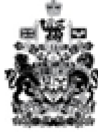

Citation: *ZZ v Canada Employment Insurance Commission*, 2023 SST 45

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	Z. Z.
Representative:	M. Z.
Respondent:	Canada Employment Insurance Commission
Representative:	Melanie Allen

Decision under appeal:	General Division decision dated May 12, 2022 (GE-22-302)

Tribunal member:	Charlotte McQuade
Type of hearing:	Videoconference
Hearing date:	September 14, 2022
Hearing participants:	Appellant Appellant's representative Respondent's representative
Decision date:	January 18, 2023
File number:	AD-22-372

Decision

[1] The appeal is dismissed.

[2] The General Division made an error of law and an error of jurisdiction. I have substituted my decision for that of the General Division.

[3] The Claimant has not proven his availability for work from December 27, 2020, to June 26, 2021.

[4] The Commission exercised its discretion judicially in retroactively verifying the Claimant's entitlement and reconsidering the claim.

Overview

[5] Z. .Z. is the Claimant. On August 2, 2021, the Canada Employment Insurance Commission (Commission) retroactively disentitled the Claimant from benefits from December 27, 2020, to June 26, 2021, because the Claimant had not proven his availability for work while attending high school full-time. This resulted in an overpayment

[6] The Claimant appealed the Commission's decision to the Tribunal's General Division, who dismissed his appeal.

[7] The Claimant appealed the General Division's decision to the Appeal Division. He argues that the General Division made a mistake of fact when it decided he wasn't available for full-time work. He says "full-time" doesn't have to mean 9 to 5 hours and he could have worked full-time hours around his schooling. The Claimant also argues that the General Division erred in law by not considering the impact of lockdowns on his job search.

[8] Additionally, the Claimant argues that the General Division made an error of jurisdiction by not considering whether the Commission exercised its discretion properly in assessing an overpayment. He says the Commission shouldn't have reconsidered

the claim because he called Service Canada before applying and was told he didn't have to report high school as "training" on the application form and he was eligible for benefits.

[9] I have decided that the General Division made an error of law when it said the Claimant had to be looking for full-time work. The General Division also made an error of jurisdiction by not deciding whether the Commission had properly exercised its jurisdiction in verifying the Claimant's entitlement and reconsidering the claim. I have substituted my decision for that of the General Division.

[10] I find that the Claimant hasn't proven his availability for work from December 27, 2020, to June 26, 2021. I also find the Commission exercised its discretion in a judicial manner. This means I cannot interfere with the Commission's decision. So, the overpayment remains.

I will not consider the Claimant's new evidence

[11] As part of his submissions, the Claimant submitted a hyperlink to a government website describing standard hours of work. He wants to rely on this to show that full-time work is not limited to typical 9 to 5 hours.

[12] This information had not been given to the General Division.[1] I have decided that I will not consider this information.

[13] The Appeal Division generally does not consider new evidence because the Appeal Division isn't rehearing the case. Instead, the Appeal Division is deciding whether the General Division made certain errors, and if so, how to fix those errors. In doing so, the Appeal Division looks at the evidence that the General Division had when it made its decision.

[1] AD2-3.

[14] There are a few limited exceptions to this rule, but the Claimant's document did not meet those exceptions.[2]

Issues

[15] The issues in this appeal are:

a) Did the General Division base its decision on an important error of fact that the Claimant was not available for full-time work around his schooling?

b) Did the General Division make an error of law by not considering the impact of the lockdowns on the Claimant's job search?

c) Did the General Division make an error of jurisdiction by not considering whether the Commission had properly exercised its discretion in verifying the Claimant's entitlement and reconsidering his claim?

Analysis

[16] The Claimant argues that the General Division based its decision on an error of fact. He also maintains the General Division made an error of law and an error of jurisdiction.

