



Citation: *CA v Canada Employment Insurance Commission*, 2022 SST 1598

**Social Security Tribunal of Canada
General Division – Employment Insurance Section**

Decision

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

Decision under appeal: Canada Employment Insurance Commission
reconsideration decision (477061) dated June 2, 2022
(issued by Service Canada)

Tribunal member: Mark Leonard
Type of hearing: Teleconference
Hearing date: September 9, 2022
Hearing participants: Appellant
Decision date: September 19, 2022
File number: GE-22-2015

Decision

[1] The appeal is dismissed.

[2] The Appellant (Claimant) hasn't shown that he was available for work while in school. This means that he can't receive Employment Insurance (EI) benefits.

Overview

[3] The Canada Employment Insurance Commission (Commission) decided that the Claimant was disentitled from receiving EI regular benefits from January 12, 2021, to December 10, 2021, because he wasn't available for work. A claimant has to be available for work to get EI regular benefits. Availability is an ongoing requirement. This means that a claimant has to be searching for a job. However, there is an exception to this rule. When a Claimant is referred for training by an authorized organization, a Claimant is deemed available and can be paid EI benefits while they complete their training.

[4] The Commission initially approved the claim subject to availability verification. When it later verified the Claimant's availability during the period he was in school, it denied the Claimant benefits. It says that the Claimant wasn't available because he was in school full-time and was not referred to the training by an authorized organization.

[5] The Claimant agrees that he was in school full-time but says that he was approved for training by an authorized agency. He reported to the Commission that he was in school and says that he was approved to receive benefits. He asserts he should not have to repay benefits for which the Commission originally approved him.

[6] I have to decide whether the Claimant has proven that he was available for work. The Claimant has to prove this on a balance of probabilities. This means that he has to show that it is more likely than not that he was available for work.

Issue

[7] Was the Claimant available for work while in school?

Analysis

[8] Two different sections of the law require claimants to show that they are available for work. However, the Commission decided to disentitle the Claimant under only one of the sections. The Claimant must therefore, show he meets the eligibility requirements of this section of the Act.

[9] **Capable and Available for Work (Section 18(1))**

[10] The Commission decided that the Claimant was disentitled from receiving benefits because he wasn't available for work.

[11] The Act says that a claimant has to prove that they are "capable of and available for work" but aren't able to find a suitable job.¹ Case law gives three things a claimant has to prove to show that they are "available" in this sense.² I will look at those factors below.

[12] In addition, the Federal Court of Appeal has said that claimants who are in school full-time are presumed to be unavailable for work.³ This is called "presumption of non-availability." It means we can suppose that students aren't available for work when the evidence shows that they are in school full-time.

[13] I will start by looking at whether I can presume that the Claimant wasn't available for work. Then, I will look at whether he was available based on the provisions of the Act and jurisprudence.

Presuming full-time students aren't available for work

[14] The presumption that students aren't available for work applies only to full-time students.

¹ See section 18(1)(a) of the Act.

² See *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96.

³ See *Canada (Attorney General) v Cyrenne*, 2010 FCA 349.

The Claimant doesn't dispute that he was a full-time student

[15] The Claimant agrees that he was a full-time student. He enrolled in a Logistics and Supply Chain Management program that started in January 2021 and finished in December 2021. His school schedule and course load clearly support that he was in school full-time days. He testified that the program was condensed from two years into one and that students were expected to devote significant time to ensure completion of the requirements to graduate.

[16] I am satisfied that the Claimant was in school full-time. I see no evidence that shows otherwise. This means that the presumption applies to the Claimant unless he can rebut it.

Rebut the Presumption

[17] To rebut the presumption, the Claimant must show that his main focus is to seek out and find suitable employment. He must also demonstrate that he has been capable in the past of both working and attending school full-time. He must also show engage in a job search and a willingness to leave school to accept a job. His course work cannot impede him from finding and accepting work. If he cannot demonstrate this, then the presumption applies to him.

[18] The Claimant testified that he made no attempts to find work while in training nor any intention to do so. He confirmed that the requirements of his program were such that he could not both work and remain in school. He did not show that he would have left school for suitable employment even if he had conducted a search.

[19] Therefore, the presumption applies to the Claimant. This means that the Claimant would be deemed unavailable for work and not entitled to EI benefits. However, as I noted above, there is an exception. When a claimant is *referred* for education or training, they can be considered available and entitled to receive benefits while in school.

Referred Training

[20] A claimant is deemed available for work when they attend a course or program of instruction authorized by the Commission or other authority.⁴

[21] The Commission submits that the Claimant has not shown that he was referred to his program by an authorized designate. As such, he cannot be deemed available while he was pursuing the program and must meet the requirements to show availability for work during the period he was in school.

[22] The Commission further points out that the Commission's approval or denial decisions concerning referrals for training are not subject to administrative review.

[23] First, while the Commission points out that referral decisions are not subject to administrative review, I find that the decisions precluded from review are ones rendered by the Commission, or other designated authority, regarding a claimant's eligibility to participate in a program. I would distinguish those from situations where it is evident that a claimant did receive a valid referral but for some reason benefits were denied.

