Citation: *AP v Canada Employment Insurance Commission*, 2022 SST 1701

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

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

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (450165) dated January 31, 2022 (issued by Service Canada)

Tribunal member:	Leanne Bourassa
Type of hearing:	Videoconference
Hearing date:	April 27, 2022
Hearing participants:	Appellant
Decision date:	June 15, 2022
File number:	GE-22-751

Decision

[1] The appeal is dismissed. The Tribunal regrettably disagrees with the Claimant, A. P.

[2] The 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] Claimants have to be available for work in order to get regular EI benefits. Availability is an ongoing requirement; claimants have to be searching for a job.

[4] In this case, the Claimant was a student. When his part-time job at a restaurant was shut down because of the COVID-19 pandemic in April 2020, he applied for EI benefits. He was paid the Canada Emergency Response Benefit (CERB).

[5] On October 4, 2020, when the CERB came to an end, the Claimant's application for CERB was automatically used by the Canada Employment Insurance Commission (Commission) to establish a regular EI claim for him. So, the Commission continued to pay him benefits.

[6] In October 2021, the Commission asked the Claimant about his studies. He told them he was in university and had been since 2018. The Commission then decided that the Claimant was not entitled to benefits beginning October 5, 2020 because he was taking a training program on his own initiative and had not proven he was available for work. He would have to pay back all of the benefits he had been paid since then.

[7] The Claimant asked for the decision to be reconsidered. The Commission maintained that he was on a full time school schedule and would not leave his schooling to accept full-time employment, so, he was not available for work.

[8] 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.

[9] The Commission says that the Claimant wasn't available because he was in school full-time during all week-days and he would not quit his school to accept a full-time position conflicting with his schedule. His course schedule presents a lot of restrictions that would reduce his chances to get back to the employment market.

[10] The Claimant disagrees and says that throughout the whole duration of his claim, he was conducting job searches, documenting his activities and accepting any suitable offer. He was applying for jobs through the university portal and was working part-time, but asking for more hours. He was only aware that his internships would not be considered full-time jobs when the Commission refused his claim

Matter I have to consider first

The Claimant had a witness at the hearing

[11] During the videoconference hearing, I noticed that the Claimant was speaking with someone off camera. It was his mother. Since she was helping the Claimant remember details about the matter and had participated in some of the calls he was talking about, I asked that if she was going to intervene, she affirm that she would tell the truth in this hearing. She did make that affirmation and participated in the hearing by supporting the Claimant. I don't feel that she gave any independent testimony that would influence my decision or would require me to weigh her credibility.

Issue

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

Analysis

[13] Two different sections of the law require claimants to show that they are available for work. The Commission decided that the Claimant was disentitled under both of these sections. So, he has to meet the criteria of both sections to get benefits.

[14] First, the *Employment Insurance Act* (Act) says that a claimant has to prove that they are making "reasonable and customary efforts" to find a suitable job.[1] The *Employment Insurance Regulations* (Regulations) give criteria that help explain what "reasonable and customary efforts" mean.[2] I will look at those criteria below.

[15] Second, 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.[3] Case law gives three things a claimant has to prove to show that they are "available" in this sense.[4] I will look at those factors below.

[16] The Commission say they decided that the Claimant was disentitled from receiving benefits because he wasn't available for work based on these two sections of the law.

[17] In addition, the Federal Court of Appeal has said that claimants who are in school full-time are presumed to be unavailable for work.[5] 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.

[18] However, the Commission also says that under new measures put in place because of the COVID-19 pandemic, they have a right to verify that a claimant who received benefits while on non-referred training is entitled to those benefits. This section

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[1] See section 50(8) of the *Employment Insurance Act* (Act).
[2] See section 9.001 of the *Employment Insurance Regulations* (Regulations).
[3] See section 18(1)(a) of the Act.
[4] See *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96.
[5] See *Canada (Attorney General) v Cyrenne*, 2010 FCA 349.

of the law allows them to require proof that a claimant was capable of and available for work on a working day in their benefit period.[6]

[19] As I read these provisions, I see that the presumption of non-availability has been displaced. A full-time student is not presumed to be unavailable, but simply has to prove their availability like any other claimant. So, even though the Commission has argued that the Claimant did not rebut the presumption, I am not concerned with that. I am only looking at whether or not the Claimant has proven his availability.

[20] So, I find that the law currently allows for the Commission, at any time after benefits are paid to a student claimant, to require proof that they were capable of and available for work.[7] A claimant who is in a training program that they have not been referred to, can only be paid benefits for a working day in their benefit period for which they have shown that they were capable of and available for work.[8] If the Claimant is unable to provide that proof, the Act says they are not entitled to benefits.

[21] Since the parties agree that the Claimant was not referred to his training and I don't see anything that contradicts this, I now need to look at whether the Claimant was available based on the two sections of the law on availability.

- The Claimant was not disentitled under section 50(8) of the Act

[22] The first section of the law that I am going to consider says that claimants have to prove that their efforts to find a job were reasonable and customary.[9]

[23] Although the Commission says that the Claimant was disentitled under this section of the law, I don't see any evidence that they asked him to prove that he was making reasonable and customary efforts to find a job.

[24] I also find that the Commission did not make any detailed submissions on how the Claimant failed to prove that he was making reasonable and customary efforts; the

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[6] See section 153.161 of the Act.
[7] This is set out in subsection 153.161(1) of the Act.
[8] This is set out in subsection 153.161(1) of the Act.
[9] See section 50(8) of the Act.

Commission only summarized what the legislation says in regard to that section of the Act[10] and what it says about reasonable and customary efforts.