[17] If established, any of these types of errors would allow me to intervene in the General Division decision.[3]

[18] The Commission maintains the General Division did not misinterpret the law concerning availability and the General Division's decision that the Claimant hadn't proven his availability for work was supported by the evidence. However, the Commission agrees the General Division should have considered whether the

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[2] Generally, new evidence will only be accepted if it provides general background information, highlights findings that the Tribunal made without supporting evidence, or reveals ways in which the Tribunal acted unfairly. See *Sharma v Canada (Attorney General),* 2018 FCA 48; See also *Sibbald v Canada (Attorney General)*, 2022 FCA 157.

[3] See section 58(1) of the *Department of Employment and Social Development Act* (DESD Act).

Commission exercised its discretion judicially in retroactively verifying the Claimant's entitlement.

The General Division decision

[19] On August 2, 2021, the Commission retroactively disentitled the Claimant from benefits from December 27, 2020, to June 26, 2021, because the Claimant had not proven his availability for work while attending high school full-time.

[20] The Claimant appealed that decision to the Tribunal's General Division.

[21] The *Employment Insurance Act* (EI Act) says that a claimant is not entitled to benefits for any working day of the claimant's benefit period unless the claimant can prove that the claimant was capable of and available for work and unable to find suitable employment.[4]

[22] The law says that full-time students are presumed to be unavailable for work.[5]

[23] There are two ways that a person can rebut that presumption. One is by showing they have a history of working full-time while also in school.[6] The other way is by showing they have exceptional circumstances.[7]

[24] If a person rebuts the presumption, that just means they are not assumed to be unavailable for work. However, they still must prove they are available for work.

[25] The General Division decided that it did not have to consider whether the Claimant had rebutted the presumption. The General Division said this was because, section 153.161 of the EI Act, which was in force between September 27, 2020, and September 25, 2021, only required that students prove their availability for work.[8] So,

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[4] See section 18(1)(a) of the *Employment Insurance Act* (EI Act).
[5] See *Canada (Attorney General) v Cyrenne*, 2010 FCA 349.
[6] See *Canada (Attorney General) v Rideout*, 2004 FCA 304.
[7] See *Canada (Attorney General) v Cyrenne*, 2010 FCA 349.
[8] See paragraph 21 of the General Division decision.

the General Division focused on whether the Claimant had proven his availability for work.

[26] The law says that availability is assessed considering three factors. These are whether the person:[9]

- wanted to go back to work as soon as a suitable job was available.
- expressed that desire through efforts to find a suitable job.
- didn't set personal conditions that might have unduly limited the person's chances of going back to work.

[27] The General Division decided the Claimant had not proven his availability for work from December 27, 2020, to June 26, 2021, while attending high school full-time.

[28] The General Division decided that while the Claimant had shown that he had a desire to return to the labour market, he did not meet the first factor as he was only prepared to work at jobs that could accommodate his schedule of mandatory daily classes from 9 a.m. to 12:30 or 1 p.m., Mondays to Fridays.

[29] The General Division decided the Claimant had not met the second factor either. The General Division acknowledged that the Claimant was awaiting recall at his father's café, and he was making some efforts to find another part-time job. However, the General Division decided the Claimant was not doing enough to find work. In particular, the General Division said the Claimant had not provided independently verifiable evidence of his job search efforts and he was not looking for full-time employment during regular business hours for every working day of his benefit period.

[30] The General Division also decided the Claimant had not satisfied the third factor. The General Division found that the Claimant had to attend classes between 9:00 a.m.

[9] See *Faucher v Canada (AG)*, A-56-96.

and 12:30 or 1 p.m., Mondays to Fridays which was a personal condition that could have unduly limited the Claimant's return to the labour market.

The Claimant didn't have to prove he was looking for full-time work

[31] The Claimant submits that the General Division made an error of fact when it decided he was not available for work full-time. The Claimant maintains full-time work doesn't have to be 9 a.m. to 5 p.m. and he could have worked full-time hours around his school schedule.

[32] The General Division found as a fact the Claimant was not looking for full-time employment during regular business hours.[10] This finding of fact was consistent with the evidence.

[33] I have listened to the audio recording from the recording. The Claimant's testimony was that he walked around to multiple cafés and tried to drop off his resume but not a lot were open. He applied to the ones that were open.[11] He did not say he was looking for full-time work.

