Citation: *TA v Canada Employment Insurance Commission*, 2023 SST 74

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	T. A.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (Record ID 439349) dated November 25, 2021 (issued by Service Canada)

Tribunal member:	Teresa M. Day
Type of hearing:	Teleconference
Hearing date:	October 18, 2022
Hearing participant:	Appellant
Decision date:	January 20, 2023
File number:	GE-22-1809

Decision

[1] The appeal is dismissed, but with a minor with modification to the period of the disentitlement[1].

[2] The Commission (who is the Respondent in this appeal) has the discretion to retroactively verify and reconsider the Claimant's entitlement to employment insurance (EI) benefits, even after benefits have been paid. They exercised that discretion judicially (properly).

[3] The Claimant (who is the Appellant in this appeal) has not proven he was available for work while attending his college course. This means he has not proven he was entitled to EI benefits. But the disentitlement imposed on his claim from October 5, 2020 to September 22, 2021 will be modified because he was recalled to work on July 28, 2021.

[4] The Claimant is now disentitled to EI benefits from October 5, 2020 to July 27, 2021 for failing to prove his availability for work while taking a training course.

Overview

[5] The Claimant applied for EI benefits on March 29, 2020. Because of the emergency Covid-19 pandemic relief measures in place at the time, he received EI Emergency Response Benefits (EI ERB). He was paid EI ERB until that temporary program ended, and then he was automatically transitioned to a claim for regular EI benefits as of October 4, 2020.

[6] On September 18, 2020, while still in receipt of EI ERB, the Claimant reported he had started a full-time training program on September 14, 2020[2]. He said his courses would be finished on December 12, 2020, that he was obligated to attend scheduled

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[1] It will only extend until the date the Claimant was recalled to work.
[2] At the hearing, the Claimant testified that he had enrolled in a 3-year computer sciences program at X Colllege, and that the first semester of the program went from September 14, 2020 to December 12, 2020.

classes, and that he was spending 25 or more hours a week on his studies. No disentitlement was imposed on his claim.

[7] On January 22, 2021, the Claimant reported that he was a full-time student in courses that ran from January 18, 2021 to April 23, 2021[3]. He said that he was obligated to attend scheduled classes, and was spending 25 or more hours per week on his studies. No disentitlement was imposed on his claim, nor was he contacted by Service Canada to investigate his availability for work.

[8] On May 28, 2021, the Claimant again reported that he was a full-time student. He said he was taking courses from May 17, 2021 and August 20, 2021, was obligated to attend scheduled classes (in the mornings on Tuesdays and Fridays, and in the afternoons on Mondays and Wednesdays), and was spending 25 or more hours per week on his studies.

[9] On October 9, 2021, the Commission imposed a retroactive disentitlement on his claim from October 5, 2020 to September 22, 2021 because he was taking a training course and had not proven his availability for work. This resulted in an overpayment of EI benefits on his claim.

[10] The Claimant asked the Commission to reconsider this decision. He said that he was willing and able to work during his studies, but his industry[4] was hit hard during the pandemic and he was unable to find another job.

[11] The Commission maintained the availability disentitlement on his claim and the Claimant appealed to the Social Security Tribunal (Tribunal).

[12] A claimant must be available for work in order to receive ***regular*** EI benefits[5]. Availability is an ongoing requirement. This means that a claimant must be searching for

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[3] At the hearing, the Claimant testified that this was the second semester of the first year of his program.
[4] The Claimant said he worked in the aviation industry (GD3-35). At the hearing, the Claimant testified that he worked as a customer service agent for Air Canada from January 14, 2019 to March 26, 2020 (see also the Claimant's Record of Employment at GD3-40).
[5] Section 18 of the *Employment Insurance Act* (EI Act).

a full-time job and cannot impose personal conditions that could unduly restrict their ability to return to work.

[13] I have to decide if the Claimant has proven that he was available for work while attending his training course. The Claimant must prove this on a balance of probabilities. This means he has to show it is more likely than not that he was available for work while he was in school.

[14] The Commission says the Claimant wasn't available for 2 reasons: because he was not actively seeking employment while in school, and because his training course limited his chances of immediately returning to the labour market.

