



Citation: *CB v Canada Employment Insurance Commission*, 2022 SST 1505

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant: C. B.
Representative: Richard-Alexandre Laniel

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (432393) dated September 14, 2021 (issued by Service Canada)

Tribunal member: Leanne Bourassa

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

Decision date: August 12, 2022
File number: GE-21-1895

Decision

[1] The appeal is dismissed. Although the Tribunal finds that the Canada Employment Insurance Commission (Commission) acted in a non-judicial manner when they verified his entitlement to benefits, the Claimant has not shown he was available for work while in school.

[2] Since the Claimant hasn't shown that he was available for work while in school, he is not entitled to Employment Insurance (EI) benefits. Unfortunately, this means that the Commission can ask him to repay the benefits he received.

Overview

[3] In March 2020 the Claimant applied for EI Emergency Response Benefits (EI ERB) after he lost his two part-time jobs because of the COVID-19 pandemic. He qualified for the benefits and the Commission paid him those benefits.

[4] In September 2020, the Claimant moved from Kitchener to Montreal to begin a university program. When his EI ERB benefits came to an end that month, the Commission automatically used his March 2020 application for benefits as an application for regular EI benefits. The Claimant continued to receive benefits and he filed bi-weekly reports reporting that he was in school.

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

[6] In July 2021, the Commission reviewed the Claimant's entitlement to benefits and decided that he was disentitled from receiving EI regular benefits from September 28, 2020 to December 18, 2020 and from January 13, 2021 to April 26, 2021. This was because he wasn't available for work since he was in school full-time and only looking for part-time work. They asked him to repay the benefits he had received during those periods.

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

[8] The Claimant says that he filled out his reports to the Commission honestly. The Commission would have known that he was in school full-time and he should not be held responsible for their decision to pay him benefits if it knew he was ineligible. Also, he was constantly searching for part-time work, which was difficult to find because his experience was in the service industry which was largely shut down because of COVID-19.

Matter I have to consider first

I held a pre-hearing conference in this case and the Commission did not attend

[9] Before holding a hearing in this case, I invited the parties to a pre-hearing conference to discuss whether the Claimant had made a request for a write off of the amount of the overpayment he was being asked to pay and if there had been any response to that request. I invited the Commission to send a representative to this conference who may have authority to consider settlement options.

[10] The pre-hearing conference took place on May 16, 2022. The Commission did not attend the pre-hearing conference.

Issue

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

Analysis

[12] Before I consider whether the Claimant was available for work, I need to address his argument that the Commission did not act appropriately when they chose to review his claim.

[13] The Claimant has argued that the Commission acted in a non-judicial manner when they chose to review his entitlement to benefits in July 2020.

Did the Commission have the authority to verify the Claimant's entitlement to EI benefits?

– The Commission has the authority to review the Claimant's entitlement

[14] I find that the law gives the Commission the authority to verify a student's entitlement to EI benefits.

[15] The law clearly says that the Commission has the authority to verify that a claimant who attends a non-referred course of study is entitled to benefits. It does this by requiring proof that the claimant was capable of and available for work on any day of their benefit period. It may take this step at any point after benefits are paid to the claimant.¹

[16] The Commission can verify the Claimant's entitlement. It is not required by law to do this. So, when it decides to do this verification, it exercises its discretion. In this case, the Claimant argues that the decision to disentitle him from getting benefits should not stand because the Commission did not exercise this discretion judicially.

– Did the Commission exercise its discretion judicially?

[17] I find that the Commission did not act judicially when it decided to exercise its discretionary authority to verify the Claimant's entitlement to benefits.

[18] The section of the law allowing the Commission to verify a student claimant's entitlement says that the Commission may verify the entitlement.² The law does not say the Commission has to take this step. This means it is up to the Commission how to exercise its discretion to do this.

¹ As it applies to this case, this authority is set out in the temporary measures to access benefits that the government put in place to help Canadians during the COVID-19 pandemic. Subsection 153.161(2) of the Employment Insurance Act sets out this power.