[34] The Claimant told the Commission that he worked part-time, from 10 to 30 hours per week, at his father's café. He said because of his high-school program, he could not have full-time employment. He said he was available for full-time employment after June 25, 2021.[12]The Claimant did not dispute the content of those notes before the General Division.

[35] Although the Claimant maintains that he could have worked full-time hours around his schooling, there was no evidence that, in fact, he was looking for full-time work. The evidence was the Claimant was looking for part-time work around his schooling. The General Division did not make an error of fact when it decided the Claimant was not looking for full-time work.

[10] See paragraph 35 of the General Division decision.
[11] I heard this from the audio recording of the General Division hearing at approximately 0:23:20.
[12] GD3-17.

[36] However, I find the General Division made an error of law by requiring the Claimant to prove that he was looking for full-time work.

[37] Claimants must prove their availability for work for every “working day” in a benefit period.[13]

[38] “Working day” is defined in the *Employment Insurance Regulations* (EI Regulations) to mean any day of the week except Saturday and Sunday.[14]

[39] The law does not say that only claimants seeking full-time employment can receive benefits. Part-time workers can establish claims for benefits. Those workers do not necessarily have to prove their availability for full-time employment. However, they must remain available to the same extent they were prior to establishing their claim.[15] They must also not set restrictions that unduly limit their chances of returning to the labour market.

[40] The Claimant had established his claim based on part-time work. The Commission noted that the Claimant’s Record of Employment (ROE) showed that he worked roughly 24 hours per week from January 19, 2020, to January 2, 2021.[16]

[41] The Claimant didn’t reduce the hours he was available to work after he was laid off. He reported being available for work and under the same conditions as he was before he started his schooling.[17]

[42] Respectfully, I find the General Division, erred in law, therefore, by concluding the Claimant had to be searching for full-time work to prove his availability for work.

[13] See section 18(1)(a) of the EI Act.
[14] See section 32 of the *Employment Insurance Regulations* (EI Regulations).
[15] See for example, *SS v Canada Employment Insurance Commission* 2022 SST 749 where the Appeal Division previously took this approach to availability.
[16] GD9-1.
[17] GD3-9.

The General Division was not required to consider the impact of the pandemic on the Claimant’s job search activities

[43] The Claimant argues the General Division made an error of law by not considering that the majority of business were closed during the lockdown which made it virtually impossible to find work.

[44] The General Division acknowledged the Claimant’s testimony that he looked for other jobs during lockdowns, but nobody would hire him. The General Division noted the Claimant applied to some other cafés that remained open and that he remained available to be recalled to his father’s café.

[45] However, the General Division decided the Claimant’s efforts fell short of showing he was engaged in an active, ongoing, and wide-ranging job search directed towards finding suitable employment.

[46] The General Division did not make an error of law by not considering the impact of the pandemic on the Claimant’s job search.

[47] Although not binding, the EI Regulations provide some guidance in deciding whether a claimant’s efforts have demonstrated an intent to return to the labour force as soon as a suitable job is available.

[48] The criteria for determining whether a claimant is making reasonable and customary efforts to find suitable employment are that those efforts must be sustained and include activities such as assessing employment opportunities, preparing a resume or cover letter, registering for jog search tools or with electronic job bank and employment agencies, attending job search workshops or job fairs, networking, contacting prospective employers, submitting job applications, and attending interviews.[18]

[49] This criteria tells me that the question of whether a claimant has made enough efforts to show he had a sincere desire to return to the workforce as soon as a suitable

[18] See section 9.001 of the EI Regulations.

job is available has to do with a claimant's efforts to find work, not external factors, such as the pandemic. What is relevant are the types of activities a claimant is undertaking to find suitable work and that the efforts are sustained.

[50] The Federal Court of Appeal has made clear that no matter how little chance of success a claimant may feel a job search would have, they still must be actively seeking work to prove their availability.[19]

[51] In this case, the General Division was not satisfied the Claimant's limited efforts were enough to show a sincere desire to return to the workforce as soon as a suitable job was available.

The General Division did not decide an issue it had to decide

[52] The Claimant submits that the General Division should have decided whether the Commission had acted properly in retroactively assessing an overpayment.