[15] The Claimant says he repeatedly advised the Commission that he was a full-time student and was never told he was not entitled to EI benefits while in school. He says the Commission should have stopped the payments to him as soon as he started regular EI benefits. He doesn't believe he should be responsible for the overpayment on his claim because he was honest about his studies and the debt is not his fault.

[16] He also says he was looking for interim work until he was recalled by his former employer to return to his previous full-time position on July 28, 2021.

[17] I am sympathetic to the Claimant's situation. But I find that the Commission was authorized to retroactively verify and reconsider the Claimant's entitlement to EI benefits – and that they did so properly. And I agree with the Commission that the Claimant was not available for work while taking his course.

[18] But I accept that he has proved his availability from July 28, 2021 when he returned to work for his prior employer. This means there will be a minor modification to the period of the disentitlement imposed on his claim.

Preliminary Matters

I: The disentitlement for being outside of Canada remains in effect.

[19] There are, in fact, 2 disentitlements on the Claimant's claim[6]:

a) one was imposed because the Claimant failed to prove his availability for work while taking a training course (the issue in this appeal);

and

b) one was imposed because the Claimant was outside of Canada from June 14, 2021 to June 25, 2021.

[20] I agree with the Commission that the second disentitlement is not before me on this appeal.

[21] The Tribunal only has jurisdiction over a decision that has been reconsidered by the Commission[7].

[22] I see no evidence the Claimant ever asked for a reconsideration of the disentitlement imposed for being outside of Canada. This means I have not considered that disentitlement and it remains in effect.

II: A reconsideration was ordered by the Tribunal's Appeal Division

[23] When the Commission maintained the availability disentitlement[8], the Claimant appealed to the General Division of the Tribunal. And when the General Division dismissed his appeal, he appealed to the Appeal Division of the Tribunal.

[24] On May 25, 2022, the Appeal Division found that the General Division made a procedural error that was unfair to the Claimant[9]. It allowed the Claimant's appeal and returned the matter to the General Division for reconsideration, where it was assigned to a different Tribunal Member[10].

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[6] See the October 9, 2021 decision letter at GD3-33.
[7] The law says that only decisions that have been reconsidered by the Commission can be appealed to the Tribunal (sections 112 and 113 of the EI Act).
[8] See the November 25, 2021 reconsideration decision letter at GD3-37.
[9] See the decision in AD-22-153.
[10] I am that Member.

[25] The Claimant was given an opportunity to file any additional evidence and submissions he wished to rely on for his new hearing[11]. Nothing further was received from the Claimant.

[26] On July 11, 2022, I held a pre-hearing case conference with the Claimant. The Claimant confirmed that all of the evidence he wanted to rely on was filed with the Tribunal *and* that he was ready to proceed with a new hearing.

[27] His new hearing was held on October 18, 2022.

[28] At the conclusion of the new hearing, I agreed to accept certain documents from the Claimant post-hearing, namely verifiable evidence of his job search efforts between October 5, 2020 and September 22, 2021.

[29] The Claimant filed this evidence with the Tribunal on October 19, 2022 (RGD09) and it was shared with the Commission. The Commission was given an opportunity to file responding submissions. These were received on November 2, 2022 (RGD13) and shared with the Claimant.

[30] The Claimant asked if he could file more post-hearing documents[12], but I did not allow him to do so[13]. This is because I only agreed to accept post-hearing documents from the Claimant that were filed by the October 19, 2022 deadline agreed to at the hearing.

[31] This is the decision from the reconsideration ordered by the Tribunal's Appeal Division.

Issues

[32] Does the Commission have the power to retroactively verify and reconsider whether the Claimant was entitled to EI benefits while he taking his training course?

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[11] See RGD02.
[12] See Claimant's November 2, 2022 E-mail to the Tribunal.
[13] See Tribunal's November 8, 2022 letter to the Claimant.

[33] If yes, has the Claimant proven his entitlement to EI benefits from October 5, 2020 to September 22, 2021 by proving he was available for work while taking his course?

Analysis

Issue 1: Can the Commission retroactively decide the Claimant was not entitled to EI benefits?

[34] Yes, it can. The law gives the Commission this power.

[35] In his Notice of Appeal, the Claimant argued he was always honest about being a full-time student and the Commission approved his claims for EI benefits. He says the Commission never told him he was not entitled to EI benefits while in school. He also says the Commission should not be allowed to come back, years later, and ask him to repay the EI benefits he received – even if it turns out he was not entitled to those benefits.