² This is set out in subsection 153.161 (2) of the Employment Insurance Act.

[19] Case law has told us that a Commission decision can only be interfered with if it is shown that it did not act judicially when exercising its discretionary authority.³

[20] 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.⁴

[21] The Claimant argues that the Commission did not act judicially when it decided to review his case. He says that the Commission did not respect its own reconsideration policy.⁵ It reviewed his claim even though he didn’t make any false or misleading statements and benefits were not paid to him contrary to the structure of the Act.

[22] The Claimant’s arguments and the case law he quoted all talk about the Commission’s authority to review claims for benefits in the usual course of affairs. The Commission argues that it verified the entitlement under a different section of the law, dealing with temporary access to benefits. But, as I mention above, the temporary measures still give it the authority to verify that the Claimant was entitled to the benefits he received.

[23] The Commission specifically says that it doesn’t consider that the Claimant made any false or misleading statements. So I accept that it did not review his entitlement to benefits for that reason.

[24] From its submissions, I can see that when it verified the Claimant’s entitlement to benefits, the Commission considered the following elements: the fact that the Claimant was not referred to his course, his course schedule, his statements on his training questionnaires, the statements he made that he was not available during traditional working hours because of school and his desire to prioritize school over finding a full time job. So, I see that it did consider these relevant factors before making a decision.

³ See for example the decision in *Canada (Attorney General) v. Purcell*, A-694-94

⁴ This is outlined in the Federal Court of Appeal decisions *Dunham*, A-708-95 and *Purcell*, A-694-94.

⁵ The Claimant refers to the Commission’s “Digest of Benefit Entitlement Principles” when making this claim. Although this is a statement of principles and does not have the force of law, I think it is of interest when I look at whether the Commission acted in a way that respected these principles.

– **The Commission neglected to consider relevant factors and acted in bad faith when verifying the Claimant’s entitlement to benefits in July 2021**

[25] I believe that the Commission intentionally neglected to consider relevant factors when it reviewed the Claimant’s entitlement to benefits. It ignored that the Claimant had originally applied for emergency EI benefits before he was in schooling, he had not intentionally made an application for regular EI benefits and the Commission had already done a verification of his entitlement in October 2020.

[26] The Commission says that the Claimant was informed of his rights and obligations when he applied for benefits. It was only after he had been paid benefits that it became aware of certain circumstances about the Claimant’s availability that made it appropriate for them to review his entitlement. I find this statement hard to accept for three reasons.

[27] First, the Claimant made his first claim for benefits in March 2020. At that time, he was not a full-time university student and the benefits that were available to him were emergency benefits that were easier to access. If he was informed of his rights and obligations, it is unlikely that he would have been told that he had to prove his availability while in school, because he was not in school full-time at that time.

[28] Second, the Claimant did not actually make an application for EI benefits after he started school in the fall of 2020. The application for regular EI benefits that was made effective September 27, 2020 was made for him automatically by the Commission’s systems, without his knowledge. He did not have a choice in making this application for benefits.⁶ So he also did not have the choice of considering any new requirements he would have had to meet to be entitled to benefits.

[29] Third, it looks like the Commission verified the Claimant’s entitlement to benefits in October 2020. The Claimant didn’t think that he was disentitled to benefits after that verification and I don’t see anything that would have told him otherwise.

⁶ I specifically asked the Commission to confirm if the Claimant had been advised that his claim would be converted to a regular EI claim in September 2020. The Commission answered my request, but did not actually address that question.

[30] I see that on September 13, 2020, the Claimant filled out a training questionnaire when he started school. This questionnaire says “Remember that you must still be available for and looking for work.” Also, “You must declare on your EI reports that you are attending a training course.” I don’t see anything on the questionnaire that would tell the Claimant he was not entitled to benefits at that point.

[31] The Commission’s records show that it contacted the Claimant on October 28, 2020, after he filled out the training questionnaire. The Commission’s notes say that “The claimant was advised of the decision, of its impact on the claim, of his or her right to file a formal request for reconsideration of the decision and the applicable time frame.” The notes don’t say what this decision was or what the impact of the decision was. So, I don’t know what the Commission decided or why.