[24] Nevertheless, the Claimant admitted that he did not receive a specific referral authorization for him to attend the training program and receive EI benefits. But he contends that he was referred to the training because he received both a grant from the Province of Alberta, and an "Alberta Student Aid" loan. He suggests that these organizations are government agencies and by the very fact that they approved his requests for aid, it implies he had been approved for the training program and therefore he should receive EI benefits.

[25] I disagree. I find that the Claimant has not shown that he had a valid referral from the Commission or an authorized designate. Student aid and grants are simply financial vehicles to assist students in their educational pursuits. They are not authorizations to engage in specific courses or programs consistent with the requirements of Section 25 of the Act. Programs designed to assist claimants in developing skills necessary to

⁴ See Section 25(1) of the *Employment Insurance Act*.

secure reliable employment and reduce the possibility of repetitive EI claims are operated by authorized organizations. They have minimum requirements that a claimant must meet for participation. The Claimant has not shown that he either applied for or received an authorization to attend the training as part of such a program.

[26] Essentially, the Claimant made a *personal* decision to take training. He requested and received financial aid. But his course of action was not approved by an authorized organization for him to receive EI benefits while in school. Therefore, he does not enjoy the benefit of being *deemed* available while pursuing his program.

– **Delay in Verifying Eligibility**

[27] The Claimant argues that the Commission took a very long time to verify his claim and question his availability, which contributed to his large overpayment.

[28] The Claimant submitted that the Commission was aware that he was in school because he told them so in his initial claim and biweekly reports. He testified that he consistently reported that he was taking training and yet, the Commission approved his claims.

[29] The Claimant posed the question; if he was not entitled to benefits, why not tell him up front? Why tell him he was approved then wait until his program was complete to inform him he was not eligible for EI thus creating a large overpayment subject to recovery?

[30] The Commission submitted that it was within its authority to examine the claim and verify the Claimant's availability.

[31] It says that it was simply following new provisions within the Act that allowed it to pay benefits without first verifying entitlement.⁵ These measures were to facilitate the rapid payment of benefits to claimants affected by the Covid-19 pandemic. Further, it relies upon Interim Order 10 and provisions found in Part VIII of the Act that empower it

⁵ See Interim Order No. 10 and Section 153.161 of the *Employment Insurance Act*.

to verify at a later time that claimants pursuing courses or a program instruction are capable and available for work.⁶

[32] In the Commission's submissions, it included one certified copy of an E-Report wherein the following statement is present regarding the Claimant.

"We have approved your training period, however, proof of your availability may later be requested and could impact your entitlement to benefits for the training period. Let us know immediately once you have finished your course or if your schedule changes."

[33] I can see how the Claimant came to the conclusion that he was authorized to proceed with his training all the while claiming and receiving EI benefits. The noted paragraph could lead one to conclude that the Commission is only interested in knowing when a program is completed and if there are schedule changes.

[34] But, in fact, there was a condition overriding the Commission's approval. In the statement noted above, the Commission places a condition that approval for benefits is subject to verification of availability. That statement is a caution. Upon reading this condition, a prudent claimant should have questioned the premise of benefit eligibility and contacted the Commission to confirm just how they might be required to prove availability and, what the consequences were if they could not.

[35] Previously, the Commission was obliged to make eligibility decisions before granting benefits but the wording of 153.161 grants the Commission the authority to approve claims subject to verification after benefits have been paid.

[36] Regarding the time delay in verifying his availability, in fact, the Act leaves little doubt concerning the authority conferred upon the Commission to verify entitlement. It states that the Commission ... *may at any point after benefits are paid ... verify that the claimant is entitled.*⁷

⁶ See Section 153.161(1) of the *Employment Insurance Act*.

⁷ See Section 153.161(2) of the *Employment Insurance Act*.

[37] Nevertheless, it is disturbing that the Commission would note even conditional approval of a claim knowing that historically, any claimant in school has a significant hurdle to overcome to prove availability. There are numerous federal court decisions that have carefully defined the stringent requirements a claimant must show before they can attend school and receive EI benefits. The Commission often cites these cases in support of its decisions to deny a claim for failing to meet availability.

[38] Yet, in this instance, the Commission conditionally approved his claim and allowed it to proceed for one full year before attempting to validate eligibility. This created a \$21,659.00 overpayment of benefits subject to repayment by the Claimant.

[39] Despite my concerns with the conduct of the Commission, I cannot find that it acted outside of its authority when it verified the Claimant's availability.

[40] Essentially, the original approval of benefits was conditional and this was conveyed to the Claimant. The Commission was within its authority to verify his claim and require the Claimant had to prove his availability. Now, this means, that to be eligible for EI benefits, he must show that he was both capable and available for work during the period he was in school.

Capable of and Available for Work

[41] I must now consider whether the Claimant was capable of and available for work but unable to find a suitable job.⁸ Case law sets out three factors for me to consider when deciding this. The Claimant has to prove the following three things:⁹

- a) He wanted to go back to work as soon as a suitable job was available.
- b) He has made efforts to find a suitable job.

