



Citation: *GM v Canada Employment Insurance Commission*, 2022 SST 1752

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

Decision

Appellant: G. M.
Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (545654) dated September 13, 2022 (issued by Service Canada)

Tribunal member: Linda Bell
Type of hearing: In person
Hearing date: December 19, 2022
Hearing participant: Appellant
Decision date: December 26, 2022
File number: GE-22-3183

Decision

[1] I am dismissing the appeal.

[2] The Claimant hasn't shown he meets the availability requirements for regular Employment Insurance (EI) benefits while recovering from his illness or while attending non-approved training. This means he is disentitled from EI benefits from January 25, 2021, to November 18, 2021.

[3] The Claimant is responsible (liable) to repay the overpayment of EI benefits.

Overview

[4] The Claimant established a claim for the EI Emergency Response Benefits (EI-ERB). When the EI-ERB ended, the Commission automatically established his claim for sickness EI benefits effective October 4, 2015. After he received the maximum 15 weeks of sickness benefits, the Claimant requested regular benefits.

[5] While in receipt of regular benefits, the Claimant decided to attend non-approved training. On January 30, 2021, he completed a training course questionnaire stating he was attending full-time training starting January 13, 2021. Then on March 15, 2021, he contacted the Commission to amend his reports to include his training.

[6] The Commission conducted a review. It decided the Claimant was disentitled from receiving EI benefits as of January 25, 2021. This is because the Commission determined he wasn't available for work while attending non-approved training.

[7] 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 and available to work.

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

[9] The Commission says the Claimant wasn't available for work because he failed to rebut the presumption of non-availability while attending full-time training. It also says he couldn't provide any evidence of a job search other than he spoke to people about cleaning jobs.

[10] The Claimant disagrees with the Commission. He appeals to the Social Security Tribunal (Tribunal). He says his doctor advised him not to return to work until the beginning of June 2021. He also says he was attending full-time training in the evening, so he was still able to work part-time. He was available to work and was actively looking for a job with the help of counsellors at WorkBC.

Issues

[11] Does the Claimant meet the availability requirements for EI benefits?

[12] Did the Commission conduct its review properly (judicially)?

[13] Is the Claimant required to repay the overpayment of EI benefits?

Analysis

Does the Claimant meet the availability requirements?

[14] First, I will consider the Commission's submissions regarding the 2010 Federal Court of Appeal decision.¹ This decision says there is a presumption that claimants who are attending training full-time are unavailable for work. The presumption applies only to full-time students. The presumption can be rebutted. This means that it would not apply.

[15] Then I must consider two different sections of the law that require claimants to show they are available for work.² In its submissions, the Commission indicates the

¹ See *Canada (Attorney General) v Cyrenne*, 2010 FCA 349.

² Paragraph 18(1)(a) of the *Employment Insurance Act* (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. Subsection 50(8) of the Act provides that, for the purpose of proving that a Claimant is available for work and unable to obtain suitable employment, the Commission may require the Claimant to prove that he or she is making reasonable and customary efforts to obtain suitable employment.

Claimant was disentitled under both sections because he hasn't shown he was capable of and available for work and unable to find suitable employment while attending unapproved training.

[16] Lastly, I must consider the temporary measures the government made to the Act in response to the COVID-19 pandemic.³ Following those amendments, the government imposed temporary measures to facilitate access to EI benefits. Those temporary measures apply to claims (benefit periods) starting between September 27, 2020, and September 25, 2021. The Claimant's benefit period started October 4, 2020, so these temporary measures apply.

[17] One of the temporary measures applies to claimants who attend a course, a program of instruction, or training to which they were not referred. Specifically, it states that a claimant, who attends unapproved training, is not entitled to be paid benefits for any working day in a benefit period for which the claimant is unable to prove that on that day they were capable of and available for work.⁴

Presumption of non-availability

[18] I find the presumption of non-availability applies to the Claimant. This is because the Claimant consistently states he was attending full-time training. I see no evidence to dispute this.

[19] The Claimant provided affirmed testimony that he was attending a full-time training course to become a health care aide. He says the courses were on-line. He explained in detail how he attended evening lectures on-line, Monday through Thursday starting at 5:30 p.m. He attended the lab in person, every Friday starting from 3:00 p.m.

[20] The Claimant says that when he first started his training, he was only available to work part-time on Saturdays. This is because he was still recovering from chemotherapy. He says that as of June 2021, he remained available to work during the

³ Subsection 153.5 of the Act.

⁴ See section 153.161 of the Act.

weekdays, prior to the start time of his lectures and labs, and on weekends. This is consistent with the information he wrote on his training course questionnaires.