[32] I asked the Claimant about this call. He says he did not understand that a decision had been made to refuse to pay him benefits. He thought that he was supposed to wait for a written letter to know what the Commission ultimately decided and in the meantime, keep filling in his bi-weekly reports. I don’t see any letter that tells him he was not entitled to benefits while he was in school, or that provides any more information about this decision. He assumed he could continue receiving benefits because no one told him he couldn’t.

[33] The Claimant also submitted screen captures of his “My Service Canada” account. I see that on October 12, 2020, there is a message saying “Action required”. It says that the Claimant’s report had been rejected and had to be processed by an agent. So, he talked to the Commission. The next message is dated October 28, 2020. It says that the dates of his training had been added to his claim from September 6, 2020 to April 17, 2021. It doesn’t say that he was not entitled to benefits or that he should stop filing claims. So the Claimant believed that the Commission had decided that he was entitled to benefits. I see nothing that say he was not.

[34] I asked the Commission for copies of the Claimant’s bi-weekly reports. In each of these reports, beginning on September 13, 2020, the Claimant reported that he was in school. The only time there was ever a response in the system from the Commission

was on April 23, 2021. The message that appears is “We have allowed your training period, however proof of your availability may later be requested and could impact your entitlement to benefits for the training period.”

[35] So, in October 2020 the Commission spoke to the Claimant, found out he was in training, told him it had made some sort of decision, but didn't clarify it in writing. Since it kept paying him benefits, didn't write anywhere that he was disentitled, and hasn't provided me with any evidence to the contrary, I conclude that the Commission decided in October 2020 that he was entitled to benefits. When it exercised its discretion to verify again in July 2021, the fact that it apparently made a decision of some sort in October 2020 doesn't seem to have been taken into consideration.

[36] The Commission then says that it only became aware of certain circumstances regarding the Claimant's availability after benefits had already been paid. It says it only found out later that he wasn't really searching for work and that he had made very few job searches because he was focusing on his schooling. This is only true at most until it talked to the Claimant on October 28, 2020. It even notes in the Claimant's My Service Canada account that the dates of training from September 6, 2020 to April 17, 2021 had been added to his claim. It then waited until July 2021 to review the entitlement again. Saying that it did not know the Claimant's circumstances until after the school year was over and he had been receiving benefits while accurately reporting he was in school for two semesters show bad faith on the Commission's part.

[37] The evidence shows that the Commission talked to the Claimant in October 2020. This was after it renewed his application for benefits without his knowledge and shortly after he started his full time studies. The Claimant was honest with the Commission at that time that he was in school and looking for part-time work around his courses. The Commission's notes show this. It knew everything it needed to know to make a decision about the Claimant's eligibility in October 2020. It paid him benefits despite this knowledge, which seems to show they had decided in his favor.

[38] I find that proceeding with reviewing the Claimant's eligibility after appearing to decide in October 2020 that he was entitled to benefits was acting in bad faith.

[39] I find the Commission did not exercise its authority in a judicial manner because it did not consider all the relevant elements before verifying the Claimant's entitlement to benefits and making a decision that he was not entitled to benefits. The Commission ignores that the Claimant did not originally apply for benefits while he was in school, that his benefits were converted to regular benefits in September 2020 without his knowledge and the fact that it verified his entitlement in October 2020 and didn't not impose a disentitlement at that time.

[40] I find that going back and verifying his entitlement a second time in July 2021 shows bad faith on the part of the Commission.

[41] Since I find that the Commission did not exercise its authority in a judicial manner, I can interfere with its decision. Before I do this, I have to take a fresh look at whether or not the Claimant was entitled to benefits. To decide this, I have to determine if he was available for work.

Was the Claimant available for work?

– The law about availability

[42] 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.

[43] 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.⁷ The Employment Insurance Regulations (Regulations) give criteria that help explain what "reasonable and customary efforts" mean.⁸

[44] 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.⁹ Case law gives three things a

⁷ See section 50(8) of the *Employment Insurance Act* (Act).

