Citation: *RF v Canada Employment Insurance Commission*, 2023 SST 1071

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	R. F.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission dated December 13, 2022 (issued by Service Canada)

Tribunal member:	Mark Leonard
Type of hearing:	In person
Hearing date:	March 29, 2023
Hearing participants:	Appellant
Decision date:	April 5, 2023
File number:	GE-22-4217 & GE-22-4219

Decision

[1] The appeal is dismissed.

[2] The Appellant has not shown that he was available for work during the periods when the Commission disentitled him from receiving benefits. This means that he can't receive Employment Insurance (EI) benefits during those periods.

Overview

[3] Both the Appellant and the Canada Employment Insurance Commission (Commission) appealed a General Division decision. The Appeals Division of the Social Security Tribunal (SST) set aside the original General Division decision and return the matter to the General Division to be heard again.

[4] The Appellant claims that the Commission did not act judicially when it selected him for a verification and retroactively disentitled him from receiving benefits because he was unable to prove his availability for work. The Commission agreed that the matter of whether it acted judicially was not addressed in the first hearing.

[5] In addition, the Commission claims that the original General Division decision to partially grant the Appellant benefits was not consistent with the law surrounding the availability of a claimant who is in school full-time.

[6] I must look at both the issue of whether the Commission acted judicially when it verified the Appellant's claim, and whether the Appellant was available for work as defined in the Employment Insurance Act (Act).

Joining Appeals

[7] Since both the Appellant and the Commission filed appeals against the previous General Division decision, I examined the claims in each and I am satisfied that the matters in both appeals are related.

[8] Both the Commission and the Appellant agree that a decision is necessary concerning the question of whether the Commission acted judicially when it retroactively verified the Appellant's claim. Further, the issue of the Appellant's availability remains a question for which both parties seek a decision. So, I have joined the appeals and the matters will be heard together during one hearing and my decision will apply to both appeal files.

Issues

[9] Did the Commission act judicially when it retroactively verified the Appellant's EI claim?

[10] Was the Appellant available for work while in school?

Analysis

Background

[11] The Appellant says that he is a full-time student pursuing a program in human resources management. He agrees that he was not referred to this program under Section 25(1)(a) or (b) of the EI Act.

[12] The Appellant says that he made a claim for the Canada Emergency Response Benefit (CERB) in 2020. On October 4, 2020, the Appellant's claim was automatically converted and established as an EI claim.

[13] The Appellant made his required reports to claim benefits and completed student questionnaires for three separate periods during which he was in school while in receipt of EI benefits. Those periods were.

- September 9, 2020, to December 21, 2020
- January 13, 2021, to April 22, 2021
- September 12, 2021, onward.

[14] In the fall of 2021, the Commission verified the Appellant's claim and determined that he had not shown he was eligible to receive the benefits during these three periods.

[15] The Commission disentitled the Appellant from receiving benefits during the three periods citing that he had not proven he was available for work within the meaning of the Act.

[16] Any claimant must be available for work to be paid EI regular benefits. Availability is an ongoing requirement. Since it had already paid the Appellant benefits for which it later determined he was not entitled, an overpayment of $13,100.00 existed subject to recovery from the Appellant.

[17] The Appellant challenges the Commission's decision and states that he applied for benefits in good faith and was approved. At no time did he misrepresent himself. He says that he completed all required reports identifying himself as a student in school and still the Commission approved him for benefits.

[18] He says that if he was not entitled to the benefits, the Commission should not have paid him. He now has a significant overpayment subject to recovery which he says will cause him financial hardship. He says he should not have to pay back benefits for which he was originally approved because of a mistake by the Commission.

[19] Before I turn to the issue of the Appellant's availability, I will address the matter of whether the Commission acted judicially when it verified the Appellant's EI claim and retroactively disentitled him.

Did the Commission act judicially when it verified the Appellant's EI claim?