[36] The Commission says that section 153.161 of the *Employment Insurance Act* (EI Act) gave it authority to verify the Claimant's entitlement to EI benefits by requiring him to prove his availability after benefits were paid"[14].

[37] I agree with the Commission.

[38] During the global Covid-19 pandemic, the government temporarily amended the EI Act and added section 153.161, effective September 27, 2020[15].

[39] This temporary pandemic measure gave the Commission the power to **verify** that a claimant taking a "course, program of instruction or non-referred training" is entitled to EI benefits by requiring proof of they were available for work on any working day during their benefit period ***at any point after benefits are paid***. This means that the **verification of entitlement** happens ***after*** benefits are paid.

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[14] See the Commission's representations at GD4-8.
[15] This provision is set out in the Commission's representations at GD4-10.

[40] This provision applies to the Claimant because his claim for regular EI benefits started as of October 4, 2020[16] and section 153.161 of the EI Act applies to any claim for regular EI benefits that started between September 27, 2020 and September 25, 2021.

[41] I therefore find the Commission was acting within the parameters established by Parliament during the pandemic and had the power to retroactively ask the Claimant to verify his entitlement to EI benefits by proving his availability for work while taking his course from October 5, 2020 to September 22, 2021.

[42] A different section of the EI Act allows the Commission to change the original decision to pay EI benefits if a claimant is unable to verify their entitlement.

[43] Section 52 of the EI Act gives the Commission the power to reconsider (change) a claim for EI benefits within 36 months after the benefits have been paid[17].

[44] The Commission acted within this limit for the Claimant's claim. The EI benefits at issue were paid for the period October 5, 2020 to September 22, 2021. The Commission first asked the Claimant to verify his availability for work during this period on September 23, 2021[18], and changed the decision regarding his entitlement to EI benefits during this period on October 9, 2021 (GD3-33). This was within 36 months of the first week of EI benefits (starting October 5, 2020) paid to the Claimant.

[45] I therefore find that the Commission was acting within the law and had the power to retroactively verify and reconsider (change) its decision on the Claimant's entitlement to EI benefits.

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[16] This was the start of the Claimant's claim for ***regular*** EI benefits. Prior to that, he was receiving EI Emergency Response Benefits, which were governed by different rules than regular EI benefits.
[17] Or with 72 months if the Commission believes a claimant made a false or misleading statement in connection with their claim for EI benefits.
[18] See Supplementary Record of Claim at GD3-30.

[46] In summary, sections 52 and 153.161 of the EI Act give the Commission the discretion to retroactively verify a claimant's entitlement to the EI benefits they received and to assess an overpayment, if appropriate[19].

[47] But the courts have said the Commission must exercise its discretion judicially when it decides to carry out a verification or to reconsider a decision[20]. This means it must not act in bad faith, for an improper purpose or motive, or in a discriminatory manner; and must not take into account an irrelevant factor or ignore a relevant factor – when deciding whether or not to exercise its power to re-examine a claim.

[48] I find that the Commission used its discretion judicially in the Claimant's case.

[49] The Commission considered all of the relevant information in deciding to verify the Claimant's entitlement. There were no new **relevant** facts provided at the hearing and there is no indication that the Commission considered irrelevant information or acted in bad faith or in a discriminatory manner. The Commission also acted for a proper purpose in verifying the Claimant's entitlement to EI benefits, especially since he was auto-enrolled in regular EI benefits after his EI ERB claim ended and there is no evidence he was given misinformation by (or even spoke with) a Service Canada representative who approved his entitlement at any time before the verification process began.

[50] I therefore find that the Commission was in a position to verify the Claimant's availability and reconsider his entitlement to EI benefits while he was a student, and that it exercised its discretion properly when it did so.

[51] This means the Claimant must prove he was entitled to EI benefits from October 5, 2020 to September 22, 2021 by proving his availability for work in order to succeed on his appeal.

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[19] The Tribunal's Appeal Division has come to this conclusion as well (see *SF v Canada Employment Insurance Commission*, 2022 SST 1095 and *Canada Employment Insurance Commission v PJ*, 2022 SST 1311).
[20] See *Canada (Attorney General) v. Purcell*, 1996 CanLii 3558 (FCA).