[53] The Claimant says he told the General Division that he called Service Canada before applying and was told he didn't have to report high school as "training" on the application form and that he was eligible for benefits. So, he says it is the Commission's mistake that he was overpaid.

[54] The Commission agrees the General Division should have explained why the Commission had the authority to assess the overpayment. But the Commission says it didn't reconsider the claim. The Commission maintains, rather, that it made a delayed entitlement decision under section 153.161 of the EI Act.

[55] The Commission's reconsideration powers are set out in section 52 of the EI Act. This section says that the Commission may reconsider a claim for benefits within 36 months after the benefits have been paid or would have been payable. This period extends to 72 months when there has been a false or misleading statement.[20]

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[19] See *The Attorney General of Canada v Cornelissen-O'Neill*, A-652-93.
[20] See section 52(1) of the EI Act.

[56] Section 153.161(1) of the EI Act provides that, for the purpose of applying paragraph 18(1)(a) of the EI Act, a claimant who attends a non-referred course, program of instruction or training is not entitled to be paid benefits for any working day in a benefit period for which the claimant is unable to prove that on that day they were capable of and available for work.

[57] Section 153.161(2) provides that the Commission may, at any point after benefits are paid to a claimant verify that a claimant who is attending a non-referred course, program of instruction or training, is entitled to those benefits by requiring proof that they were capable of and available for work on any working day in their benefit period.

[58] Both section 52 and section 153.161(2) of the EI Act are discretionary decisions. This means that while the Commission can seek to verify a claimant's entitlement and reconsider their claim, it doesn't have to.

[59] Discretionary powers must be exercised in a judicial manner. This means when the Commission decides to verify entitlement or to reconsider a claim, the Commission's decision can be set aside if the Commission:[21]

- acted in bad faith
- acted for an improper purpose or motive
- took into account an irrelevant factor
- ignored a relevant factor, or
- acted in a discriminatory manner.

[60] The General Division referred to section 153.161 in its decision and said it applied to the Claimant's situation.[22] But the General Division did not decide whether

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[21] See *Canada (Attorney General) v Purcell*, 1995 CanLII 3558 (FCA).
[22] See paragraph 20 of the General Division decision.

the Commission had exercised its discretion judicially in retroactively verifying the Claimant's entitlement and assessing an overpayment.

[61] Since the Claimant raised the issue of whether the Commission had acted properly in assessing the overpayment, it was an error of jurisdiction to not decide this issue.

Remedy

[62] As the General Division has made several reviewable errors, I can intervene in the case.[23]

[63] To fix the General Division's error, I can either refer the matter back to the General Division for reconsideration or I can give the decision the General Division should have given.[24]

[64] The Commission asks that I dismiss the Claimant's appeal on the availability issue but return the question of whether the Commission exercised its discretion judicially to the General Division for reconsideration

[65] The Claimant wants me to allow the appeal on all issues. He says I should substitute my decision to find he is available for work and, in the alternative, find that the Commission did not properly exercise its discretion in reconsidering his claim.

[66] I am satisfied the parties had a full and fail opportunity to present their case before the General Division and the record is sufficiently complete enough for me to substitute my decision on both issues.

[67] The Claimant already gave evidence to the General Division about why he thinks the Commission acted improperly in reconsidering his claim. Although the Commission did not provide submissions to the General Division concerning what factors it

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[23] See section 58(1) of the DESD Act.
[24] Sections 59(1) of the DESD Act.

considered in the exercise of its discretion, the Commission's notes and decisions provide insight into its considerations.

[68] So, I find this is an appropriate case for me to substitute my decision.

The Claimant hasn't proven his availability for work

[69] The Claimant hasn't proven his availability for work from December 27, 2020, to June 26, 2021.