[25] The Commission did ask the Claimant for his class schedule, which he provided. From this schedule the Commission concluded that the Claimant was a full time student. Since he was a full-time student, the Commission seems to have decided this was proof he was not making reasonable and customary efforts to find a job. It is not.

[26] The Commission notes that its officer did tell the Claimant that an active job search for full time employment could rebut the presumption that a full-time student was not available. But it didn't ask him to provide proof of a job search. So I find that the Commission did not look at whether the Claimant made reasonable and customary efforts to find a job. So they did not base a disentitlement on that section of the law.

[27] Based on the lack of evidence that the Commission asked the Claimant to prove his reasonable and customary efforts to find suitable employment under that section of the Act, the Commission did not disentitle the Claimant under subsection 50(8) of the Act. Therefore, it is not something I need to consider.

Capable of and available for work

[28] I also have to consider whether the Claimant was capable of and available for work but unable to find a suitable job.[11] Case law sets out three factors for me to consider when deciding this. The Claimant has to prove the following three things:[12]

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.

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

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[10] See section 50(8) of the Act.
[11] See section 18(1)(a) of the Act.
[12] 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.

[29] When I consider each of these factors, I have to look at the Claimant's attitude and conduct.[13]

– **Wanting to go back to work**

[30] The Claimant has shown that he wanted to go to work as soon as a suitable job was available.

[31] From the Records of Employment he sent in, I see that the Claimant was consistently employed on a part-time basis from March 15, 2019. He worked part-time while he was in school and while he was doing his full-time internships. The COVID-19 pandemic did shut down the restaurant he worked for a while and then reduced his hours when he returned, but he did not voluntarily stop working.

[32] The Claimant also said that he had asked his employer for more hours, but there weren't any more hours available. He also explained that when he saw one of his part-time jobs would be shutting down, he applied for another. The records of employment support that. So I find the Claimant was consistently trying to work part-time, which shows he wanted to work.

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

[33] The Claimant didn't make enough efforts to find a suitable job.

[34] The Claimant did provide the Tribunal with some information about his job search. This included a list of jobs he had applied for through his university's job portal.

[35] Those efforts weren't enough to meet the requirements of this second factor because the jobs he was applying for were all internships and summer positions. The Claimant explained that he had to do some internship work as part of his university program. This means that the focus of his job search was to fulfil his degree requirements.

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[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.

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

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

[37] The Claimant says he hasn't done this because he was able to work around his school schedule and get almost full-time hours of work. He could also have adjusted his schedule to do more school work in the evenings and weekends so he could work.

[38] The Commission says the Claimant was restricted by his course schedule that had him in class every week day. He agreed that he never worked full time while attending class full-time.

[39] I find that the Claimant did have personal conditions that limited his chances of going back to work for a few reasons: first, he was only looking for jobs that would work around his class schedule. He provided his class schedules and I can see that he would have been limited to evening and weekend work. The EI Act requires that a claimant show they are available every day of the week, and is not limited to work outside of a class schedule.[14]

[40] Second, the Claimant did confirm that he would not have abandoned his program for work. This is certainly reasonable, but does put limits on what jobs were available to him. I acknowledge that the Claimant said he would have moved around his course schedule if possible, or taken fewer classes, but this still shows that his schooling was his priority. So it was a personal condition that limited his availability for work.

[41] Finally, from the job search information the Claimant sent in, I see that he was looking for only two types of jobs: internships or positions that could fulfil his school requirements, or jobs in the restaurant sector. I understand why he made those choices, but with pandemic restrictions in place during that time, the Claimant looking to work in those areas did limit his chances of finding a job with enough hours.

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[14] See *Duquet v. Canada (Attorney General)*, 2008 FCA 313 and *Canada (Attorney General) v. Gauthier*, 2006 FCA 40

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

[42] 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.

Additional questions

[43] At the end of the day, the issue for the Claimant is that he received benefits he thought he was entitled to and is now being asked to pay them back. This is causing him stress and hardship. In the context of the pandemic, the Commission paid out benefits without always immediately reviewing if the claimant was eligible.

[44] The Claimant told the Tribunal that he was honest about being in school so the Commission should not have paid him benefits if he was not entitled to them. The Claimant testified that he contacted the Commission around the time of each of his internships and was told that everything was alright. I believe that he did that. He says if he had been informed that he might have to pay it all back, he would never have accepted the benefits. The fact that the government was automatically approving benefits was an error that should not concern the applicants.

[45] I understand his frustration. Unfortunately, the law specifically requires that a Claimant for any sort of regular EI benefits be available for work. Also, the law gives the Commission the power to review students' availability for work. They can do this, even if EI benefits have already been paid.[15] I can not change that.

[46] The Commission has the right to cancel a debt from an overpayment if it is uncollectable or would cause undue hardship.[16] This is called a write-off.

[47] The issue in the reconsideration decision before the Tribunal is not based on a request for a write-off. If the Claimant wants to ask for this, he would have to ask the

[15] See subsection 153.161(2) of the Act.
[16] See paragraph 153.1306(1)(f) of the Act.

Commission. Only the Commission can make a decision to write-off an overpayment and the law does not allow the Tribunal to review such a decision.[17]

[48] What that means is that I do not have the authority to cancel any debt because of an overpayment, no matter how sympathetic I may find the case.

Conclusion

[49] The Claimant hasn't shown that he was available for work within the meaning of the law. Because of this, I find that the Claimant was disentitled from receiving EI benefits from October 5, 2021.

[50] This means that the appeal is dismissed.

Leanne Bourassa
Member, General Division – Employment Insurance Section

[17] This is set out in section 153.1307 of the Act.