Citation: *ET v Canada Employment Insurance Commission*, 2022 SST 1665

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

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

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (459190) dated March 3, 2022 (issued by Service Canada)

Tribunal member:	Gary Conrad
Type of hearing:	Teleconference
Hearing date:	June 23, 2022
Hearing participant:	Appellant
Decision date:	July 5, 2022
File number:	GE-22-1330

Decision

[1] I am dismissing the appeal with modification.

[2] I find the Commission made an initial decision to approve the Claimant's schooling and pay her benefits for part of the period of the disentitlement prior to their January 19, 2022, decision.

[3] I find that while they can go back and review that initial decision, their decision to do so was not done judicially, as they took into account an irrelevant factor and ignored relevant factors.

[4] In making the decision they should have made I find they should not have gone back and reviewed their initial decision, so that means the initial decision stands and the Claimant is not disentitled for the period of September 28, 2020, to September 4, 2021.

[5] For the period of September 5, 2021, onward there was no initial decision made prior to the January 19, 2022, decision and in reviewing the Claimant's availability I find she is not available and therefore the disentitlement should be upheld for that period.

Overview

[6] Claimants have to be available for work in order to get regular employment insurance (EI) benefits. Availability is an ongoing requirement; claimants have to be searching for a job.

[7] A claim for regular employment insurance (EI) benefits was automatically established for the Claimant on September 27, 2020, after her Employment Insurance Emergency Response Benefits ended.

[8] During the course of receiving benefits the Claimant was going to school. She reported this to the Commission multiple times and continued to collect benefits.

[9] In January 2022, the Commission spoke with the Claimant about her schooling.

[10] After reviewing all the information the Claimant provided to them during the January 2022 call, and the information she provided previously, the Commission decided the Claimant was not available for work while attending her school and disentitled her from benefits from September 28, 2020, onward.

[11] The Claimant says the Commission is not acting fairly as she told them about her schooling all along and they approved it, then suddenly in January 2022, they changed their mind and are asking for all the money back that they paid her.

Matter I have to consider first

[12] In their submissions the Commission states they did not request a job search from the Claimant and so did not disentitle her under subsection 50(8) of the *Employment Insurance Act* (Act).[1] Subsection 50(8) of the Act relates to a person failing to prove to the Commission that they were making reasonable and customary efforts to find suitable employment.

[13] So, as the Commission has said they did not disentitle the Claimant under subsection 50(8) of the Act, it is not something I need to consider.

Issues

[14] Did the Commission make an initial decision to approve the Claimant's training?

[15] If so, can they go back and review that decision?

[16] If they can review it, did they act judicially when they made their decision?

[17] Is the Claimant available for work?

[1] GD04-8

Analysis

Did the Commission make an initial decision?

[18] The Claimant says that it is not fair that the Commission approved her for benefits through 2020 and 2021, and then suddenly, in January 2022, changed their mind and said she was not available.

[19] The Claimant says she was always truthful in all her reporting, letting the Commission know all the details about her work and schooling.

[20] The Commission submits that their position of availability has not changed, despite the COVID-19 pandemic; claimants requesting regular benefits must prove their availability for work.[2]

[21] However, due to the COVID-19 pandemic the Commission says they relaxed some requirements related to the review of availability starting on September 27, 2020.[3]

[22] Prior to September 27, 2020, the Commission says that they would have reviewed the Claimant's availability for work before benefits were paid, but due to a modified operations approach, from September 27, 2020, onward availability was not reviewed, they just automatically allowed claims in their processing system.[4]

[23] This practice was halted on September 25, 2021.[5]

[24] The Commission submits that it approved a period of training for the Claimant ending on December 15, 2020,[6] and that this was the only decision made regarding the Claimant's training prior to the decision dated January 19, 2022.[7]

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[2] GD04-6
[3] GD04-6
[4] GD04-6
[5] GD04-6
[6] GD04-7
[7] GD04-6

[25] The Commission submits that subsequent to the decision to allow the Claimant's training up to December 15, 2020, all her training was allowed through the automatic approval system they had put in place starting September 2020.[8]

[26] I disagree with the submission of the Commission, that the only decision they made regarding the Claimant's training was the one that allowed her training up to December 15, 2020. I find that all of the instances of automatic approvals of the Claimant's training are also decisions made by the Commission in relation to the Claimant's claim.

