



Citation: *AB v Canada Employment Insurance Commission*, 2022 SST 1717

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

Decision

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

Decision under appeal: Canada Employment Insurance Commission
reconsideration decision (476928) dated May 30, 2022
(issued by Service Canada)

Tribunal member: Catherine Shaw
Type of hearing: Videoconference
Hearing date: October 25, 2022
Hearing participant: Appellant
Decision date: November 18, 2022
File number: GE-22-2186

Decision

[1] The appeal is dismissed. The Tribunal disagrees with the Claimant.

[2] The Claimant hasn't shown that he was available for work. 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 Employment Insurance (EI) regular benefits as of June 7, 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.

[4] I must 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.

[5] The Commission says that the Claimant wasn't available because he was attending a full-time school program. He stopped working two jobs so he could attend this program and was only looking for work that he could do around his course schedule.

[6] The Claimant disagrees and states that he wanted to work full-time while in school and was actively seeking a suitable job.

Matters I have to consider first

The Claimant's referral to training

[7] At the hearing, the Claimant stated that he had applied for a referral to his training through the Commission.¹ He spoke with a Commission officer in March 2022,

¹ A claimant can be referred to a training program in accordance with section 25 of the *Employment Insurance Act* (EI Act).

who helped him apply for a program that would allow him to attend school and get EI benefits.

[8] After the hearing, I asked the Commission about the status of the Claimant's referral. The Commission initially replied that it had no record of the Claimant's conversation with the Commission officer in March 2022, and no evidence that the Claimant had applied for a referral to his training.²

[9] Later, the Commission filed additional submissions acknowledging that the Claimant spoke to a Commission officer on March 16, 2022. It said that it's possible the Claimant applied for the Life Long Learning initiative at that time,³ but even if he did apply, he does not meet the conditions to qualify for that program.⁴

[10] I accept both parties' submissions. I believe the Claimant applied for a referral to his training with a Commission officer in March 2022. And the Commission has decided that he doesn't qualify for the referral. So, I accept that the Claimant was not referred to his training program.

Issue

[11] Was the Claimant available for work?

Analysis

[12] 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.

[13] 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.⁵ The

² See GD6.

³ See GD8.

⁴ As the Commission stated in its documents, a decision regarding a claimant's referral to training is not subject to reconsideration under section 112 of the EI Act, and so I have no jurisdiction to review the Commission's decision whether the Claimant is approved for a referral to his training.

⁵ See section 50(8) of the EI Act.

Employment Insurance Regulations (Regulations) give criteria that help explain what “reasonable and customary efforts” mean.⁶ I will look at those criteria below.

[14] 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.⁷ Case law gives three things a claimant has to prove to show that they are “available” in this sense.⁸ I will look at those factors below.

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

[16] I will now consider these two sections myself to determine whether the Claimant was available for work.

Reasonable and customary efforts to find a job

[17] The law sets out criteria for me to consider when deciding whether the Claimant’s efforts were reasonable and customary.⁹ I have to look at whether his efforts were sustained and whether they were directed toward finding a suitable job. In other words, the Claimant has to have kept trying to find a suitable job.

[18] I also have to consider the Claimant’s efforts to find a job. The Regulations list nine job-search activities I have to consider. Some examples of those activities are the following:¹⁰

- assessing employment opportunities
- networking
- contacting employers who may be hiring
- applying for jobs

[19] The Commission says that the Claimant didn’t do enough to try to find a job.

⁶ See section 9.001 of the *Employment Insurance Regulations* (EI Regulations).

⁷ See section 18(1)(a) of the EI Act.

⁸ See *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96.

⁹ See section 9.001 of the EI Regulations.

¹⁰ See section 9.001 of the EI Regulations.

[20] The Claimant disagrees. He works in the health care sector. He was employed in two jobs before starting his school program. He left those jobs because the work schedules were incompatible with attending his courses. But, he actively started looking for other work in health care that he could do around his course schedule.

[21] The Claimant testified that he checked multiple job posting websites on a regular basis looking for work opportunities. He had notifications set up to alert him to new job postings. He spoke to his previous employers about jobs that would fit his schedule. He also had contacts in the health care industry that he spoke to about potential job opportunities.

[22] The Claimant said it was difficult to find jobs would work with his course schedule. He was looking for jobs that had all evening shifts, all nights, or all weekends. But, he said those jobs weren't there because of union scheduling restrictions. And some jobs required him to work 12-hour shifts for two consecutive days and then have two days off work. Those jobs would make it difficult for him to attend school.

[23] Ultimately, the Claimant didn't apply for any jobs because he couldn't find any that would fit his schedule. When his EI benefits ended in June 2022, he returned to his former job on a casual basis. He is called in to work shifts and accepts when he is available.

[24] The Claimant says that his efforts were enough to prove that he was available for work.

[25] I find that the Claimant made reasonable and sustained efforts to find work from June 7, 2021. He assessed employment opportunities on several job search websites on a regular basis. He networked with other students and contacted his former employer to inquire about potential job openings. I'm satisfied that his efforts were directed at finding suitable employment within the health care sector.

[26] The Claimant has proven that his efforts to find a job were reasonable and customary.

Capable of and available for work

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

- 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.

[28] When I consider each of these factors, I have to look at the Claimant's attitude and conduct.¹²

– Wanting to go back to work

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

[30] The Claimant was working in two jobs. He left these jobs to attend school in starting in March 2021.

[31] I think the Claimant's conduct in leaving his jobs to attend school doesn't show that he wanted to go back to work as soon as a suitable job was available. The Claimant's choice to leave his employment to attend school indicates that his priority was his school, not going back to work as soon as he could.

