Citation: *ZZ v Canada Employment Insurance Commission*, 2022 SST 1580

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	Z. Z.
Representative:	M. S.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (434911) dated October 12, 2021 (issued by Service Canada)

Tribunal member:	Teresa M. Day
Type of hearing:	Videoconference
Hearing date:	March 22, 2022
Hearing participant:	Appellant Appellant's representative
Decision date:	May 11, 2022
File number:	GE-22-302

Decision

[1] The appeal is dismissed.

[2] The Claimant (who is the Appellant in this appeal) has not proven that he was available for work while attending high school full-time. This means that the disentitlement imposed on his claim for regular employment (EI) benefits cannot be changed.

Overview

[3] The Claimant established a claim for regular EI benefits starting as of December 27, 2020.

[4] On May 27, 2021, and again on July 29, 2021, the Claimant reported that he was attending high school full-time while on claim[1]. He said he was obligated to attend scheduled classes during regular business hours from Monday to Friday[2], and was not willing to leave high school to accept full-time work.

[5] On August 2, 2021, the Respondent (Commission) imposed a retroactive disentitlement on his claim from December 27, 2020 to June 26, 2021[3] because the Claimant was taking a training course and had not proven his availability for work[4]. This resulted in a $5,234.00 overpayment on his claim[5].

[6] The Claimant asked the Commission to reconsider. He said that:

- Before he applied, he spoke with two Service Canada agents who told him that high school is not considered a training course. He applied for EI benefits on that basis.

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[1] He said that his school year started on September 8, 2020 and ended on June 25, 2021.
[2] He said that after June 25, 2021, he was available to work full-time every day from Monday to Sunday without restrictions.
[3] See decision letter at GD3-19.
[4] The Commission referred to sections 18(1) and 153.161 of the *Employment Insurance Act* (EI Act) as the basis for their decision (see GD3-20).
[5] See Notice of Debt at GD9-50.

- He met the rest of the eligibility requirements to receive EI benefits.
- He was ready, willing and available to work every day of the week.
- During lockdown, his school switched to remote learning. His classes were online, Monday to Friday, from 9am to 12:30pm. He had the rest of the day and all weekend to work. He could easily have put in the equivalent of full-time hours outside of his classes.

[7] The Commission was not persuaded and maintained the disentitlement on his claim[6]. The Claimant appealed to the Social Security Tribunal (Tribunal).

[8] A claimant must be available for work in order to receive regular EI benefits. Availability is an ongoing requirement. This means that a claimant must be searching for a job and cannot impose personal conditions that could unduly restrict their ability to return to work.

[9] I have to decide if the Claimant has proven that he was available for work during the period of the disentitlement, namely while he was attending high school full-time. The Claimant must prove this on a balance of probabilities[7].

[10] The Commission says that the Claimant wasn't available for 2 reasons: because school was his priority – ***not*** seeking and accepting full-time employment; and because he was limiting himself to working for his father's business[8] and only during hours outside of his class schedule, which limited his chances of immediately returning to the labour market.

[11] The Claimant says he was only attending 4 hours of classes per day and had plenty of time to work outside of his school schedule. He also says he advised the Commission that he was a full-time high school student, and was never told he couldn't receive EI benefits while in school. He wants EI benefits for the weeks Ontario was in

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[6] See decision letter at GD3-29.
[7] This means he has to show it is more likely than not that he was available for work while he was in school.
[8] The Claimant works at a Second Cup café that is owned by his father.

Covid-19 pandemic “lockdowns” between December 27, 2020 and June 26, 2021 because he says he met the eligibility criteria: he was laid off due to the pandemic, but was available for work the whole time.

[12] I agree with the Commission. The Claimant has not proven that he was available for work for purposes of receiving regular EI benefits. These are the reasons for my decision.

Issue

[13] Was the Claimant available for work while he was a full-time high school student between December 27, 2020 and June 26, 2021?

Analysis

[14] To be considered available for work for purposes of regular EI benefits, the law says that a claimant must show that they are capable of, and available for work and unable to obtain suitable employment[9].

[15] There is no question that the Claimant was ***capable*** of work during this time[10]. So I will proceed directly to the availability analysis to assess his entitlement to regular EI benefits between December 27, 2020 and June 26, 2021[11].