[27] The Commission is trying to argue that the automatic approval of training is not a decision, because it was automated, but I find this argument is fatally flawed.

[28] I find the Commission made a decision when they **decided**, as it was their choice to do so or not, to automatically allow all training.

[29] This automatic allowing of training with no review was not a software glitch, there was no artificial intelligence in the system that did this on its own, it is the Commission's system, they are in charge of it, so the change to automatically allow training was a conscious decision made by the Commission in light of the pandemic.

[30] This is further shown by their **decision** to end this practice on September 25, 2021, as their ability to do this shows their positive control over this practice and the benefits system.

[31] Even if you consider that the Commission's decision not to review training and its impact on availability was a negative decision, as in they decided not to do something, that is still a decision made by the Commission.

[32] The fact that a decision to refuse to do something is a decision is further supported by the fact that the Tribunal can review a refusal by the Commission to review a decision pursuant to a reconsideration request, if they determine the reconsideration request was filed late. Since the Tribunal can only review a decision of

[8] GD04-6

the Commission[9] this shows a decision to not do something is still a decision of the Commission.

[33] So, this means that all of the Claimant's benefits from September 28, 2020, to September 4, 2021, had an initial decision made by the Commission to allow the training and pay the Claimant benefits. The benefits in this period were either allowed by the decision the Commission made to approve the Claimant's training to December 15, 2020, or were part of the Commission's decision to automatically allow benefits regardless of training.

[34] However, for the period of September 5, 2021, onward, no initial decision was made prior to the January 19, 2022, decision.

[35] The report for the week of September 5, 2021 to September 18, 2021, says that the Claimant's training details would need to be reviewed and a decision made before payment could be issued.[10] This shows that no initial decision was made to approve the Claimant's benefits from that point onward.

Can the Commission go back and review a previous decision?

[36] Since I have found the Commission did not make an initial decision for the period of September 5, 2021, onward prior to their January 19, 2022, decision I do not need to consider if they an go back and review a decision for that period, since there is no initial decision for them review.

[37] However, for the period of September 28, 2020, to September 4, 2021, where I find the Commission did make an initial decision prior to their January 19, 2022, decision, I find the Commission can go back and review their initial decision to approve the Claimant's training.

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[9] Section 113 of the *Employment Insurance Act*
[10] GD03-243

[38] The Commission submits that the law[11] allows them, at any point after benefits are paid, to go back and verify if the Claimant is capable of and available for work during her benefit period.[12]

[39] I find I agree with the Commission's submissions. The law states that the Commission may, at any point after benefits are paid, verify that the Claimant is available for work within her benefit period. There is no time limit on when they can do this, and there are no requirements that must be fulfilled to allow them to do this and no restrictions stated on the Commission's power to review the Claimant's availability.[13]

[40] So, the Commission can review their initial decision for the period of September 28, 2020, to September 4, 2021, to approve the Claimant's training and pay her benefits.

Did they act judicially when they made their decision?

[41] No, the Commission did not act judicially when they made their decision to go back and review their initial decision for the period of September 28, 2020, to September 4, 2021, as they relied on an irrelevant factor and ignored relevant factors when they made their decision.

[42] While the law allows the Commission to go back and review their decision for the period of September 28, 2020, to September 4, 2021, their decision to do so is discretionary.

[43] This means they do not have to do a review, but they can choose to do a review if they want to, as the law says the Commission "may" verify a claimant's availability after benefits have been paid, not that they "must" review availability after paying benefits.

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[11] See 153.161(2) of the *Employment Insurance Act*
[12] GD04-6
[13] See 153.161(2) of the *Employment Insurance Act*

[44] What this means is that I can only interfere with, in other words change, their decision, if they did not exercise their discretion properly when they made the decision.[14]

[45] In order for the Commission to have used their discretion properly they must not have acted in bad faith, or for an improper purpose or motive, took into account an irrelevant factor or ignored a relevant factor or acted in a discriminatory manner when they made the decision to review their initial decision for the period of September 28, 2020, to September 4, 2021.

[46] The Claimant says the Commission failed to take into account a relevant factor as they ignored her job search efforts.