⁸ See section 9.001 of the *Employment Insurance Regulations* (Regulations).

⁹ See section 18(1)(a) of the Act.

claimant has to prove to show that they are “available” in this sense.¹⁰ I will look at those factors below.

– **The presumption of non-availability of students does not apply here**

[45] In addition, the Federal Court of Appeal has said that claimants who are in school full-time are presumed to be unavailable for work.¹¹ 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.

[46] A new, temporary section of the EI Act says claimants who attend a full-time course cannot receive benefits unless they prove that they are capable and available for work.¹² This is different from presuming that they are not available. Under this section, a claimant in full-time studies doesn’t need to rebut a presumption that he is unavailable, he only needs to prove his availability like any other claimant.

[47] In its arguments, the Commission argues that it would like to point out that it does not automatically consider one is not available for work based solely on the fact that they are attending school. This statement is frankly surprising given that the Commission also argues that full-time students are presumed to be unavailable and provides arguments about rebutting the presumption. So it is not at all clear to me if the Commission believes the presumption applies or not.

[48] The temporary measures mentioned above apply to claims that were made between September 27, 2020 and September 25, 2021. In this case, the Commission says that the Claimant’s subsequent claim was started automatically by the system effective September 27, 2020. So the temporary measures would apply to his claim for regular EI benefits. This means he only has to prove his availability, not rebut the presumption of non-availability.

¹⁰ See *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96.

¹¹ See *Canada (Attorney General) v Cyrenne*, 2010 FCA 349.

¹² This is subsection 153.161(1) of the Act.

[49] Since the Commission verified the Claimant's eligibility under this section of the EI Act, I will not consider whether or not he has rebutted a presumption of non-availability. I will only look at whether he proved he was available.

Reasonable and customary efforts to find a job

[50] 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 were reasonable and customary.¹³

[51] The law sets out criteria for me to consider when deciding whether the Claimant's efforts were reasonable and customary.¹⁴ I have to look at whether his efforts were sustained and whether they were directed toward finding a suitable job. In other words, the Claimant has to have kept trying to find a suitable job.

[52] 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:¹⁵

- assessing employment opportunities
- preparing a résumé or cover letter
- contacting employers who may be hiring
- applying for jobs

[53] The Commission says that the Claimant didn't do enough to try to find a job. They say this because the Claimant told it that he did not really look for jobs and if a full-time job was available he would not have taken it, as his education was his priority.

[54] The Claimant disagrees. He says he was looking for part-time jobs while he was in school, but it was difficult to find a job in his industry. He was available for work from Friday to Sunday and some weeknights. He had experience working in bars and

¹³ See section 50(8) of the Act.

¹⁴ See section 9.001 of the Regulations.

¹⁵ See section 9.001 of the Regulations.

restaurants, but with restrictions related to the COVID-19 pandemic, there was not much available.

[55] I find that the Claimant has not proven that he was making reasonable and customary efforts to find a job.

[56] While I note that the Commission did not ask the Claimant to give it a record of his job search activities, its notes show that the Claimant was clear that he wasn't really looking for a job because he was focused on school. So they had no evidence that the Claimant was making efforts to find a job and did see the need to ask for it.

[57] During the hearing, the Claimant said he was looking for a job, but that when he arrived in Montreal in September 2020 only outdoor dining was open and then everything shut down again because of the pandemic. He says that throughout the winter there wasn't really a possibility of working because everything was closed. So he made some efforts, but nothing would pan out.

[58] I understand that the conditions of the COVID-19 pandemic made finding a job in the restaurant/bar industry very difficult. However, the Claimant still had to provide some proof that he had engaged in some of the job search activities listed in the regulations. I don't see any of that other than his testimony. He has not shown he actually applied for any jobs until about April 2021 when he tried a part-time job with a bike shop. He hasn't provided a list of employers he talked to, or said that he signed up for any job search tools or engaged in any networking activities. So, I don't see any evidence of a sustained effort to find a job while he was in school.

