Citation: *EL v Canada Employment Insurance Commission*, 2022 SST 1592

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

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

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (447531) dated February 23, 2022 (issued by Service Canada)

Tribunal member:	Amanda Pezzutto
Type of hearing:	Videoconference
Hearing date:	May 31, 2022
Hearing participant:	Appellant
Decision date:	June 16, 2022
File number:	GE-22-1032

Decision

[1] E. L. is the Claimant. The Canada Employment Insurance Commission (Commission) is asking her repay Employment Insurance (EI) benefits. This is because the Commission says she hasn't proven that she was available for work. The Claimant is appealing the Commission's decision to the Social Security Tribunal (Tribunal).

[2] I am dismissing the Claimant's appeal. I find that she hasn't proven that she was available for work within the meaning of the law. She didn't make enough efforts to find a job and her school obligations limited her chances of fully returning to the labour market.

[3] But I ask that the Commission consider whether it can write off some or all of the overpayment. This is because the Claimant says the debt will cause her financial hardship.

Overview

[4] The Claimant was studying full-time. In October 2020, she started collecting EI regular benefits at the same time she was in school. She gave the Commission information about her course schedule and collected EI regular benefits for about a year. Then, in November 2021, the Commission reviewed her availability for work. The Commission decided that she wasn't available for work while she was in school. The Commission asked her to repay all the EI benefits she had received.

[5] The Commission says the Claimant hasn't proven that she was available for work starting October 4, 2020. The Commission says she was a full-time student and hasn't overcome the presumption that full-time students aren't available for work. The Commission also says she didn't do enough to try to find a job.

[6] The Claimant disagrees with the Commission's decision. She says that her classes were flexible because they were online and mostly self-paced. She says she was working part-time and could have taken more work, if it was available. She also says the Commission had all the information it needed about her studies. She says the

Commission shouldn't have paid EI benefits if it had concerns about her availability for work.

Issue

[7] I must decide if the Claimant has proven that she available for work starting October 4, 2020. But first, I will look at whether the Commission has the power to review her entitlement to EI benefits.

Analysis

Does the law give the Commission the power to review the Claimant's entitlement to EI benefits?

[8] The law gives the Commission very broad powers to revisit any of its decisions about EI benefits.[1] But the Commission has to follow the law about time limits when it reviews its decisions. Usually, the Commission has a maximum of three years to revisit its decisions.[2] If the Commission paid you EI benefits you weren't really entitled to receive, the Commission can ask you to repay those EI benefits.[3]

[9] The law specifically gives the Commission the power to review students' availability for work. The law gives the Commission this review power even if it already paid EI benefits.[4]

[10] In this case, the Commission looked at the EI benefits it paid to the Claimant starting October 4, 2020. According to the Commission's evidence, the Commission started its review on November 15, 2021. During this conversation, the Commission told

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1 See *Briere v Canada Employment and Immigration Commission*, A-637-86 on the broad power given by section 52 of the Employment Insurance Act:

> This provision authorizes it to amend a posteriori within a period of three or six years, as the case may be, a whole series of claims for benefit and to make a fresh decision on its own initiative as to entitlement to benefit, and in appropriate cases to withdraw its earlier approval and require claimants to repay what had been validly paid pursuant to such approval.

2 Subsection 52(1) of the *Employment Insurance Act*. The law says the Commission has 36 months. See also *Canada (Attorney General) v Laforest*, A-607-87. In this decision, the Federal Court of Appeal held that the Commission has 36 months to reconsider a claim for benefits, make a decision, calculate the overpayment, if any, and notify the claimant of the overpayment.

3 Subsection 52(3) of the *Employment Insurance Act*.

4 Subsection 153.161(2) of the *Employment Insurance Act*.

the Claimant that it was reviewing her availability for work. The Commission decided that the Claimant wasn't available for work and notified her of its decision by letter dated November 15, 2021.