[21] Based on the above, I find the presumption of non-availability applies to the Claimant. I will now determine whether the Claimant has rebutted the presumption.

– **Has the Claimant rebutted the presumption?**

[22] No, I find the Claimant hasn't rebutted the presumption of non-availability while attending training full-time.

[23] There are two ways the Claimant can rebut the presumption. He can show he has a history of working full-time while attending full-time training.⁵ Or he can show that there are exceptional circumstances in his case.⁶

[24] The Commission says that the Claimant failed to rebut the presumption of non-availability while attending full-time training. This is because the evidence states he was not available for work. Additionally, when asked about looking for work, the Claimant could not provide any evidence of a job search other than he spoke to people about cleaning jobs, but he didn't apply for work.

[25] The Claimant explained that since he came to Canada in 2019, he has only worked in a warehouse job. Prior to coming to Canada, he had taken a one-year teacher's course and worked as a teacher in Africa.

[26] After consideration of the evidence before me, I find that the Claimant hasn't rebutted the presumption of non-availability. The Claimant hasn't shown he has a history of full-time work while attending full-time training so he can't rebut the presumption that way.

[27] Also, the Claimant hasn't shown exceptional circumstances that would rebut the presumption. Although the Claimant says he was available to work part-time on Saturdays prior to the beginning of June 2021, and part-time on every day before

⁵ See *Canada (Attorney General) v Rideout*, 2004 FCA 304.

⁶ See *Canada (Attorney General) v Cyrenne*, 2010 FCA 349.

training started on weekdays after that, this is not an exception. Instead, this is consistent with not being available to work Monday through Friday during normal business hours, while attending full-time training. So, he hasn't rebutted the presumption that he is not available for work.

– **The presumption isn't rebutted**

[28] The Federal Court of Appeal hasn't yet told us how the presumption and the sections of the law dealing with availability relate to each other. Because this is unclear, I am going to continue on to decide whether the Claimant has proven his availability, even though I have already found the Claimant is presumed to be unavailable.

Reasonable and customary efforts to find suitable employment

[29] I have determined the Claimant is not disentitled under section 50(8) of the Act. This is because the Commission's documents don't show they asked the Claimant to prove his availability by submitting a detailed job search record. Nor is there any indication the Commission explained what information was required for a job search record. This means the Claimant is not disentitled under section 50(8) of the Act.

Capable of and available for work and unable to find suitable employment

[30] I must consider whether the Claimant has shown he was capable of and available for work and unable to find suitable employment.⁷ The Claimant has to prove three things to show he was available under this section:

- a) A desire to return to the labour market as soon as a suitable job is available
- b) That desire is expressed through efforts to find a suitable job
- c) No personal conditions that might unduly limit their chances of returning to the labour market⁸

⁷ Paragraph 18(1)(a) of the Act.

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

[31] I have to consider each of these factors to decide the question of availability, looking at the attitude and conduct of the Claimant.⁹

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

[32] Yes. The Claimant has shown a desire to return to the labour market.

[33] At the hearing, the Claimant said he needed to work while attending his training because he needed money to survive. Based on the foregoing, I find the Claimant has shown he had a desire to return to the labour market, as soon as a suitable job was available.

– **Did the Claimant make efforts to find a suitable job?**

[34] Yes. The Claimant has shown he was making some efforts to find a suitable job after the beginning of June 2021. As per the medical note on file, the Claimant's doctor advised him that he should not consider a return to work until May/June 2021.

[35] While they are not binding when deciding this particular requirement, I have considered the list of job-search activities, outlined below, as guidance when deciding this second factor.

[36] The *Employment Insurance Regulations* (Regulations) list nine job-search activities I have to consider. Some examples of those activities are

- registering for job-search tools or with on-line job banks or employment agencies
- networking
- creating a resume and cover letter
- applying for jobs.¹⁰

⁹ *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96. *Canada (Attorney General v Whiffen*, A-1472-92 and *Carpentier v The Attorney General of Canada*, A-474-97.

¹⁰ See section 9.001 of the Regulations.

[37] The Commission states the Claimant is unable to meet this second factor for availability. This is because the Claimant was not able to advise of a job search after May or June 2021. The Commission also states there is doubt as to his intentions or his willingness to look for and accept employment because he told the Commission he began a practicum at the end of August 2021 which was related to the training he had just completed.

[38] The Claimant says he did make efforts to look for work while completing his courses.¹¹ He provided credible testimony explaining how he contacted the counsellor at WorkBC in February 2021. The counsellor helped him look for work. He spoke to friends trying to find work. He spoke with people who had recently got a cleaning contract, but they didn't give him any work. He wrote a resume and dropped it off at different locations. This is how he was able to secure a full-time as a health care aide on November 25, 2021.