⁸ See section 18(1)(a) of the Act.

⁹ These three factors appear in *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A- 57-96. This decision paraphrases those three factors for plain language.

- c) He didn't set personal conditions that might have unduly (in other words, overly) limited his chances of going back to work.

[42] When I consider each of these factors, I have to look at the Claimant's attitude and conduct.¹⁰

Wanting to go back to work

[43] The Claimant hasn't shown that he wanted to go back to work as soon as a suitable job was available.

[44] This *Faucher* requirement requires the Claimant to demonstrate a desire to return to work as soon as a suitable job was available. The Claimant is unable to demonstrate this because he did not seek out any employment while he was in school.

[45] I am satisfied that the Claimant wants a better job. It's the reason he pursued additional education to upgrade his skills. But it is evident that the Claimant's priority was to complete his training program. He focussed on his studies and made no efforts to find work during his time in the program.

[46] He testified that when completing his bi-weekly reports, he consistently responded "yes" to the question of whether he was willing and capable of working.

[47] But demonstrating the desire to return to the labour market as soon as possible requires more than indicating "yes" to the question. Any EI claimant must be prepared to show that there are seeking employment as soon as possible through sustained efforts.

[48] The Claimant testified that he did not seek employment because his program was exceedingly demanding. He said that he did not have enough time to complete his program requirements, work, and respond to his other family obligations.

[49] I recognize that a serious contributing factor to the Claimant not making these efforts is the fact that the Commission informed the Claimant that he had been

¹⁰ 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.

approved for benefits. He simply did not think he had to look for work while he believed he was approved to attend school. But his belief is not a mitigating factor that would exempt him from meeting the availability requirements.

Making efforts to find a suitable job

[50] I find that the Claimant did not make enough effort to find a suitable job.

[51] I have considered the list of usual job-search activities listed in the *Regulations*.¹¹ For this factor, that list is for guidance only.¹²

[52] The Claimant said that he did not make any attempts to find work. He was entirely honest in his statement. He did not believe he was required to do so while he was on training. He believed he was approved and could make claims while at school. So he did not conduct any form of job search consistent with the activities listed in the *Regulations*.

[53] However, given the finding that he had not been properly referred for training, he was obligated to make those efforts to find employment in order to remain eligible for EI benefits.

Unduly limiting chances of going back to work

[54] The Claimant did set personal conditions that might have unduly limited his chances of going back to work.

[55] The Commission says that the Claimant was not willing to leave his training program to accept work. Continuing with the training program given its significant demands meant his chances of finding and maintaining employment were unduly limited.

[56] The Claimant did suggest that he would have been willing to try working nights while he was in school if he could have found an appropriate job that let him stay in

¹¹ See Section 9.0001 of the *Employment Insurance Regulations*.

¹² I am not bound by the list of job-search activities in deciding this second factor. Here, I can use the list for guidance only.

school. But this statement was predicated upon him now knowing he was obligated to seek work. The Claimant simply did not believe he was required to do so at the time and therefore took no steps to find any employment while in school.

[57] What is evident is that the Claimant prioritized school over seeking work. The significant demands of his program precluded him for both working and attending school. Therefore, his unwillingness to quit school coupled with the significant study demands of his program, did unduly limit his chances of finding suitable employment.

So, was the Claimant Capable of and Available for Work?

[58] Regrettably no. Despite the Commission's contributory actions to the Claimant's situation, he did not receive a specific referral that would have deemed him available while in school. Further, based on my findings on the three factors, I find that the Claimant hasn't shown that he was capable of and available for work but unable to find a suitable job.

[59] While the Claimant could have been more prudent in questioning the availability condition, it is abundantly evident that the Commission's delay in reconsidering his claim has placed the Claimant in a very difficult financial situation

[60] I empathize with the Claimant's frustration. He believed he was doing everything correctly to remain eligible for EI benefits while in school only to be told at the end of his program, and after receiving almost a full year of benefits, that he was not qualified for those benefits.

[61] A large overpayment now exists. However, I do not have any discretion to waive it no matter how compelling I find his argument or circumstances to be. The law simply does not empower the Tribunal to relieve him from liability for the overpayment and I cannot ignore the law, even if the outcome may seem unfair.¹³ This means that, even

¹³ See (*Canada (A.G.) v. Kneé*, 2011 FCA 301)

though he was honest and acted with good faith from the beginning, I cannot reduce or remove the overpayment on his claim.¹⁴

[62] Unfortunately, for the Claimant, he has not proven that he was available for work within the meaning of the law from January 2021, to December 2021. This means he was not entitled to EI benefits during the entire period.

[63] The Claimant is left with two options:

a) He can ask the Commission to consider writing off the debt because of undue hardship. 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.

Conclusion

[64] The appeal is dismissed.

[65] The Claimant hasn't shown that he was available for work within the meaning of the law. However, the Commission should self-examine its own actions that contributed to the Claimant's present situation and consider applying its discretionary powers.

Mark Leonard
Member, General Division – Employment Insurance Section

¹⁴ See Sections 43 and 44 of the *Employment Insurance Act*.