Issue 2: Has the Claimant proven his availability for work?

[52] No, he has not. The Claimant has not satisfied the legal test for availability.

[53] To be considered available for work for purposes of regular EI benefits, the law says the Claimant must show that he is capable of, and available for work and unable to obtain suitable employment[21].

[54] There is no question that the Claimant was ***capable*** of work during this time[22]. Therefore, I will proceed directly to the availability analysis to assess his entitlement to regular EI benefits between October 5, 2020 to September 22, 2021 .

[55] The Federal Court of Appeal has said that availability must be determined by analyzing 3 factors:

a) the desire to return to the labour market as soon as a suitable job is offered;

b) the expression of that desire through efforts to find a suitable job; and

c) not setting personal conditions that might unduly limit the chances of returning to the labour market[23] .

[56] These 3 factors are commonly referred to as the "*Faucher* factors", after the case in which they were first laid out by the court.

[57] I considered each of the *Faucher* factors and found that the Claimant has not satisfied any of them.

Evidence from the Claimant

[58] The Claimant testified:

a) Regarding his prior employment at Air Canada:

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[21] Section 18(1)(a) of the *Employment Insurance Act* (EI Act).
[22] I see no indication the Claimant was medically unable to work during this period.
[23] See *Faucher v. Canada (Employment and Immigration Commission)*, A-56-96.

- He was employed full-time by Air Canada between January 14, 2019 and March 26, 2020. He was a customer service agent and worked at check-in and the gates, handling everything related to “ground support”.
- Air Canada laid off many employees during the pandemic, including him.
- Employees were told they would be recalled by seniority, and the union kept saying recall would happen soon.
- He expected to be recalled because the employer made him sign a letter that said he was willing to return to work as soon as he was recalled and acknowledging that it could be on as little as 2 weeks notice.
- He agreed and checked every category of employment (full-time, part-time, in the Call Centre, and so on) because he just wanted to go back to work.
- He was in touch with colleagues who had more seniority than him and they confirmed they were being recalled, but without any notice. When the employer contacted them, it wanted them “right away”.
- Recall notifications were by phone call and the union was in touch with employees throughout the lay-off advising which years of service were being recalled.
- He was monitoring his recall prospects.
- He was recalled by Air Canada in early July 2021, when he was given “a few shifts at a time”. Starting on July 28, 2021, he was recalled full-time.
- His full-time shifts starting on July 28, 2021 are listed in his appeal materials starting at GD5-2[24].

[24] This document was difficult for me to read, so the Claimant read it in during his testimony and confirmed the dates and hours of the shifts he worked

- He “can’t remember” why he never told the Commission that he was recalled to full-time hours starting July 28, 2021.

- He has pay cheques from July 25, 2021 to September 18, 2021 that would show he was working. And he reported these earnings on his claimant reports.

- He continued to work full-time for Air Canada until February 2022, when he transferred to in-flight service and switched to part-time.

b) Regarding his college program:

- He started a 3-year computer science program at X College in September 2020.

- It is a full-time program and he has always carried a full-time course load.

- He started the second year of the program in September 2021 and completed it.

- But he did not start third year in September 2022, as he is “deferring it” for now.

- He already has a 4-year business degree from “X”, which he completed in 2018.

- For the period of the disentitlement (Oct. 5, 2020 to Sept. 22, 2021), he was in the first year of his full-time college program.

- There were 3 terms: Sept – Dec 2020, January – April 2021, and May – August 2021.

- Classes were held every weekday in Term 1, with a day off in Term 2 (Wednesdays) and Term 3 (Thursdays)[25].

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[25] The Claimant testified that his class schedule in Term 1 was Mondays 9am to 12noon and 1pm to 4pm, Tuesdays 9am to 12noon and 1pm to 4pm, Wednesdays 1pm to 4pm, Thursdays 8am to 11am and 12noon to 3pm, Fridays 8am to 9am and 1pm to 3pm.

The Claimant testified that his class schedule in Term 2 was Mondays 10am to 1pm and 4pm to 7pm, Tuesdays 8am to 11am and 12noon to 3pm, no classes on Wednesdays, Thursdays 9am to 12noon, Fridays 1pm to 4pm.