[16] 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;

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[9] Section 18(1)(a) of the *Employment Insurance Act* (EI Act).
[10] I see no indication that the Claimant was medically unable to work during this period.
[11] The Commission says it used ***both*** sections 18 and 50 of the EI Act to disentitle the Claimant to EI benefits (see GD4-1). But I do not think the Commission has proven that it used section 50. I see no evidence that the Commission asked the Claimant about his job search efforts or requested proof he was making reasonable and customary efforts to find a job. There is also no evidence that the Commission told the Claimant that he wasn’t making reasonable and customary efforts to find a job or explained why his efforts were insufficient. Therefore, I will not consider section 50 of the EI Act in my analysis, and will limit my consideration to whether the Claimant has proven his availability as required by section 18 of the EI Act.

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[12] .

[17] These 3 factors are commonly referred to as the "*Faucher* factors", after the case in which they were first laid out by the court. When I consider each of these factors, I have to look at the Claimant's attitude and conduct[13].

[18] The Federal Court of Appeal has also said that:

a) availability is determined for **each working day** in a benefit period for which a claimant can prove that, on that day, they were capable of and available for work and unable to obtain suitable employment[14]; and

b) claimants who are in school full-time are **presumed** to be unavailable for work[15] (this is commonly referred to as the **presumption of non-availability**). This means that decision-makers can assume that students are <u>not</u> available for work when the evidence shows they are in school full-time. But a claimant can rebut the presumption by showing they have a multi-year history of working full-time while in school[16], or that there are exceptional circumstances that apply to their case[17].

[19] I would normally start by looking at whether I can presume that the Claimant wasn't available for work and if the Claimant has rebutted the presumption of non-availability[18]. Only then would I look at whether he was available for work based on the *Faucher* factors.

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[12] See *Faucher v. Canada (Employment and Immigration Commission)*, A-56-96.
[13] Two decisions from case law set out this requirement. Those decisions are *Canada (Attorney General) v Whiffen*, A-1472-92; and *Carpentier v Canada (Attorney General)*, A-474-97.
[14] See *Canada (Attorney General) v. Cloutier*, 2005 FCA 73.
[15] See *Canada (Attorney General) v. Cyrenne*, 2010 FCA 349
[16] See *Canada (Attorney General) v. Rideout*, 2004 FCA 304.
[17] See *Canada (Attorney General) v. Cyrenne*, 2010 FCA 349.
[18] At the hearing, the Claimant said he had a history of working while in school. After the hearing, he submitted two Records of Employment (at GD7) to support his testimony. M. Z. also submitted an explanation of the Claimant's work history (at GD11). For the reasons set out in paragraphs 20 to 22 of

[20] But the Commission relied on a specific legal provision, namely section 153.161 of the *Employment Insurance Act* (EI Act), to impose the disentitlement on the Claimant's claim. This section governs the issue of student availability[19] and applies to the Claimant's situation[20]. It says that a claimant who is a student is not entitled to be paid EI benefits for any working day unless they can prove that on that day they were capable of and available for work[21]. It also authorizes the Commission – ***at any point after benefits are paid*** – to verify that a student claimant was entitled to benefits by requiring proof of their availability during their benefit period[22].

[21] A very recent decision of the Tribunal's Appeal Division found that where the Commission relies on section 153.161 of the EI Act to impose a disentitlement on a student claimant, rebutting the presumption of non-availability is irrelevant because full-time students **must** prove they are capable of and available for work[23]. And this requires an analysis of the *Faucher* factors.

[22] I will therefore proceed directly to the *Faucher* analysis.

Issue 1: Was the Claimant available for work according to the Faucher factors?

[23] No, he was not. The Claimant has not satisfied all of the *Faucher* factors.

Wanting to go back to work

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

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my decision, I do not need to make any findings with respect to this evidence or the Commission's responding submissions in GD9.

[19] For purposes of section 18 of the EI Act.

[20] There is no exception for high school students.

[21] Section 153.161(1) of the EI Act.

[22] Section 153.16(2) of the EI Act.

[23] See *Canada Employment Insurance Commission v. RJ*, 2022 SST 212, which was issued on April 5, 2022.