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

Capable of and available for work

[60] I also have to consider whether the Claimant was capable of and available for work but unable to find a suitable job.¹⁶ Case law sets out three factors for me to consider when deciding this. The Claimant has to prove the following three things:¹⁷

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

[61] When I consider each of these factors, I have to look at the Claimant's attitude and conduct.¹⁸

– Wanting to go back to work

[62] The Claimant has said that he wanted to go back to work as soon as a suitable job was available.

[63] I accept that the Claimant says his plan was to find a part-time job that he could do while he was in his full-time studies. He reported on his Training Questionnaires that he had worked while studying in the past and that he was making efforts to find work since the beginning of his program. He said he was available for work and capable of working under the same conditions as he was before he started his program.

[64] So I find the Claimant may have wanted to go back to work. However, this needs to be demonstrated by making efforts to find a suitable job.

¹⁶ See section 18(1)(a) of the Act.

¹⁷ 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.

¹⁸ 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.

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

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

[66] 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.¹⁹

[67] The Claimant's efforts to find a new job seem to have included looking for part-time jobs in the restaurant and bar area, even though the COVID-19 measures were restricting their activities. I explained what activities he said he engaged in above when looking at whether the Claimant has made reasonable and customary efforts to find a job.

[68] Those efforts weren't enough to meet the requirements of this second factor because I don't see any evidence of how many jobs the Claimant applied for, with which employers, when any applications were made and if he extended his job search beyond his usual sector before April 2021. So I am not convinced he was making enough efforts to find a job.

[69] I understand that there were challenges to applying for jobs in the context of COVID-19 restrictions. However the Claimant hasn't convinced me that he was making more than a minimal efforts to find a job despite those restrictions.

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

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

[71] The Claimant says he hasn't done this because he was looking for part-time jobs that he could do around his school schedule. The restaurant industry he had experience in had business hours that would allow him to work around his school schedule.

¹⁹ 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.

[72] The Commission says that the Claimant was significantly limiting his availability while taking his full-time courses and he was only willing to accept part-time work outside of his school hours.

[73] I see a few ways in which the Claimant was limiting his chances of going back to work: he was only looking for part-time work, he was looking for work that could be done around his school schedule and until April 2021 he was limiting his job search to the restaurant/bar sector.

[74] While these limits are all understandable because the Claimant was prioritizing his schooling and his previous experience when looking for jobs, they did reduce the chances of his returning to the workforce. I know that COVID-19 restrictions were matters outside his control that would have limited restaurant and bar jobs that were available. However, his decision to focus on those jobs did limit his chances at getting back to work.

[75] I also have to conclude that the fact that the Claimant was in full-time studies and specifically looking for jobs where he could work Friday through Sunday and weeknights, limited his chances to find a job as well. While prioritizing his studies is commendable, the EI Act requires claimants to be available for employment during every working day. The Claimant didn't have that availability and even wrote in his training questionnaires that if a job conflicted with his program, he would only accept it as long as he could delay the start date to allow him to finish his program. This limits the jobs that would be available to him.

[76] So because of those factors, I find that the Claimant did have personal conditions that limited his chances of returning to work.

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

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

Additional comments

[78] I recognize that this decision results in the Claimant, a student with at most part-time income, being saddled with a large overpayment. He is sadly far from alone in being in this situation. I understand he has contacted the Canada Revenue Agency for assistance in dealing with this burden but that will only have helped to delay the payments.

[79] While I do not have the jurisdiction to order the Commission to consider writing off the debt that the Claimant incurred by relying on its actions, I would encourage it to consider it in this case. This situation could have been avoided if the Commission had allowed the Claimant to make an informed decision about his benefits by communicating a clear decision to him in October 2020.

Conclusion

[80] Although the Commission has not acted judicially in exercising their discretion under the law, the Claimant hasn't shown that he was available for work within the meaning of the EI Act. Because of this, I find that the Claimant can't receive EI benefits.

[81] This means that the appeal is regrettably dismissed.

Leanne Bourassa
Member, General Division – Employment Insurance Section