Citation: *EM v Canada Employment Insurance Commission*, 2022 SST 1514

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	E. M.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (444985) dated January 17, 2022 (issued by Service Canada)

Tribunal member:	John Noonan
Type of hearing:	Teleconference
Hearing date:	April 5, 2022
Hearing participant:	Appellant
Decision date:	April 13, 2022
File number:	GE-22-601

Decision

[1] The appeal is dismissed.

Overview

[2] The Appellant, E. M., was upon reconsideration by the Commission, notified that it was unable to pay her Employment Insurance benefits from November 23, 2020 because she was taking a training course on her own initiative and has not proven her availability for work. The Appellant maintains that she had been provided with benefits based on information provided since the beginning of her claim and the Commission was always aware of her attending University, approving her claim and paying her benefits (GD3-34).The Tribunal must decide if the Appellant has proven her 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: Did the Appellant have a desire to return to the labour market as soon as suitable employment is offered?

Issue #2: Was she making reasonable and customary efforts to obtain full time work?

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

Analysis

[4] The relevant legislative provisions are reproduced at GD4.

[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 is not available for work when she is taking a full-time course on her own initiative. To rebut this presumption, the Appellant must demonstrate that her main intention is to immediately accept suitable employment as evidenced by job search efforts, that she is prepared to make whatever arrangements may be required, or that she is prepared to abandon the course. She must demonstrate by her 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 she 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. She must continue to seek employment and must show that course requirements have not placed restrictions on her 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 her 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: Did the Appellant have a desire to return to the labour market as soon as suitable employment is offered?

[10] No, for the revised period of disentitlement..

[11] In this case, by the Appellant's statements and submissions, she was attending a full time program of studies that required in excess of 20 hours per week of her time.

[12] She was not approved by a designated authority to attend this program.

[13] The Appellant stated and confirmed at her hearing that she started full-time training as of September 2020.

[14] She testified that she always worked while in school. She confirmed her present employment is part time as is her second job as a restaurant server. She works all hours available to her but also confirmed her class schedule is set and cannot be changed therefore her work hours must be outside her class schedule.

[15] She needs to work for the financial support it offers. The Covid shutdown has negatively affected the hiring practices of many of the businesses to which she has applied.

[16] For the period in question, November 23, 2020 onward, she did not feel she was required to adhere to the same requirements regarding reporting that trades students would be subject to therefore there is no evidence the Appellant was carrying out a comprehensive job search that would lead to full time employment. Instead she sought out part time jobs that would not interfere with her class schedule.

[17] However, the Commission has accepted the Appellant's assertion that she was available for and seeking fulltime employment as per the following *"Following the claimant's request for reconsideration, the Commission modified to the decision that the*

claimant could not be considered available for work from November 23, 2020 to April 24, 2021 and from September 8, 2021 to December 18, 2021, however with the last renewable week of her claim being November 14, 2021, benefits were to denied for that period only. She was also advised that should a subsequent claim be submitted, benefits would be denied to December 18, 2021 (GD3-38 to GD3-39). Based on the modified decision, a Notice of Debt was issued on February 9, 2022 reducing the debt to $10,515 (GD3-40 to GD3-42).

[18] I find that these actions, or lack of, on the part of the Appellant do not show, throughout the entire period in question with the exception as shown above , a sincere desire to return to the labour market as soon as suitable employment is offered.

Issue 2: Was she making reasonable and customary efforts to obtain full time work?

[19] No, not for the revised period of disentitlement.

[20] Again, there is no evidence the Appellant was carrying out a comprehensive job search with the goal of finding full time employment throughout the period of disentitlement.

[21] While she maintains that she was available, she is still, in order to be eligible to receive benefits, required to carry out a reasonable job search.

[22] She explained that she had to look for work that would not interfere with her class schedule since she could not change it and had to attend classes.

[23] She has, as a result, restricted her job search.

[24] The Appellant's job search activity since November 23, 2020 cannot be considered a reasonable and customary job search as per section 9.001 of the Regulations.

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

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

[26] Yes., for the revised period of disentitlement.

[27] The Appellant stated that her intention was to complete her course, and not to return to the workforce as soon as possible and based on her lack of reasonable job search activity and the fact she has invested $9,000 into her program of studies, I find this to be consistent with the facts before me.

[28] The Appellant has failed to rebut the presumption of non-availability while in an university program as she stated her focus was on her studies rather than being available for work. She stated she was not available for full time work and only part time work.

[29] I find that the Appellant in this case while not following a course of instruction approved by an authority designated by the Commission, by spending 20 plus hours per week on her program of studies and not choosing to carry out a reasonable job search, did set personal conditions that might unduly limit her chances of returning to the labour market.

[30] Furthermore, the Federal Court of Appeal has confirmed that a claimant who restricts her availability and is only available for employment outside of her course schedule has not proven availability for work within the meaning of the EIA. **Duquet v. Canada (AG), 2008 FCA 313; Canada (AG) v. Gauthier, 2006 FCA 40**

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

[32] While this Member supports the Appellant’s efforts to complete her education and find suitable employment as a result, I find that she has failed to present evidence

of “exceptional circumstances” that would rebut the presumption of non-availability while attending a full time course. She is therefore not eligible to receive benefits from November 23, 2020 through to April 24, 2021 and from September 8, 2021 through to December 18, 2021.

[33] It seems unlikely to me that a university student could misconstrue the training question on the bi-weekly reports. The question “Did you attend school or training course during the period of this report?” is straightforward. There is no reference to trades. It is common knowledge that university is considered post secondary schooling.

[34] 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 disentitlement, 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.”

[35] While the Appellant did not directly request that the Tribunal consider the possibility that the overpayment be waived, her concern regarding same deserves an explanation. This is a decision that can only be made by the Commission, the Tribunal has no jurisdiction in this matter. The Commissions 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.

[36] 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. It is the Commission who holds the authority to reduce or write-off an overpayment.

[37] 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.

[38] This process must be initiated by the Appellant, she must apply to the Commission to have the debt written off,

[39] 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.

[40] 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

[41] Neither the Tribunal or the Commission have any discretion or authority to override clear statutory provisions and conditions imposed by the Act or the Regulations on the basis of fairness, compassion, financial or extenuating circumstances.

Conclusion

[42] I find that, having given due consideration to all of the circumstances, the Appellant has not successfully rebutted the assertion that she was not available for work from November 23, 2020 through to April 24, 2021 and from September 8, 2021 through to December 18, 2021 and as such the appeal regarding availability is dismissed.

John Noonan
Member, General Division – Employment Insurance Section