[70] The General Division decided that the presumption of non-availability for full-time students was not necessary to apply under section 153.161 of the EI Act. That presumption is set out in case law from the Federal Court of Appeal.[25]

[71] The General Division relied on a case from Appeal Division when it decided the presumption didn't apply. However, the Appeal Division has not been consistent on this issue.[26]

[72] I find that the presumption still applies under section 153.161 of the EI Act. I cannot see anything in that section that displaces the case law from the Federal Court of Appeal concerning the presumption of non-availability. Section 153.161(1) still requires student claimants to prove their availability for work under section 18(1)(a) of the EI Act and the presumption relates to section 18(1)(a) of the EI Act.

[73] The Claimant was a full-time student, so he was presumed to be unavailable for work. There is no evidence the Claimant has a history of working full-time along with schooling so he can't rebut the presumption that way.

[74] However, the Claimant had a demonstrated history of working at his father's café for approximately 24 hours per week while attending school. His ROE shows he did this

[25] See, for example, *Canada (Attorney General) v Gagnon*, 2005 FCA 321; See also *Canada (Attorney General) v Cyrenne*, 2010 FCA 349.
[26] See for example, *Canada Employment Insurance Commission* v RJ, 2022 SST 212 where the presumption was said not to apply; See also *SS v Canada Employment Insurance Commission,* 2022 SST 749, where the presumption was said to apply.

for at least a year. So, I am satisfied the Claimant could have continued to manage this number of hours along with his schooling.

[75] I find the Claimant has rebutted the presumption of non-availability. But all that means is that I can't assume he was not available for work. The Claimant still must prove his availability.

[76] I find the Claimant has not proven his availability for work.

[77] I see no reason to disturb the General Division's finding that the Claimant did not have a sincere desire to return to the labour market as soon as a suitable job is available.

[78] The evidence was that the Claimant was not willing to drop his schooling if offered work and was only willing to work around his schooling which was from 9 a.m. to 12:30 or 1:00 p.m. from Monday to Friday. He was prioritizing his schooling over going back to work. While he may have had a desire to go back to work, limiting his hours of availability does not show a sincere desire to return to the workforce "as soon as" a suitable job was available.

[79] With respect to the second availability factor, I find that the Claimant's efforts to find suitable employment do not express a sincere desire to return to the labour market as soon as a suitable job was available.

[80] For guidance, I have considered the criteria for determining whether the efforts a claimant is making to obtain suitable employment are reasonable and customary efforts.[27]

[81] The Claimant testified that his faith restricts him from working in places where he might come into contact with alcohol, which includes some grocery stores and

[27] See section 9.001 of the EI Regulations.

restaurants.[28] So, suitable work for the Claimant was retail type work where he could not come in contact with alcohol. [29]

[82] The Claimant's job search consisted of awaiting recall at his father's café and dropping off resumes at some cafés that were open.

[83] As the General Division pointed out, the Federal Court of Appeal has said that waiting to be recalled to employment is not sufficient to prove availability.[30]

[84] I find that the Claimant's efforts do not demonstrate an active and sustained effort to find employment. Rather, his job search was quite passive. The Claimant could have, for example, engaged in other job search activities such as looking for work online. He could have registered with some job-search agencies. He could have tried to network to find a job. He could have expanded his search beyond cafés to other retail type jobs where alcohol was not being sold.

[85] As above, even though the Claimant was looking for work in the context of lockdowns and the chances of finding work may have appeared slim, the Claimant was still required to be actively seeking work to meet the availability criteria.

[86] I find, further, that the Claimant does not meet the third availability factor either. The Claimant set a personal condition of only being willing to work around his schooling which was from 9 to 12:30 p.m. or 1:00 p.m. Monday to Friday. I find this condition unduly limited his chances of returning to the labour market.

[87] The Federal Court of Appeal has repeatedly said that students who limit their availability for work around their schooling are not available for work.[31] So, I have to keep that principle in mind.

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[28] See paragraph 25 of the General Division decision.
[29] See section 9.002(1)(c) of the EI Regulations which says one criteria for determining what constitutes suitable employment for the claimant is that the nature of the work is not contrary to the claimant's oral convictions or religious beliefs.
[30] See *Canada (Attorney General) v Cornelissen-O'Neill*, A-652-93; See also *DeLamirande v Canada (Attorney General)*, 2004 FCA 311.
[31] See, for example, *Canada (Attorney General) v Gagnon*, 2005 FCA 321; See also *Duquet v Canada Employment Insurance Commission*, 2008 FCA 313; See also *Canada (Attorney General) v Primard,*

[88] However, I can't just apply that case law without consideration of the evidence. Availability is a question of fact and that means I still have to consider whether, in the Claimant's particular situation, only being willing to work around his schooling unduly limited his particular chances of returning to work.