– Making efforts to find a suitable job

[32] The Claimant didn't make enough effort to find a suitable job.

¹¹ 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.

¹² 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.

[33] I have considered the list of job-search activities given above in deciding this second factor. For this factor, that list is for guidance only.¹³

[34] The Claimant checked several job search websites for work on a regular basis. He signed up for notifications of new job postings on one website. He networked with other students about potential job openings. He also contacted his former employer about employment. He didn't apply for any jobs because he couldn't find anything with a schedule that would work around his courses.

[35] I believe the Claimant was making some efforts to find work. But, the Claimant's efforts were limited. And because he was only looking for work around his course schedule, he didn't apply for any jobs.

[36] The Claimant's efforts aren't enough to show that he was trying to find a suitable job as soon as possible because he didn't apply for any jobs. By not applying for jobs, the Claimant couldn't have obtained suitable employment.

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

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

[38] The Commission says the Claimant set a personal condition because he was only willing to accept employment around his course schedule.

[39] The Claimant agreed that he was only looking for work around his course schedule. But, he said that if he found work that conflicted with his course schedule, he would have done his best to make it work.

[40] At the hearing, the Claimant said that there were plenty of full-time jobs available at his former employer, but the hours did not work with his school schedule. This was the same for all of the job postings that he found in the health care sector. There were

¹³ 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.

no jobs that were all evenings or all nights. He didn't apply for any jobs because the jobs didn't have schedules that would work around his courses.

[41] I think the Claimant's school obligations are a personal condition that might unduly limit his chances of going back to work. His school obligations significantly reduce the jobs he could apply for or accept, as any job would have to work around his school schedule.

[42] He has shown that this restriction has already impacted his work, as he left his jobs to attend his school program. He also acknowledged that this limitation has reduced the amount of jobs that he could apply for, as he had found other suitable job postings for full-time work.

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

[43] 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.

[44] I know that the Claimant said he was available for work. But this isn't enough to prove availability within the meaning of the law. By leaving his job to attend school and then restricting his job search to jobs that he could work around his course schedule, the Claimant hasn't shown that he was available for work from June 7, 2021.

Other arguments

Could the Commission go back and review the Claimant's benefits after he was paid?

[45] Yes. The Claimant had the authority to review the Claimant's entitlement to benefits.

[46] The Claimant said that he should be eligible for EI benefits because the Commission knew that he was attending school full-time when it initially decided to pay him benefits.

[47] He disclosed his attendance in a full-time school program on his application and continually throughout his EI reporting. He spoke to several Commission officers who

assured him that he was eligible for EI benefits while attending school. He was honest and upfront with the Commission about his school attendance. So the Commission shouldn't be able to rescind its decision after paying him benefits.

[48] The Claimant also points to the changes the federal government made to increase access to EI due to the impact of COVID-19. He argues this supports a broader interpretation of his eligibility for benefits, as he was attending school to further his career in the health care sector.

[49] It's true that the federal government made temporary changes to facilitate increased access to benefits due to the COVID-19 pandemic. In March 2020, the government reduced the number of hours of insurable employment needed to qualify for benefits and increased certain EI benefit amounts, among many other changes.

[50] However, as part of these temporary measures, the government also confirmed that students who are studying full-time cannot get benefits unless they prove that they are available for work.¹⁴ The law also says that the Commission has the power to go back and review a claim at any point after benefits are paid to a claimant, in order to verify their availability.¹⁵

[51] I understand that the Claimant was assured by several Commission officers that he was eligible for benefits. I don't doubt that he was given this information. Unfortunately, the Federal Court of Appeal has held that misinformation by the Commission no basis for relief from the operation of the law.¹⁶ The Court has also stated that the law must be followed even if the Commission made errors.¹⁷

[52] I am bound by these decisions. I sympathize with the Claimant's situation but I cannot order the Commission to pay EI benefits if the Claimant is not entitled to them.

Does the Claimant have to repay benefits?

¹⁴ See section 153.161(2) of the EI Act.

¹⁵ See sections 52 and 153.161(2) of the EI Act.

¹⁶ See *Canada (Attorney General) v. Shaw*, 2002 FCA 325.

¹⁷ See *Robinson v. Canada (Attorney General)*, 2013 FCA 255.

[53] Yes. The Claimant has to repay the benefits that he wasn't entitled to receive.

[54] The Claimant said that it was the Commission's error that he was paid benefits if he was not entitled to receive them. He was honest about his school attendance from the beginning of his claim. Commission officers advised him that he was eligible for these benefits.

[55] The law says that you are required to repay any amount paid to you as benefits by the Commission to which you were not entitled to receive.¹⁸

[56] I have no doubt the Claimant acted honestly in all of his dealings with the Commission. Unfortunately, regardless of whether the Commission is at fault for the Claimant receiving these benefits, he is liable to repay the amount he received.

[57] I have no authority to waive or write-off the overpayment or to direct the Commission to do so. That authority rests with the Commission.¹⁹

[58] The Claimant can ask the Commission to write off his overpayment. If the Commission refuses, he can appeal that decision to the Federal Court. And if repayment will cause the Claimant financial hardship, he can contact the Debt Management Call Centre of the Canada Revenue Agency and ask about applying for debt relief.

Conclusion

[59] 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 can't receive EI benefits.

[60] This means that the appeal is dismissed.

Catherine Shaw
Member, General Division – Employment Insurance Section

¹⁸ See section 43(b) of the EI Act.

¹⁹ See sections 112.1 and 113 of the Act.