[47] While the Commission only made submissions related to the decision they made to approve the Claimant's training to December 15, 2020, these submissions are still relevant to whether they acted judicially. The Commission submits they did not arbitrarily reverse their decision, they did so because they got new information.

[48] The Commission says that in the training questionnaire the Claimant completed on September 15, 2020, she said she was spending 15-24 hours on her studies per week,[15] but when they spoke to her on January 9, 2022, she said she was spending over 30 hours a week on her schooling.[16]

[49] In a general sense the Commission submits that from September 28, 2020, onward, the Claimant's schooling was her primary concern, finding work was

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[14] *Canada (Attorney General) v Kaur*, 2007 FCA 287. The Commission's decision can only be interfered with if it exercised its discretionary power in a non-judicial manner or acted in a perverse or capricious manner without regard to the material before it: *Canada (Attorney General) v Tong*, 2003 FCA 281. Discretion is exercised in a non-judicial manner if the decision-maker acted in bad faith, or for an improper purpose or motive, took into account an irrelevant factor or ignored a relevant factor or acted in a discriminatory manner: *Attorney General of Canada v Purcell*, A-694-94.

[15] GD03-26

[16] GD04-7 the Commission says that it was the Claimant's indication that she was spending over 30 hours per week on her studies as found in GD03-260 and GD03-261 that prompted a review of the Claimant's availability despite the previous decision made in October 2020, approving her training and finding her available.

secondary, and her school obligations and work preferences would reduce her job options so much that she would be unlikely to attain full employment. [17]

[50] I find the Commission took into account an irrelevant factor when they decided to review its decision because the Claimant told the Commission she was spending over 30 hours per week on her schooling.

[51] The January 9, 2022, call makes no mention of what period of time the Claimant's statement she spends 30 hours a week on schooling refers to. From reading the notes of the call, it appears the 30 hours a week refers to the amount of time the Claimant is spending on her schooling at the time of the phone call.

[52] The notes state that "Client spends over 30hr/week in her studies including classroom and self-study" The wording of that sentence puts the information into the present tense as it says 'spends' instead of 'spent', which supports it is referring to the amount of time the Claimant is spending in school at the time of the call.[18]

[53] The notes do have things written in the past tense, such as where it says "Client was in school since the start of the claim." This shows the note taker was alternating between past and present when discussing things with the Claimant. I find it is reasonable to assume then that the note taker would have referenced the past when referring to the 30 hours a week of schooling if that was the time frame the 30 hours a week of studying related to.[19]

[54] The January 11, 2022, call[20] also does not specify a time period for the question on how many hours the Claimant spends on her studies each week. It simply asks "How many hours do you spend on your studies each week?" This question is also in the present tense which would suggest the answer of "over 30" is related to the time of the phone call.

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[17] GD04-8
[18] GD03-260
[19] GD03-260
[20] GD03-261

[55] Further support that the hours of study listed in the January 11, 2022, phone call are related to the time of the call is the fact that there were periods of time, prior to the phone call, where the Claimant was only in school part-time. It would be reasonable to assume if the call had been about hours per week in past times there would be various answers depending on whether the Claimant was in full or part-time schooling.

[56] So, the Commission deciding to go back and review a decision based on information that has no indication it is linked to the time frame under review is taking into account an irrelevant factor.

[57] To be clear, the amount of time the Claimant spends on her schooling is not irrelevant in the overall scheme of determining availability, but it is irrelevant to apply the amount of time the Claimant may be spending in one period of time, to a period of time in the past.

[58] I find the Commission ignored the following relevant factors:

- That there were significant periods where the Claimant was not in school. There were periods from December 2020 to January 2021,[21] April 2021, to May 2021, and June to September 2021, where the Claimant says she had no schooling in her reports.

- That the Claimant completed a training questionnaire on May 20, 2021, where she said that she was only in school part-time and was only taking two courses.[22]

- That the Commission had already made a decision approving the Claimant's training and finding she was entitled to benefits to December 15, 2020, while she was a full-time student, obligated to attend classes, and made school her priority over work as she said would finish her course rather than drop out to take a job.[23]

[21] GD03-82, GD03-90, GD03-149, GD03-158, GD03-166, GD03-201, GD03-209, GD03-217, GD03-225, GD03-231
[22] GD03-249-252
[23] GD03-26 to GD03-28

[59] These factors are relevant as the Commission is saying the Claimant's schooling leads to her not being available and that the information she was studying 30 hours a week led to a review.