- Attendance was not mandatory. The course was being delivered online and the classes were recorded. He could work on his own time, at his own pace.

- He studied for 1-2 hours "on top of" watching the classes, which he was able to do a "high speed".

- He doesn't recall why he told the Commission that he was obligated to attend scheduled classes[26].

c) Regarding working while in school

- During his first period of employment at Air Canada (January 2019 to March 2020), he worked "midnights". His normal working hours were 6pm to 4am, or 4 or 5pm to 5am.

- When he was recalled to work in July 2021, he was already doing his course work during the day – between 9am and 5pm, so then he went to work at night.

- He was able to arrange his work schedule around his course work.

- He also worked night shift as a security guard during his X degree.

- This shows he has a history of working while in school.

- Every person is different, but he is capable of managing both work and school at the same time.

- He was able to arrange his schedule to do both without any issues. He provided his calendar for August 2021 (at RGD5-2 to RGD5-3), which shows when his courses were (afternoons) and when his work shifts were (nights).

The Claimant testified that his class schedule in Term 3 was Mondays 12noon to 3pm, Tuesdays 11am to 2pm, Wednesdays 12noon to 3pm, no classes on Thursdays, Fridays 9am to 1pm.

[26] The Claimant completed 3 on-line Training Questionnaires during the period of the disentitlement: September 18, 2020 (GD3-16 to GD3-19), January 22, 2021 (GD3-20 to GD3-23) and May 28, 2021 (GD3-24 to GD3-28). On all 3 questionnaires, he said he was obligated to attend scheduled classes.

d) Regarding his job search efforts

- After he was laid off by Air Canada in March 2020, he did his best to look for a job.
- He lives with his 2 elderly parents. With the Covid pandemic, he had to be careful with bus transportation and needed to find a "low-risk Covid job" so he did not infect his parents.
- He was also awaiting recall from his previous employer.
- While he was awaiting recall, he was applying to other positions[27], but he had to get something he could "leave quickly" to return to Air Canada.
- He was only looking for a 6-month contract or a temporary position.
- He told the prospective employers that he was awaiting recall by his regular employer and might have to leave quickly.
- He was only looking for interim employment until recall.

Applying the *Faucher* factors

[59] I agree with the Claimant that it makes no sense that the disentitlement imposed for failing to prove availability for work extends to September 22, 2021, which is after he had returned to work full-time for Air Canada on July 28, 2021.

[60] I asked the Commission for submissions on whether the disentitlement should be lifted at least as of July 28, 2021[28]. The Commission agreed that the disentitlement

[27] The Claimant agreed to file verifiable evidence of his job search efforts between October 5, 2020 and September 22, 2021 with the Tribunal immediately following his hearing. The documentation he filed is at RGD09. This evidence was shared with the Commission, and their responding submissions (at RGD11 and RGD13) were shared with the Claimant.
[28] See RGD10-2.

could be removed beginning July 28, 2021 as the Claimant's availability would be proven by his return to work[29].

[61] I will therefore apply the *Faucher* factors to consider whether the Claimant was available for work between October 5, 2020 (the start of the disentitlement imposed on his claim) and July 27, 2021 (the day before he returned to work).

The First *Faucher* factor: wanting to return to work

[62] To satisfy the first *Faucher* factor, the Claimant must prove he wanted to return to work as soon as suitable employment was available. To do this, he must show he had a desire to return to work for every working day of his benefit period and that his availability was not unduly limited.

[63] I understand that the Claimant wanted to return to work at Air Canada while also attending his full-time college program[30], but he must still prove his availability for work in order to be entitled to regular EI benefits.

[1] This means he must demonstrate his availability during **regular business hours** for every working day and cannot restrict himself to working irregular hours because of a class schedule that significantly limits his availability[31]. For purposes of proving availability under section 18 of the EI Act, a working day is any day of the week **except Saturday and Sunday**[32].