[11] So the evidence shows me that the Commission completed each part of the retroactive review within the time limits allowed by the law. The Commission reconsidered the Claimant's claims for benefits, made a decision, calculated the overpayment, and notified her of the decision all within 36 months of the date it originally paid the benefits.

[12] So, I find that the Commission used its power to retroactively review the Claimant's entitlement to EI benefits in a way that respects the law. The law gives the Commission the authority to make a retroactive review, and the Commission followed the guidelines and time limits described in the law when it did its retroactive review.

[13] I understand that the Claimant gave the Commission information about her school on training questionnaires. Even though the Commission had information about her class schedule, the Commission waited about a year to make a decision about her availability for work. This has led to a large overpayment for the Claimant. I am sympathetic to her circumstances, and I understand that the Commission's delay has caused her financial problems. But I find that the law gives the Commission the authority to make a retroactive decision about the Claimant's availability for work.

[14] I understand that the Claimant says that the debt will cause financial hardship. I also note that the Claimant was open and honest with the Commission about her class schedule. It was the Commission's decision to pay benefits first, and then make a decision about his entitlement to EI benefits afterwards. Even though the law gives the Commission the power to make these kinds of decisions retroactively,[5] this is a discretionary power. This means that the Commission doesn't have to make retroactive decisions that create overpayments, particularly when the issue is availability for work.[6] I

[5] See Subsection 52(1) of the *Employment Insurance Act*. See also *Canada (Attorney General) v Laforest*, A-607-87 and *Briere v Canada Employment and Immigration Commission*, A-637-86.
[6] See chapter 17.3.2 of the *Digest of Benefit Entitlement Principles* for the Commission's usual policy on these kinds of decisions.

ask that the Commission consider whether this was an appropriate use of its discretionary power.

[15] Alternatively, the law gives the Commission broad powers to write off an overpayment in certain situations, including when the debt would cause undue hardship.[7] I ask that the Commission consider whether it may write off some or all of the Claimant's debt. If the Commission refuses to write off the Claimant's debt, she can ask the Federal Court to review this decision.

Availability for work

[16] There are two different sections of the law that say you have to prove that you are available for work.

[17] First, the *Employment Insurance Act* (EI Act) says that you have to prove that you are making "reasonable and customary efforts" to find a suitable job.[8] The *Employment Insurance Regulations* (EI Regulations) give examples that help explain what "reasonable and customary efforts" means.[9]

[18] Second, the EI Act says that you have to prove that you are "capable of and available for work" but aren't able to find a suitable job.[10] Case law gives three things you have to prove to show that you are "available" in this sense.[11] Students have to prove their availability for work under this part of the law.[12]

[19] You have to prove that you are available for work on a balance of probabilities. This means that you have to prove that it is more likely than not that you are available for work.

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[7] Subsection 56(1) of the *Employment Insurance Regulations*, particularly paragraph (f).
[8] See section 50(8) of the *Employment Insurance Act*
[9] See section 9.001 of the *Employment Insurance Regulations*
[10] See section 18(1)(a) of the *Employment Insurance Act*.
[11] See *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96.
[12] Subsection 153.161(1) of the *Employment Insurance Act*.

[20] The Commission says it used both sections of the law to refuse EI benefits. So, I will look at both sections of the law when I decide if the Claimant has proven her availability for work.

Reasonable and customary efforts to find a job

[21] The law explains how I must look at the Claimant's job search efforts and decide if she has proven that her efforts were "reasonable and customary." I have to look at whether she made sustained efforts. This means she has to show that she kept trying to find a suitable job.

[22] The law gives examples of which kinds of job search activities are reasonable and customary. For instance, I can look at whether the Claimant was doing the following kinds of job search activities:

- assessing employment opportunities
- preparing a résumé or cover letter
- registering for job-search tools or with online job banks or employment agencies
- applying for jobs
- attending interviews[13]

[23] These are only some of the examples listed in the law. There are more examples of reasonable and customary job search efforts in the EI Regulations.