[89] The Claimant had a history of working irregular shifts around his school schedule at his father's café.

[90] I accept that some cafés might have been able to accommodate the Claimant's school schedule. But, according to the Claimant's testimony, there were not a lot open during the lockdown.[32]Further, the Claimant's restriction in hours he could work was significant, given he was not able to work each day until the afternoon. The Claimant's restrictive schedule meant he was eliminating a pool of other potential retail employers who operate during a typical workday schedule or who might require morning shifts.

[91] I find, therefore, only being available for work around his schooling was an undue restriction on the Claimant's chances of returning to the labour market.

[92] I can understand why the Claimant did not want to interfere with his high school schedule for a job. However, availability is an objective question and does not depend on a claimant's particular reasons for restricting his availability, even if they are sympathetic or admirable.

[93] Unfortunately, the Claimant has not been able to establish that he meets any of the availability criteria. So, he has not proven his availability for work from December 27, 2020, to June 26, 2021.

2003 FCA 349 and *Canada (Attorney General) v Rideout*, 2004 FCA 304; See also *Horton v. Canada (Attorney General)*, 2020 FC 743 (CanLII).

[32] I heard this at approximately from the audio recording of the General Division hearing at approximately 0:23:20.

The Commission exercised its discretion properly

[94] The Claimant says the Commission didn't exercise its discretion properly in reconsidering his claim. He says it is the Commission's mistake he was overpaid. He says he was told by a Service Canada agent that he didn't have to declare his high school on the application form as it wasn't "training" and that he was eligible for benefits.

[95] The Commission says it didn't reconsider the claim under section 52 of the EI Act but rather made a delayed initial entitlement decision under section 153.161 of the EI Act.

[96] The Appeal Division has previously held that section 153.161 does not permit a delayed entitlement decision.[33] Rather it permits a delayed verification of entitlement. I agree with that reasoning and adopt it in this case.

[97] Even so, section 52 and section 153.161 of the EI Act together give the Commission the power to retroactively verify a claimant's entitlement after benefits have been paid and to reconsider the claim and assess an overpayment, if appropriate.

[98] The question in this case is whether the Commission acted judicially in doing so. I will review the context in which the Commission exercised its discretion.

[99] The Claimant completed an application for benefits on January 5, 2021. He did not declare his schooling.

[100] The Application form noted the Claimant's responsibilities which included being capable of and available for work and unable to obtain suitable employment. The responsibilities included actively searching for suitable employment and keeping a detailed job search record. Various job search activities were also explained.[34] The application said that the information would be used to determine eligibility for EI benefits and the information provided was subject to verification.[35]

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[33] See *SF v Canada Employment Insurance Commission*, 2022 SST 1095.
[34] GD3-8 to GD3-9.
[35] GD3-11.

[101] Based on the limited information provided in the application form, the Commission decided to pay the Claimant benefits.

[102] The Claimant completed biweekly reports for the period from December 27, 2020, to March 6, 2021. On each report he answered “No” to the question, “Did you attend school or a training course during the period of this report.”[36]

[103] On May 27, 2021, the Claimant contacted the Commission to renew his claim. During that conversation, the Commission became aware that the Claimant had been attending full-time high school from September 8, 2020, to June 26, 2021, and was not willing to change his schooling or drop his schooling to accept full-time employment. The Claimant also said he was obligated to attend classes and was spending 18 hours per week on his classes.[37]

[104] After that conversation, from the week of June 6, 2021, the Claimant then began reporting his schooling on his claimant reports.[38]

[105] On July 29, 2021, the Commission spoke to the Claimant again about his schooling to try to verify his entitlement. The Commission obtained additional information about the Claimant’s school schedule, the time he spent on his schooling, that he was not willing to quit or change his course to accept employment and his previous work schedule.