[39] I recognize there is no formula to determine a reasonable period to allow a claimant to explore job opportunities. Nor is there a set number of jobs that a claimant must apply for, to meet this second criteria. This means I must consider specific circumstances on a case-by-case basis.¹²

[40] In this case, the economic effects caused by the global COVID-19 pandemic and public health orders in the Claimant's Province are circumstances that I considered when determining the reasonable period to explore job opportunities.

[41] I also considered the Claimant's limited work experience in Canada and his medical condition. At the hearing, the Claimant explained how he came to Canada in 2019 and worked in a warehouse until he became ill. Prior to that he had worked as a teacher in another country.

¹¹ Section 6 of the Act defines what type of employment is not suitable. Section 9.002 of the Regulations lists the criteria for determining suitable employment.

¹² See section 10.4.1.4 of the Digest of Benefit Entitlement Principles.

[42] The Claimant decided that his best option to get another job was to take training to become a health care aide. He completed his training on November 18, 2021. He started a full-time job as a health care aide on November 25, 2021.

[43] After consideration of the foregoing, I find the Claimant's efforts to find a suitable job were enough to meet the requirements of this second factor.

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

[44] Yes. I find the Claimant set personal conditions that unduly limited his chances of returning to the labour market. Here is what I considered.

[45] The law says a claimant has to be available during regular hours for every working day of the week.¹³ The law also says that a working day is any day of the week except Saturday and Sunday.¹⁴

[46] The Commission submits the Claimant's statements indicate he was placing restrictions on his availability for work, which could limit his chances of returning to the labour market. Specifically, the Claimant was only available to work part-time on Saturdays. He also told the Commission he began a practicum at the end of August 2021 which was related to the training he had just completed.

[47] The Claimant admits that when he completed his first training questionnaire he could only work on Saturdays while he built up his immunity after undergoing chemotherapy. Then in June 2021, he began looking for work he could do during the week, prior to the start time of his training, and on weekends. He also said he had transportation issues during this time.

[48] The Claimant confirmed that once his courses were finished, he had to complete a full-time practicum. His practicum was 8 weeks consisting of 7 weeks of full-time shift work in long-term care plus 1 week in community support medicine. He completed his

¹³ At the Federal Court of Appeal, see *Bertrand, Vézina, Gagnon, Primard, Duquet, and Rideout*. See also *Canada (Attorney General) v Boland*, 2004 FCA 251 (CanLII). At the Appeal Division, see *R.J. and R.V.*

¹⁴ See section 32 of the Regulations.

practicum on November 18, 2021. He says his practicum was full-time (40 hours per week) so he was not available to work during this time.

[49] Based on the evidence before me, I find the Claimant had personal conditions that unduly limited his chances of returning to the labour market. Namely, he restricted his availability to work part-time on Saturdays, until June 2021, due to his medical recovery. Then he was restricting to working part-time on weekdays prior to the start time of his training courses. He was not able to work during the 8 weeks he completed his practicum, ending November 18, 2021. So, I find the Claimant hasn't shown he was capable of and available for work and unable to find suitable employment.¹⁵

Is the Claimant entitled to EI benefits?

[50] As set out above, the temporary measures state a claimant, who attends non-approved training, is not entitled to be paid benefits for any working day in a benefit period for which the claimant is unable to prove that on that day they were capable of and available for work.¹⁶

[51] After considering my findings, I can only conclude the Claimant was not available during regular hours for every working day of the week while taking non-approved training. This means the Claimant is disentitled from EI benefits, from January 25, 2021, to November 18, 2021.

The Commission's power

[52] I find the Commission had the power to disentitle the Claimant from EI benefits, retroactively. Here is what I considered.

[53] The law states that the Commission may verify whether the claimant is entitled to benefits at any point after those benefits are paid. They may do this by requiring proof the Claimant was capable of and available for work on any working day of their benefit

¹⁵ See section 18(1)(a) of the Act.

¹⁶ See section 153.161 of the Act.

period.¹⁷ This means the Commission makes its own decision whether to verify entitlement to benefits. This is called a discretionary power.¹⁸

[54] The law also states a claimant, who attends a course or training to which the claimant is not referred by the Commission or their delegate, must prove their availability to work. A claimant is disentitled from benefits for any working day in a benefit period for which the claimant is unable to prove that on that day they were capable of and available for work.¹⁹

[55] As set out above, the temporary measures gave the Commission the power to review the Claimant's entitlement to benefits after benefits were paid. It also gave the Commission the authority to impose a retroactive disentitlement.

