] If the claimant was not available for employment because of personal reasons, then it cannot be good cause to refuse suitable employment **(Bertrand A-613-81).**

[28] While this Member supports the Appellant's efforts to complete his education and find suitable employment as a result, I find that he has failed to present evidence of "exceptional circumstances" that would rebut the presumption of non-availability while attending a full time course. He is therefore not eligible to receive benefits.

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

[30] The Commission acknowledges that due to the COVID-19 pandemic, some requirements related to availability for work while attending training programs have been relaxed until September 2021. Prior to 27 September 2020, a claimant's availability for work would have been reviewed by a Commission representative when the claimant indicated he (or she) was involved in a non-referred course of training or instruction. As of 27 September 2020, availability is no longer automatically reviewed when a claimant submits an application for benefits, or a bi-weekly claimant report, and reports that he (or she) is attending non-referred training but is still available for work as required. Rather than being reviewed by an agent, the training is automatically allowed. However, the Commission still has the authority to review a claimant's availability, and impose a retroactive or current disqualification, if it is determined that his (or her) availability for work, as required by the legislation and established jurisprudence, has not been proven. If a claimant makes a statement or provides information that brings his (or her) availability while attending a non-referred course of instruction into question, the

Commission can, pursuant to subsection 50(8) of the Act, “require the claimant to prove that the claimant is making reasonable and customary efforts to obtain suitable employment.”

[31] The Appellant in this case asked a Service Canada Agent why he was singled out when he had done all that was asked of him honestly and had reported his training throughout its entirety without any issue regarding his availability was addressed one way or another,

[32] The Agent’s reply “***Officer explained the Officers in the call centres have access to the client’s file, and when he was calling in earlier, there were no issues on his file for them to mention. The issue did not arise until the client completed the third training questionnaire. Even then, the call centre agents would not have been able to adjudicate the issue as it required a higher level officer to complete the work***”

[33] In other words, had the Appellant not “called in” while on claim his availability would probably not have been in question.

[34] 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.

[35] However, the Tribunal can comment on the circumstances that led to the overpayment.

[36] ***The common characteristics found in the situations and circumstances leading to an overpayment write off, are that the claimant cannot be held directly responsible for the events which led to the overpayment. In other words, the claimant did not play a role in or have any real control over the events except to request and receive the benefits in good faith.***

[37] In this case the Commission approved benefits with the same information it is now using to deny and recoup those benefits. The Appellant here played no role in the

approval process as he had honestly and correctly responded to all questions asked of him.

[38] It is important to prevent situations where a claimant is required to pay for delays or errors caused by the Commission, when the situation is completely out of the claimant's control.

[39] Whether an error or adherence to the above policy of the Commission, the decisions regarding the approval of benefits were out of his control and were completely in the hands of the Commission,

[40] Overpayments that occur when the Commission does not make a decision on a claim within a reasonable period of time may result in a portion of the overpayment being written off. This refers to situations where a claimant provided information, and before the Commission processed the information, benefits were incorrectly paid. The portion of the overpayment that would not have occurred, had there been no delay, can be written off. A Commission error occurs when benefits are wrongly paid because the Commission did not action the claim appropriately (Digest 17.2.0). This may occur when there is information on file which the Commission ignores, or when errors in the calculation of one or more elements of the claim occur (EI Regulation 56(2)(b)(i)).

[41] The Appellant here started his course of instruction on January 4, 2021 with the full knowledge and implied consent of the Commission. The Commission paid benefits based on that knowledge and consent then waited over a full year, January 10, 2022, to rescind approval and request the Appellant repay \$17, 000. This entire amount was paid due to the Commission's delay in actioning the information before it as submitted on numerous occasions by the Appellant.

[42] It is the Commission who holds the authority to reduce or write-off an overpayment but this is not automatic, application must be made to the Commission. One must outline the details that having such a debt would have and is having on the claimant's finances, stress related to the debt and what caused the debt.

[43] 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.

[44] **This process must be initiated by the Appellant, he must apply to the Commission to have the debt written off,**

[45] 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.

[46] Even though 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.

[47] 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.

[48] 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

[49] I find that, having given due consideration to all of the circumstances, the Appellant has not successfully rebutted the assertion that he was not available for work and as such the appeal regarding availability is dismissed.

John Noonan

Member, General Division – Employment Insurance Section