[24] The Commission says the Claimant wasn't making enough efforts to find a job. The Commission says she didn't look for work because she already had a part-time job.

[25] The Claimant disagrees. She says that she was trying to find work.

[26] At the hearing, the Claimant described her job search efforts between October 2020 and October 2021. She said that she worked on her resume and cover letter. She

[13] See section 9.001 of the *Employment Insurance Regulations*.

looked at online job banks. She signed up for job alerts from Indeed. She was already working part-time at a restaurant and she told her employer that she was available for more shifts.

[27] The Claimant gave the Commission evidence showing that she applied for a job in March 2020. She also said she applied for jobs starting October 27, 2021. But she told the Commission that she didn't apply for jobs between October 2020 and early October 2021. At the hearing, she agreed with this. She said she didn't submit any job applications during this period.

[28] The Claimant also submitted a training questionnaire in September 2020. On this questionnaire, she said she hadn't been looking for work because she already had a part-time job. Then, in another training questionnaire she completed in September 2021, she said she had been looking for work.

[29] I don't give any weight to the training questionnaire from September 2020. This is because I am only looking at the Claimant's availability for work starting October 4, 2020. For the same reasons, I won't give weight to the job applications the Claimant submitted in March 2020 and on October 27, 2021.

[30] The Claimant said she looked for work between early October 2020 and early October 2021 by looking at job banks, assessing employment opportunities, and speaking to her employer. She also said she worked on her resume and cover letter. I believe her, and I agree that these are some of the job search activities listed in the law.

[31] But the law says you have to show that your job search efforts were sustained. This means that you have to show that you were actively trying to find a job. The law also says that you have to show that your job search efforts were directed at finding a suitable job. So I think making job applications is a very important job search activity. You can't get a new job if you don't apply for any jobs. The fact that the Claimant hasn't given me any evidence showing that she applied for jobs during the period I am reviewing makes it hard for her to prove that she was making reasonable and customary efforts to find a suitable job.

[32] I don't think the Claimant has shown that she was doing enough active job search efforts after October 4, 2020 and before October 27, 2021 to meet the requirements of the law. I find that she hasn't proven that she was making reasonable and customary efforts to find a job.

Capable of and available for work

[33] The second part of the law that talks about availability says that you have to prove that you are capable of and available for work but unable to find a suitable job.

[34] Case law gives me three factors to consider when I make a decision about availability for work. This means I have to make a decision about each one of the following factors:

1. You must show that you wanted to get back to work as soon as someone offered you a suitable job. Your attitude and actions should show that you wanted to get back to work as soon as you could;

2. You must show that you made reasonable efforts to find a suitable job;

3. You shouldn't have limits, or personal conditions, that could have prevented you from finding a job. If you did set any limits on your job search, you have to show that the limits were reasonable.[14]

[35] Students have to prove that they are available for work, just like anyone else asking for EI benefits.[15]

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[14] In in *Faucher v. Canada Employment and Immigration Commission*, A-56-96, the Federal Court of Appeal says that you prove availability by showing a desire to return to work as soon as a suitable employment is offered; expressing your desire to return to work by making efforts to find a suitable employment; and not setting any personal conditions that could unduly limit your chances of returning to the labour market. In *Canada (Attorney General) v. Whiffen*, a-1472-92, the Federal Court of Appeal says that claimants show a desire to return to work through their attitude and conduct. They must make reasonable efforts to find a job, and any restrictions on their job search should be reasonable, considering their circumstances. I have paraphrased the principles described in these decisions in plain language.
[15] Section 153.161 of the *Employment Insurance Act*.

– **Wanting to go back to work**

[36] The Claimant had a part-time job. She worked after October 4, 2020 and she kept working throughout the entire period I am reviewing. I think this shows that she wanted to work. I find that she has met the requirements of this factor.

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

[37] I have already looked at whether the Claimant was making reasonable and customary efforts to find a suitable job. This factor falls under a different part of the law. But I think the reasonable and customary job search efforts listed in the law can help me as I look at this factor.