[20] I find that the Commission acted judicially when it retroactively verified the Appellant's claim.

[21] The Commission submits that Section 153.161 of the EI Act details when claimants who are engaged in courses, a program if instruction, or non-referred training

will not be entitled to EI benefits for any day for which they cannot prove they were capable and available for work.

[22] The Commission further submits that Section 153.161(2) of the EI Act gives it the discretion to retroactively verify a claimant's entitlement to the benefits they received and to assess an overpayment subject to recovery from the claimant.

[23] Section 153.161(2) reads.

> *"The Commission **may**, at any point after benefits are paid to a claimant, verify that the claimant … is entitled to those benefits by requiring proof that they were capable of and available for work on any working day of their benefit period."*

[24] Where the EI Act uses the word may, it means that the Commission has the discretion to choose whether to act or not. When the Commission exercises its discretion to act, it is expected that the Tribunal will not interfere with the Commission's decision unless it can be shown that the Commission,

- acted in bad faith, acted for an improper purpose or motive,
- took into account an irrelevant factor,
- ignored a relevant factor,
- or acted in a discriminatory manner.

Bad Faith

[25] The Appellant says that the Commission did not act judicially when it retroactively verified his claim. From the Appellant's words, I gather he suggests that the Commission acted in bad faith by first paying him benefits, then determining that he was not entitled to them resulting in a demand for repayment of those benefits.

[26] He says that he applied for the Canada Emergency Response Benefit (CERB) but ended up on EI benefits. He testified that during the time he was making his claims, he believed he was receiving CERB. He confirmed that he completed all required documentation, including the three student questionnaires and that he provided honest

and complete answers to the questions. He offers that he fully disclosed that he was a full-time student and questions why the Commission would have paid him if he was not entitled.

[27] He says that the continued payment of EI benefits during the periods he was in school was not his fault. He says that it is the Commission's mistake that it continued to pay him benefits. He says that the Commission should bear the blame for the circumstances, and he should not have to repay the benefits they mistakenly paid him.

[28] The Commission submits that it has the authority to verify the Appellant's availability for any period that they paid him EI benefits.[1] Further it says that it acted judicially when it verified the Appellant's claim and issued a notice of overpayment of EI benefits.

[29] It says that to address the increased number of EI claims arising out of the impacts of the Covid-19 pandemic, the EI Act was amended to include temporary measures to allow for a streamlined EI process. It says that the Act provided it the option to pay benefits up front and postpone the determination of entitlement until later.

[30] Further, it submits that Section 153.161 specifically addresses the issue of availability of claimants who pursued non referred courses, programs of instruction or training.

[31] It says that Section 153.161(1) details that claimants pursuing non-referred educational opportunities are not entitled to be paid benefits for any working day for which they are unable to prove they were available for work. Further, they claim that Section 153.161(2) confers that authority to verify a claimant's available within the meaning of the Act, at any time after benefits have been paid.

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[1] See Section 153.161 (2) of the EI Act. See also Interim Order #10, Canada Gazette, Part II, volume 154. No 21, beginning on page 2422

[32] The Commission says it considered the Appellant's educational requirements, his class schedule, and his efforts to find employment. It concluded that he prioritized his studies and imposed limitations to his availability for work.

[33] It says that it did not act in bad faith or for an improper purpose or motive when it applied the legislative authority to verify the Appellant's claim. It says it evaluated the appellant's availability applying the requirements of the legislation and case law. It says it did not ignore any factors, did not consider any irrelevant factors, nor did it act in a discriminatory manner.

[34] It says that because the Appellant was found not to have proven his availability for the periods in question, it had no choice but to apply the law and issue a disentitlement resulting in an overpayment notice seeking recovery of the benefits for which the Appellant was not entitled.

[35] The Commission says that it has followed the legislation correctly in paying the Appellant benefits subject to a later verification. It says that when it exercises its authority to conduct a verification and issue a disentitlement that may result in establishing an overpayment, it is not a mistake, but merely following the law.