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[29] See RGD11-16. Note: this does ***not*** automatically mean the Claimant could be paid additional EI benefits. As the Commission explains at RGD11-15 to RGD11-16, the Claimant received regular EI benefits from October 4, 2020 up to the week ending June 12, 2021. He was not entitled to EI benefits while he was outside of Canada from June 14 – 25, 2021. But he didn't attempt to file any further claimant reports until September 1, 2021, but which time they were late and benefits were not paid. I agree with the Commission that it is troubling that when he did try to file his late reports for the period July 25, 2021 to August 7, 2021, he did not declare any work or earnings – even though he has now presented evidence showing he was working full-time. It would be up to the Claimant to accurately report all work and earnings if he were to pursue any further EI benefits on this claim.

[30] The Claimant said he wanted to finish his studies and that his job at Air Canada allowed him to work around his course obligations. This was demonstrated with his schedule for August 2021 (at RGD5-2 to RGD5-3), which showed he was scheduled to work around his courses.

[31] This principle is set out in the decision of *Duquet v. Canada (Employment and Immigration Commission),* 2008 FCA 313.

[32] Section 32 of the *Employment Insurance Regulations*.

[64] I find that the Claimant's true intention was to return to work for his previous employer when recalled, and that he was not prepared to give up that employment relationship to pursue or start a different full-time job.

[65] I further find that the Claimant was limiting his working hours to evenings and weekends because of his full-time college course and, therefore, was not available for work within the meaning of the law[33].

[66] Suitable employment is generally considered to mean full-time employment that takes place within regular working hours, Mondays to Fridays. But the Claimant didn't want a new full-time job. He was only prepared to accept a temporary position that could accommodate his weekday classes while he continued his full-time college program and waited to be recalled by Air Canada. This means he has not shown he was willing to immediate accept suitable employment as soon as it became available.

[67] I find the Claimant has shown he had a desire to return to the labour market, but only to a temporary job that could accommodate his studies and only until he was recalled to work by his former employment.

[68] This not sufficient to satisfy the first *Faucher* factor.

The second *Faucher* factor: making efforts to find a job

[69] To satisfy the second *Faucher* factor, the Claimant's job search efforts must show he had a desire to return to the labour market while on claim. This means he must prove he was looking for suitable employment for every day of his benefit period.

[70] The Claimant testified that he was only looking for interim employment until he was recalled. He even told prospective employers that he was awaiting recall and would leave their position recalled.

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[33] See *Canada (Attorney General) v. Primard*, 2003 FCA 349.

[71] I accept that the Claimant's lay-off was temporary and that he had an on-going willingness and desire to work at Air Canada. I also understand that his preference was to return to work in his previous position there.

[72] But the courts have said that maintaining the employment tie and waiting to be recalled to employment is not sufficient to prove availability[34]. Only claimants who are actively looking for employment can receive regular EI benefits. This is the case even if there is a possibility of recall or the period of unemployment is unknown or relatively short-term.

[73] The courts have also said that a claimant's job search efforts must be sufficient to prove[35] an active, on-going[36] and wide-ranging job search directed towards finding suitable employment[37].

[74] The Claimant's job search efforts between October 2020 and July 27, 2021 fall short of this standard.

[75] The Claimant gave various statements about his job search efforts during the Commission's verification and reconsideration process. These are summarized at GD4-4 to GD4-7 and at RGD11-16 to RGD11-17. I agree with the Commission that the efforts described by the Claimant were minimal and half-hearted, and occasionally inappropriate – such as traveling to Dubai for a week to look for work or applying to be a delivery driver even though he did not have a driver's license. I also cannot ignore how his description of his job search efforts changed in response to negative decisions on his claim (which makes them less credible), or that it wasn't until October 8, 2021 that

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[34] *Canada Employment Insurance Commission v GS*, 2020 SST 1076; *D. B. v Canada Employment Insurance Commission*, 2019 SST 1277; *Canada (Attorney General) v Cornelissen-O'Neill*, A-652-93; *Faucher v Canada (Employment and Immigration Commission)*, A-56-96; *Canada (Attorney General) v Cloutier*, 2005 FCA 73; *DeLamirande v Canada (Attorney General)*, 2004 FCA 311; *CUB 76450; CUB 69221; CUB 64656; CUB 52936; CUB 35563.*

[35] With verifiable evidence – including the names and contact information of the employers contacted and the dates he made enquiries and/or submitted an application.

[36] A claimant must be searching for work for ***every working day of their benefit period***.

[37] Suitable employment is generally considered to be full-time employment.

he told the Commission he was now increasing his efforts to find a job and had finally signed up for on-line job search tools.