[106] The Claimant also explained to the Commission in that conversation that he answered “no” to the question, “Are you taking or will you be taking a course or training program?” on his application form, because he was told to do that when he talked with a Service Canada agent by telephone. He said the agent told him that he could receive employment insurance even if he is attending high school, therefore he could answer “no” to that question.[39]

[36] GD9-10 to GD9-41.
[37] GD3-15.
[38] GD9-42.
[39] GD3-17.

[107] Based on the information obtained, the Commission exercised its discretion to reconsider the claim.

[108] On August 2, 2021, the Commission issued a decision that the Claimant was disentitled to benefits from December 27, 2020, to June 26, 2021, as he was taking a training course on his own initiative and had not proven his availability for work.[40] An overpayment was calculated, and a notice of overpayment was issued.[41]

[109] I see no evidence that the Commission acted in bad faith or took into account irrelevant factors or ignored relevant factors or acted in a discriminatory manner when it decided to verify the Claimant's entitlement to benefits on July 29, 2021. The Commission acted upon the relevant information it received in the phone conversation of May 27, 2021, that called into question the Claimant's entitlement to benefits. So, it decided to verify the Claimant's entitlement by seeking out further information on July 29, 2021.

[110] The Claimant has not persuaded me that the Commission exercised its discretion in a non-judicial manner in reconsidering the claim on August 2, 2021, and assessing an overpayment.

[111] The Commission did not fail to consider relevant information or consider irrelevant information or act in a discriminatory manner or in bad faith when it decided to reconsider the claim. Claimants are obligated to repay benefits paid to the Commission to which they are not entitled.[42] So, reconsidering a claim where it appears a claimant may not be entitled to benefits is a proper purpose.

[112] No new relevant information was provided by the Claimant at the General Division. The Commission was aware of the information the Claimant had been given by a Service Canada agent as the Claimant told the Commission about that information.

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[40] GD3-19 to GD3-20.
[41] GD9-50.
[42] See section 43 of the EI Act.

[113] The Commission did not mention that information in its decision to reconsider the claim. But, it did not have to. The Claimant wasn't given mistaken advice about his eligibility. He was eligible for benefits when he applied, having earned enough hours of insurable employment to qualify for benefits.

[114] But, as the application makes clear, there are ongoing requirements to be entitled to EI benefits, one of those being that claimants must be capable of and available to work. There was no evidence that the Claimant had any discussion with the Service Canada agent when he applied for benefits about his availability for work or that he was misled in any way about the availability requirements.

[115] The Claimant was improperly advised by the agent to not report his schooling on the application form. However, the ongoing payments were not made to the Claimant based on that form alone. The Claimant completed biweekly claim reports. These contained a notation that says, "I understand this information will be used to determine my eligibility for employment insurance benefits. I understand the information I have provided is subject to verification."

[116] The Claimant did not declare his schooling on the biweekly claimant reports. I believe the Claimant made an honest mistake when he didn't declare his schooling on these reports. He may have understood the Commission's advice about not reporting his schooling on the application form also applied to the claimant reports.

[117] However, the result was that the Commission was not aware of the Claimant's schooling, while ongoing payments were being made to the Claimant. The Commission was not aware of the schooling until the phone call of May 27, 2021.

[118] I find the Commission acted judicially in reconsidering the claim, given the new information it received on May 27, 2021, that had not been declared on the claimant reports, that the Claimant was in school, and also considering the Claimant was not able to prove his availability for work when the Commission sought verification of his entitlement on July 29, 2021.

[119] Since the Commission acted judicially in reconsidering the claim, I cannot interfere with its decision to do so. This means the overpayment remains.

[120] I recognize this result is going to be disappointing for the Claimant. If he hasn't done so, the Claimant can still ask the Commission to consider writing off the debt. He can also ask Canada Revenue Agency's Debt Management Call Centre (1-866-864-5823) to consider writing off any debt or whether they will accept a repayment schedule.

Conclusion

[121] The appeal is dismissed.

Charlotte McQuade
Member, Appeal Division