Should the Commission act properly when deciding to reconsider the Claimant's claim?

[56] Yes. Even though the Commission has discretionary power to review the Claimant's availability and entitlement to benefits, the Commission must make its decision properly and fairly. This is also called making its decision judicially.

[57] The Commission must look at all of the information when it makes a decision. The Commission should pay attention to important information about your availability to work while attending non-approved training and ignore things that are not important.²⁰

[58] I recognize the Claimant had undergone chemotherapy during the outbreak of the global COVID-19 pandemic. He followed his doctor's advice about when he could return to work. Instead of sitting idle, he decided to attend on-line training to improve his chances of returning to work upon his recovery. But this doesn't change the fact that he

¹⁷ See section 153.161 of the Act.

¹⁸ Although not exactly on point, in *Canada (Attorney General) v. Knowler*, A-445-95, the Federal Court of Appeal decided that when the Commission has the power to decide, it is a discretionary power.

¹⁹ See section 18 of the Act.

²⁰ In *Canada (Attorney General) v. Purcell*, A-694-94, the Federal Court of Appeal states that the Commission must consider all relevant factors, ignore irrelevant factors, act in good faith, and act in a manner that is not discriminatory.

attended training without obtaining approval from the Commission or their delegated authority.

[59] The Commission conduct its review in November 2021. This was after the Claimant submitted a training course questionnaire stating he was attending full-time training starting January 13, 2021. It was also after he contacted the Commission to amend his reports to include his training.

[60] I must respect the Commission's discretionary power. Usually, this means that I can't change the Commission's decision. But, if the Commission didn't make its decision fairly, then I can step into the Commission's role. Then, I may make the decision whether the Claimant meets the availability requirements to be entitled to the benefits he received.

Did the Commission act properly (judicially)?

[61] Yes. I find the Commission conducted its review judicially. This is because the Commission considered all relevant factors, ignored irrelevant factors, acted in good faith, and acted in a manner that is not discriminatory. Here is what I considered.

[62] The Commission says the Claimant completed a training course questionnaire stating he was attending full-time training starting January 13, 2021. Then on March 15, 2021, he contacted the Commission to amend his reports to include his training. Several months later, the Commission conducted a review of his claims.

[63] I recognize the Claimant wishes the Commission didn't retroactively disentitle him from receiving benefits. This is because the large overpayment may cause him financial hardship.

[64] After careful review of the foregoing, I find the Commission acted judicially when conducting its review of the Claimant's availability and entitlement to benefits. It conducted its review in accordance with the law and considered the relevant evidence it had before it. I see no evidence the Commission considered irrelevant factors, didn't act in good faith, or acted in a discriminatory manner when it made its decision.

[65] This is truly an unfortunate situation. I recognize the Commission's lengthy delay in reviewing the claims has created a large overpayment. The Claimant disclosed his training on the training course questionnaire eleven months before the Commission issued its decision. So, any person would reasonably assume in these circumstances that they were entitled to the benefits they were receiving.

[66] However, the Commission conducted its assessment judicially and in accordance with the law. So I must respect the Commission's discretionary power. This means I can't change the Commission's decision.

Repayment of an overpayment

[67] The law states that a claimant is responsible (liable) to repay EI benefits that they are not entitled to receive.²¹

[68] I don't have any authority to reduce or waive the overpayment.²² That authority rests with the Commission. I also don't have any authority to order the Commission to waive an overpayment.

[69] The Federal Court of Canada has the jurisdiction to hear an appeal relating to a write-off issue.²³ So if the Commission refuses a request to write off or reduce the overpayment, the Claimant may pursue an appeal at the Federal Court of Canada.

[70] If the Claimant is wanting to negotiate repayment arrangements, he may wish to contact the Canada Revenue Agency (CRA) to discuss repayment options.

[71] I truly sympathize with the Claimant given the circumstances he presented. But my decision is not based on fairness or financial hardship. Instead, my decision is based on the facts before me and the application of the EI law. There are no exceptions

²¹ See section 43 of the Act.

²² See sections 112.1 and 113 of the Act.

²³ See *Steel v Canada (Attorney General)*, 2011 FCA 153; *Bernatchez v Canada (Attorney General)*, 2013 FC 111.

and no room for discretion. I can't interpret or rewrite the Act in a manner that is contrary to its plain meaning, even in the interest of compassion.²⁴

Conclusion

[72] The appeal is dismissed.

Linda Bell
Member, General Division – Employment Insurance Section

²⁴ *Canada (Attorney General) v Knee*, 2011 FCA 301.