[60] If the Commission has considered these relevant factors they would have seen that they had already decided the Claimant was available while attending school full-time, being obligated to take classes, and making school her priority work and that the only things that changed over the period in question was the Claimant either taking less or no schooling.

[61] This would have shown them that there was no cause to review the decision as the Claimant was already determined to be available while a full-time student so there would be no need to review the claim simply because she was taking even less schooling.

[62] If the Commission considered the relevant factors they would have seen there was no need to review the claim because they thought the Claimant was suddenly more full-time by going to school 30 hours a week, since they had already approved her as a full-time student. Her status would not have changed from full-time if she was studying more, it would simply confirm she was full-time.

[63] Instead the Commission took into account an irrelevant factor, the amount of time the Claimant spends on her studies outside the initial decision period, to try and nullify the decision they had already made to allow the Claimant benefits as a full-time student, in order to provide support for their decision to say that while the Claimant was available before as a full-time student, suddenly, being full-time meant she was not available.

[64] The Commission also cannot attempt to fall back on the claim their decision to approve the Claimant to December 15, 2020, when she was a full-time student, obligated to take classes and would refuse to leave her schooling to take a job was an automated decision, so is not relevant, as they state in their submissions it was only

after this decision was made that they started allowing the Claimant's training automatically.[24]

[65] The notes of this decision to allow the Claimant's training to December 15, 2020,[25] further support this decision was made and communicated to the Claimant by an employee of the Commission who turned their mind to the issue, reviewed information, and then rendered a decision.

[66] So, since the Commission considered irrelevant factors and ignored relevant factors, their decision was not made judicially.

[67] Since the Commission failed to act "judicially" when making its decision I will give the decision the Commission should have given pursuant to subsection 54(1) of the *Department of Employment and Social Development Act*.

[68] In making the decision the Commission should have made I find the initial decision to approve the Claimant's training and find her availability in order, and was entitled to benefits for the period of September 28, 2020, to September 4, 2021, should not have been reviewed.

[69] The Claimant was found to be available and entitled to benefits while being a full-time student, who was obligated to attend classes, and was making school her priority over work,[26] so when the irrelevant factor of the time the Claimant spends on her studies on a time period other than the period of the initial decision is ignored, then nothing had changed to support a review of the initial decision.

[70] Yes, there were points where the Claimant was not in school or was part-time, as noted in other training questionnaires during the period of the initial decision, but that information should not have triggered a review, as, if the Claimant was found to be available when attending school full-time there is no need to revisit a decision already allowing her benefits because she is suddenly has less schooling.

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[24] GD04-6
[25] GD03-30
[26] See GD03-26 to GD03-28

[71] As the initial decision should not have been reviewed, this means the initial decision would remain unchanged and the Claimant is therefore not disentitled from benefits for the period of September 28, 2020, to September 4, 2021.

[72] However, there is still the issue of the disentitlement for the period of September 5, 2021, onward, and since I have found there was no initial decision made for this period prior to the January 19, 2022, decision, there is no issue with the Commission making a decision on the Claimant's availability for this period.

[73] So, I will continue with the standard availability analysis for this period of disentitlement.

Is the Claimant available for work for the period of September 5, 2021 onward?

[74] The law requires claimants to show that they are available for work.[27] In order to be paid EI benefits, claimants have to be capable of and available for work and unable to find suitable employment.[28]

[75] In considering whether a student is available pursuant to section 18 of the Act, the Federal Court of Appeal, in 2010, pronounced that there is a presumption that claimants who are attending school full-time are unavailable for work.

[76] The Act was recently changed and the new provisions apply to the Claimant.[29] As I read the new provisions the presumption of unavailability has been displaced. A full-time student is not presumed to be unavailable, but rather must prove their availability just like any other claimant.