[25] The Claimant and his father, M. Z. (M. Z.), testified that:

- He was a full-time Grade 11 student from September 2020 to April 2021.
- He worked at his father's Second Cup café for 22-25 hours/week. The hours of his shifts varied. Sometimes he worked from 5pm to10pm or 3pm to 8pm. Other times he worked from 1pm to 7pm or 1pm to 6pm.
- He worked at the café every week, except during the provincial "lockdowns" due to the Covid-19 pandemic.
- When the province went into lockdown, he would be laid off.
- When the lockdown was lifted, he immediately returned to work at the café.
- He is only asking for EI benefits during the lockdowns.
- He did look for other jobs during the lockdowns. But he didn't find anything because "90%" of business were closed, he doesn't have a car, and his Muslim faith restricts him from working in places where he might come into contact with alcohol, which includes grocery stores and restaurants.
- There were very few places open for him to drop off his resume.
- His classes were on-line during lockdown. He was required to be on-line for school from 9am to 12:30 or 1pm, Monday to Friday. He spent an additional 1-2 hours per day studying, but could do this on his own time.
- He was available for work every day after school and all day on weekends. During lockdown this meant Monday to Friday after 1pm. Even without weekends, he could easily have worked 8 hours/day and put in 37.5 hours/week between Monday and Friday, which is the equivalent of full-time hours.
- A full-time job doesn't have to be 9am – 5pm.

> He wasn't going to drop out of high school to get a full-time job, but he could have worked around his class schedule and put in the equivalent of full-time hours.

[26] I accept that the Claimant wanted to work while also attending high school full-time. But 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[24].

[27] 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**[25].

[28] The Claimant has shown that he had a desire to return to the labour market, but was only prepared to work at jobs that could accommodate his schedule of mandatory daily classes from 9am to 12:30 or 1pm, Mondays to Fridays. This is not sufficient to satisfy the first *Faucher* factor.

Making efforts to find a suitable job

[29] For the second *Faucher* factor, the Claimant must prove that he was looking for suitable employment for every day of his benefit period.

[30] The Claimant and M. Z. testified that:

- He did look for other jobs during lockdowns, but nobody would hire him.
- He applied to some other cafés that remained open.
- He was able to return to work at his father's café, and was always immediately re-hired there when the lockdowns were over.

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[24] This principle is set out in the decision of *Duquet v. Canada (Employment and Immigration Commission),* 2008 FCA 313.
[25] Section 32 of the *Employment Insurance Regulations*.

- He did not keep a log of his job search efforts because he did not understand this was required.

- "EI" never informed him that he had to look for a job or that he needed to keep a record of his job search efforts.

- He was 16 years old. "EI" can't expect him to log everything he did to try to find a job.

[31] I acknowledge that the Claimant's lay-offs from his father's café were temporary, and I accept that the Claimant had an on-going willingness and desire to work there.

[32] But the courts have said that maintaining the employment tie and remaining part of the work force part-time while going to school does not necessarily make a person available for work[26]. The courts have also said that waiting to be recalled to employment is not sufficient to prove availability[27]. 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.

[33] Although I am troubled by the Claimant's testimony that he did not know he had to looking for a job while on claim[28], I can accept that he was making some efforts to find another part-time job to make up for the hours he lost due to the lockdown.

[34] But he was not doing enough to find work.

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[26] *Canada (Attorney General) v. Gagnon*, 2005 FCA 321, *Canada (Attorney General) v. Loder*, 2004 FCA 18, *Canada (Attorney General) v. Rideout*, 2004 FCA, *Canada (Attorney General) v. Primard* (2003) 2003 FCA 349 (CanLII), 317 N.R. 359 (FCA), *Canada (Attorney General v. Bois*, 2001 FCA 175.
[27] *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*.
[28] It is clear on all applications for EI benefits, under the section "Your Responsibilities" that claimants must actively search for and accept offers of suitable employment and keep a detailed record of their job search efforts. See GD3-8 to GD3-9.

[35] The courts have said that a claimant's job search efforts must be sufficient to prove[29] an active, on-going[30] and wide-ranging job search directed towards finding suitable employment[31]. The Claimant's job search efforts fall short of this standard. Separate and apart from his failure to provide independently verifiable evidence of his job search efforts, the Claimant was not looking for full-time employment during regular business hours for every working day of his benefit period. This means he was not doing enough to find suitable employment while he was in school.

[36] I therefore find that the Claimant has not satisfied the second *Faucher f*actor.

Unduly limiting chances of going back to work

[37] 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.

[38] As stated above, availability must be demonstrated during regular working hours for every working day. It cannot be restricted to irregular hours, such as evenings, nights, weekends and/or school holidays, in order to accommodate a course schedule that significantly limits availability[32].

[39] The Claimant's schooling was a personal condition that restricted and could have overly limited his chances of returning to the labour market.