[38] The Claimant said that she looked at online job banks and assessed employment opportunities. She worked on her resume and cover letter. But she didn't submit any job applications between early October 2020 and October 2021.

[39] You have to be actively looking for work to prove that you are available for work. I think this means that you have to apply for jobs. You also have to prove that your job search efforts are reasonable.[16]

[40] I don't think the Claimant has proven that she was making reasonable job search efforts. Even if it seemed unlikely that she would find a job, she has to show that she was actively looking for work. She didn't apply for any jobs in this period, so I don't think her job search efforts are enough to meet the requirements of this factor.

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

[41] The Commission says the Claimant set personal conditions that limited her chances of returning to work. The Commission says the Claimant had school obligations because she was a full-time student. The Commission also says that the Claimant hasn't overcome the presumption that full-time students aren't available for work

[16] *Canada (Attorney General) v Cornelissen-O'Neal*, A-652-93, and *Canada (Attorney General) v Whiffen*, A-1472-92.

[42] The Claimant agrees that she was a full-time student. But she says her school obligations didn't limit her chances of returning to the labour market.

[43] At the hearing, the Claimant said she had a history of balancing work and school. She said that she had worked at least 20 hours a week, and as much as 30 or 40 hours a week while she was in going to school before the pandemic started. I have no reason to doubt the Claimant's statements, so I believe her. I think it is likely that she has a history of balancing work and school.

[44] But it isn't enough to simply show that she had a history of working while going to school. The Claimant still has to prove that she didn't set any personal conditions that would have limited her chances of returning to the labour market.[17] So this means I still have to look at her school schedule after October 4, 2020. Even if the Claimant balanced work and school in the past, has she proven that she didn't have personal conditions that limited her chances of finding a job after October 4, 2020?

[45] The Claimant has given conflicting information about her school obligations. She told the Commission that she had to attend scheduled classes. She said this on her training questionnaires and when she spoke to Commission officers. But at the hearing, she said that her classes were online and completely flexible. She agreed that some of her classes took place at scheduled times, but she said she could miss these classes. She said she didn't have any days or times when she had to attend classes.

[46] The Claimant's statements at the hearing contradict what she told Commission officers. I think it is likely that the Claimant had some flexibility, but I think her earlier statements are more likely to be true. I think it is likely that the Claimant attended scheduled classes because she told different Commission officers, at different times, that this was her schedule. It was only at the hearing that she said she didn't have to attend any scheduled classes.

[47] I understand that the Claimant told the Commission that she usually worked evenings and weekends. She said this work schedule didn't interfere with her classes. I

[17] See *Canada Employment Insurance v RJ*, 2022 SST 212, especially paragraph 65.

give some weight to this. But the law says that it isn't enough to be available for work evening and weekends. To prove that you are available for work in the way you must be available for EI benefits, you can't set limits on the specific days or times that you can work.[18]

[48] I think it is likely that the Claimant had scheduled classes on certain days and times. I think it is likely that these school obligations put some limits on the days and times she could work. So, I find that the Claimant set personal conditions that unduly limited her chances of returning to the labour market.

[49] I understand that the Claimant didn't have classes during the school breaks. So I find that she didn't have personal conditions because of her class schedule during the summer break.

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

[50] I agree that the Claimant wanted to work. But she hasn't proven that she was making enough efforts to find a job. She set personal conditions during the school year that unduly limited her chances of returning to the labour market. So, I find that the Claimant hasn't proven that she was available for work starting October 4, 2020.

Conclusion

[51] I am dismissing the Claimant's appeal. She hasn't proven that she was available for work within the meaning of the law, starting October 4, 2020. This means she isn't entitled to EI regular benefits.

Amanda Pezzutto
Member, General Division – Employment Insurance Section

[18] Again, see *Canada Employment Insurance v RJ*, 2022 SST 212, paragraphs 31 to 41.