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[27] Paragraph 18(1)(a) of the *Employment Insurance Act* provides that a claimant is not entitled to be paid benefits for a working day in a benefit period for which he or she fails to prove that on that day he or she was capable of and available for work and unable to obtain suitable employment.
[28] Paragraph 18(1)(a) of the *Employment Insurance Act*.
[29] Subsection 153.161(1) of the *Employment Insurance Act*

[77] In order to be paid EI benefits, claimants have to be capable of and available for work and unable to find suitable employment.[30] The Claimant has to prove three things to show she is available:

1. A desire to return to the labour market as soon as a suitable job was available
2. That desire expressed through efforts to find a suitable job
3. No personal conditions that might have unduly limited their chances of returning to the labour market[31]

[78] I have to consider each of these factors to decide the question of availability,[32] looking at the attitude and conduct of the Claimant,[33] from September 5, 2021, onward

Did the Claimant have a desire to return to the labour market as soon as a suitable job was available?

[79] I find the Claimant does have a desire to return to the labour market as soon as a suitable job is available.

[80] The Claimant testified that she wanted to work and was working for a local health authority whenever she could pick up shifts and was looking for more jobs as she was not getting as many shifts as she wanted.

[81] I find the Claimant working while attending school and looking for other jobs, as she was not getting as much work as she wanted, shows her desire to be in the labour market.

Has the Claimant made efforts to find a suitable job?

[82] The Claimant is making enough efforts to find a suitable job.

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[30] Paragraph 18(1)(a) of the *Employment Insurance Act*.
[31] *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96.
[32] *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96.
[33] *Canada (Attorney General v Whiffen*, A-1472-92 and *Carpentier v The Attorney General of Canada*, A-474-97.

[83] The Claimant testified that she is continuously looking for work.

[84] The Claimant says that she had a job at the local health authority, which was casual so they would send out shifts and she would pick the ones she could work.

[85] She was getting less and less shifts and so was looking for other employment. Eventually her contract with the health authority ended.

[86] The Claimant says she is looking online and applying to all sorts of positions, not just health related positions, and got multiple interviews and eventually landed another job working part-time as a medical assistant.

[87] I find the Claimant's efforts to look for work, in various fields of employment, represents sufficient and ongoing efforts to find employment as shown by the fact her efforts secured her a job.

Did the Claimant set personal conditions that might unduly limit her chances of returning to the labour market?

[88] I find the Claimant has set personal conditions that might unduly limited her chances of returning to the labour market; that condition being her schooling.

[89] The Claimant says from the period of September 5, 2021, until January 2022 she was taking four classes a week as a fulltime student, and had mandatory attendance at her classes.

[90] Starting in January 2022 she went down to only two classes a week and continued this into April 2022.

[91] The Claimant says her contract at the regional health authority ended but she got a new part-time job in May 2022 working as a medical assistant.

[92] I find the Claimant having to attend her classes at set times on set days, means that her availability is restricted to certain times on certain days which limits her chances of finding employment.[34]

[93] While it may seem odd to say that the Claimant has a person condition overly restricting her chances of returning to the labour market when she has a job, she cannot work part-time and be subsidized by EI due to her job not providing sufficiently for her while not being able to work full-time due to her schooling putting limits on her availability.

[94] I note that while the Claimant might be available on the weekends, I am only looking at her availability for working days and the law says that weekends are not working days.[35]

Is the Claimant capable of and available for work and unable to find suitable employment for the period of September 5, 2021, onward?

[95] Considering my findings on each of the three factors together, I find that the Claimant is not available for work from September 5, 2021, onward.

[34] See *Duquet v Canada (Employment and Immigration Commission)*, 2008 FCA 313 which supports this.
[35] Section 32 of the *Employment Insurance Regulations*

Conclusion

[96] I am dismissing the appeal with modification.

[97] I find that for the period of September 28, 2020, to September 4, 2021, the Commission made an initial decision to approve the Claimant's schooling and pay her benefits prior to their January 19, 2022, decision.

[98] I find that while they can go back and review that initial decision, their decision to do so was not done judicially, as they considered an irrelevant factor and ignored relevant factors.

[99] In making the decision they should have made I find they should not have gone back and reviewed their initial decision, so that means the initial decision stands and the Claimant is not disentitled for the period of September 28, 2020, to September 4, 2021.

[100] For the period of September 5, 2021, onward, there was no initial decision made prior to their January 19, 2022, decision and in reviewing the Claimant's availability I find she is not available and therefore the disentitlement should be upheld for that period.

Gary Conrad
Member, General Division – Employment Insurance Section