[40] I cannot ignore the fact that the Appellant was required to attend daily classes between 9:00am and 12:30 or 1pm, Mondays to Fridays. Having to be present for daily classes at set times in the mornings and early afternoons was a personal condition that could have unduly limited the Claimant's return to the labour market. It meant he was only available for work to the extent that it did not conflict with his school schedule. This

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[29] With verifiable evidence – including the names and contact information of the employers contacted and the dates he made enquiries and/or submitted an application.
[30] A claimant must be searching for work for ***every working day of their benefit period***.
[31] Suitable employment is generally considered to be full-time employment.
[32] See *Bertrand (1982), 1982 Carswell Nat 466 (CA).* See also the recent decision of the Tribunal's Appeal Division in *Canada Employment Insurance Commission v. RJ*, 2022 SST 212.

significantly reduced the jobs he could apply for or accept, because an employer would have to be willing to allow him to work around his school schedule.

[41] I am supported in this conclusion by a number of Federal Court of Appeal decisions on the issue of student availability. In these cases, the court found that restrictions on the days and/or times a student claimant could work because of their class schedule meant that the student claimant was not available on the working days of their benefit period[33] and was setting personal conditions that might unduly limit their chances of returning to the labour market[34].

[42] The Claimant was not available during regular hours for every working day during the period of the disentitlement. He was only available at certain times on working days (Mondays to Fridays[35]) because he was obliged to attend his high school classes. This represents setting personal conditions that could unduly limit his chances of returning to the labour market.

[43] I therefore find that the Claimant has not satisfied the third *Faucher* factor.

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

[44] The Claimant must satisfy all 3 of the *Faucher* factors to prove his availability for work according to section 18 of the EI Act.

[45] Based on my findings, he has not satisfied any of them. 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 from December 27, 2020 to June 26, 2021. This means he was not

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[33] See *Canada (Attorney General) v. Gagnon,* 2005 FCA 321 and *Duquet v. Canada Employment Insurance Commission and Attorney General of Canada*, 2008 FCA 313.
[34] See *Canada (Attorney General) v. Primard*, 2003 FCA 349 and *Canada (Attorney General) v. Rideout*, 2004 FCA 304.
[35] As defined by section 32 of the *Employment Insurance Regulations*.

available for work for purposes of the EI Act and, therefore, not entitled to EI benefits while he was in school.

Issue 2: The Overpayment

[46] The Claimant has a large overpayment due to the retroactive disentitlement imposed on his claim.

[47] He and M. Z. expressed their frustration about this, pointing out that they checked with Service Canada about the Claimant's eligibility prior to applying and never hid the fact that he was a full-time high school student. They do not understand why the Claimant was approved for EI benefits if he was not entitled to them while he was in school.

[48] They also questioned why the Claimant is required to contribute to the EI program if he's not eligible to receive EI benefits.

[49] I sympathize with the Claimant and M. Z. about the large overpayment, but I do not have any discretion to waive it – no matter how compelling their arguments may be. The law simply does not empower the Tribunal to relieve the Claimant from liability for the overpayment[36], and I cannot ignore the law, even if the outcome may seem unfair[37]. This means that, even though he was honest and acted with good faith from the beginning, I cannot reduce or remove the overpayment on her claim.

[50] Unfortunately for the Claimant, he has not proven that he was available for work within the meaning of the law from December 27, 2020 and June 26, 2021. This means he was not entitled to EI benefits during this period, and must repay the benefits he received.

[51] The Claimant is left with 2 options:

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[36] Sections 43 and 44 of the *Employment Insurance Act* establish liability for an overpayment on a claimant.
[37] *Granger v. Canada (CEIC)*, [1989] 1 S.C.R. 141

a) He can ask the Commission to consider writing off the debt because of undue hardship[38]. If he doesn't like the Commission's response, she can appeal to the Federal Court of Canada.

or

b) He can contact the Debt Management Call Centre at Canada Revenue Agency about a repayment schedule or for other debt relief[39].

Conclusion

[52] The Claimant has not proven that he was available for work within the meaning of the law from December 27, 2020 to June 26, 2021. I therefore find that he is disentitled to EI benefits because he has not proven his availability for work while he was attending high school full-time.

[53] This means that the disentitlement imposed on his claim from December 27, 2020 to June 26, 2021 must remain.

[54] The appeal is dismissed.

Teresa M. Day
Member, General Division – Employment Insurance Section

[38] Section 56 of the *Employment Insurance Regulations* gives the Commission broad powers to write off an overpayment when it would cause undue hardship for a claimant to repay it.
[39] The telephone number is found on the Notice of Debt and account statements sent to the Claimant for the overpayment.