[76] At the hearing, I explained the need for a job search record that could be verified by the Commission. The Claimant then submitted the information at RGD09-7 to RGD09-19.

[77] I agree with the Commission's responding representations at RGD13-1 to RGD13-3. There is still no credible evidence of actual applications submitted by the Claimant or the dates of application (such as e-mail confirmations or a call log of follow-up efforts). I also agree that the Claimant's unpaid work (5 days per week from March 2021 to June 22, 2021) helping his friend start a business does not count as searching for suitable employment. Nor does his search for a co-op placement to fulfill the requirements of his studies. There is only one job application that can be verified (at RGD09-18), but it relates to job search efforts in October 2021 (outside of the Claimant's benefit period).

[78] I find the Claimant was not doing enough to find work between October 5, 2020 and July 27, 2021.

[79] This means he has not satisfied the second *Faucher f*actor.

The third *Faucher* factor: not setting personal conditions on employment

[80] To satisfy the third *Faucher* factor, the Claimant must prove that he did not set personal conditions that could have unduly limited his chances of returning to work for every working day of his benefit period.

[81] The fact that the Claimant was waiting to be recalled to work at Air Canada – and making a point of advising prospective employers that he would leave their position when that happened – shows he had ruled out applying for or accepting any other full-time jobs. I also cannot ignore the fact that telling a prospective employer that their position was merely a stop-gap until he was recall to other employment would be a significant disincentive to hiring him.

[82] I therefore find that the Claimant's intention to return to work for Air Canada immediately upon recall – whenever that occurred – was a restriction that unduly limited his chances of returning to the labour market. And it means the Claimant cannot satisfy the third *Faucher* factor.

[83] The Claimant's schooling was another personal condition that restricted and could have overly limited his chances of returning to the labour market. The fact that the Claimant was in a full-time college program, with 25 hours of classes spread across all weekdays (Mondays to Fridays[38]) that he either needed to attend or watch online was also a restriction that unduly limited his chances of returning to the labour market. This is evident from the fact that he arranged his work schedule around his class times.

[84] This also means he cannot satisfy the third *Faucher* factor.

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

[2] The Claimant must satisfy all 3 of the *Faucher* factors to prove availability pursuant to section 18 of the EI Act.

[3] Based on my findings, he has not satisfied any of them for the period between October 5, 2020 and July 27, 2021.

[4] I therefore find that the Claimant has not shown that he was capable of and available for work, but unable to find a suitable job between October 5, 2020 and July 27, 2021. This means he is not entitled to EI benefits during this period of time.

Issue 3: The overpayment

[85] The Claimant has not proven that he was available for work within the meaning of the law between October 5, 2020 and July 27, 2021. This means he was not entitled to EI benefits during this period and must repay the benefits he received.

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[38] See footnote 25 above. I acknowledge the Claimant's testimony that in Term 2 he had Wednesdays off and in Term 3 he had Thursdays off. But this does not significantly change the analysis. The Claimant's work pattern was restricted to irregular hours resulting from his course schedule in a way that significantly limited his availability for work during regular business hours for every working day of his benefit period.

[86] The Claimant is left with 2 options:

a) He can ask the Commission to consider writing off the debt because of undue hardship[39]. If he doesn't like the Commission's response, he can appeal to the Federal Court of Canada.

or

b) He can contact the Debt Management Call Centre at CRA at 1-866-864-5823 about a repayment schedule or for other debt relief[40].

Conclusion

[87] The Claimant has not proven he was available for work within the meaning of the law from October 5, 2020 to July 27, 2021. He is disentitled to EI benefits during this period because he has not proven his availability for work while he was attending his full-time college course.

[88] This means that the disentitlement imposed on his claim must remain, although it will be rescinded as of July 28, 2021[41].

[89] The appeal is dismissed, with modification to the period of the disentitlement.

Teresa M. Day

Member, General Division – Employment Insurance Section

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[39] Section 56 of the *Employment Insurance Regulations* gives the Commission broad powers to write off an overpayment when it would cause undue financial hardship for a claimant to repay it.
[40] The telephone number is found on the Notice of Debt and account statements sent to the Claimant for the overpayment.
[41] For the reasons set out in paragraphs 58-60 above.