[36] The Commission has a policy that addressed when it will and will not recover benefits it has mistakenly paid.

[37] The Commission's reconsideration policy is found in Chapter 17 of the *Digest of Benefit Entitlement Principles.* It reads.

[38] 17.3.3 Reconsideration policy reads.

> *The Commission has developed a policy to ensure a consistent and fair application of section 52 of the EIA [Employment Insurance Act] and to prevent creating debt when the claimant was overpaid through no fault of their own. A claim will only be reconsidered when:*
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> - *benefits have been underpaid.*
> - *benefits were paid contrary to the structure of the EIA.*

- *benefits were paid as a result of a false or misleading statement.*
- *the claimant ought to have known there was no entitlement to the benefits received.*

[39] The Commission's policy also says that no overpayment will be created if the Commission incorrectly paid benefits.[2]

[40] However, the Commission differentiates a verification pursuant to Section 52 of the Act and a verification under Section 153.161(2). It says that a verification is not a reconsideration decision, and therefore is not constrained by its reconsideration policy.

[41] The Commission does admit that Section 153.161(2) notes that it may verify a claim. It agrees that the word may means that its decision to verify a claim is a discretionary one and therefore is subject to review in consideration of the factors noted above.

[42] The Commission's reconsideration policy was developed before the Covid-19 pandemic and does not consider Section 153.161 of the Act. This provision in the Act specifically details the circumstances wherein the Commission may verify availability and entitlement to benefits.

[43] The Tribunal has found on several occasions that the Commission's discretion under Section 153.161 is not limited by the factors outlined in its reconsideration policy.[3] I am not bound by those decisions, but I find the reasoning persuasive.

[44] I agree with the Commission that its authority to verify a claim under Section 153.161(2) is not the same as a reconsideration decision made under Section 52 of the Act.

[45] I am satisfied that the Commission did not mistakenly pay the Appellant benefits. It has the authority to establish the Appellant's claim and immediately begin paying him

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[2] See Section 17.3.2.2 of the Commission's policy.
[3] *SF v Canada Employment Insurance Commission*, 2022 SST 1095 and *Canada Employment Insurance Commission v SL*, 2022 SST 556 and *WA v. Canada Employment Insurance Commission*, 2023 SST 17.

benefits subject to later verification. It did not act in bad faith when it chose to verify the Appellant's claim.

Did the Commission Fail to Consider a Relevant factor?

[46] The Appellant believes that the Commission failed to consider a relevant factor. He says that the Covid-19 pandemic was a contributing factor to his circumstances. He says that the pandemic caused significant negative impacts for everyone. He testified that the main reason he elected not to seek employment was because he was afraid of contracting Covid-19 and the negative effects there could be if he did.

[47] The Commission made no submissions on the Appellant's contention that it failed to consider the Appellant's fear of contracting Covid-19; however, I recognize that the Appellant did not raise this issue with the Commission at any time prior to the Commission's reconsideration decision, so it was unaware of his concern.

[48] I find that the Commission did not fail to consider a relevant factor. The Commission could not consider the Appellant's concern and how it might affect his availability because he did not tell them during any of his interactions with Commission representatives.

[49] I am not persuaded by the Appellant's argument that his fear of contracting Covid-19 was a factor that the Commission needed to consider. I accept that the Covid-19 pandemic did affect everyone worldwide. However, commerce continued. Most employers implemented public health recommendations to minimize the spread of the illness and allow employees to continue working. Some instituted remote working options to facilitate continued employment in the safest possible conditions.

[50] Workers could not voluntarily leave an employment and expect to receive EI benefits despite the risk of contracting Covid-19.[4] Likewise, a claimant cannot avoid the obligation to seek employment as is a requirement to prove availability under section 18(1)(a) of the Act despite the risks posed by Covid-19.

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[4] See Section 153.9(3)

[51] The Appellant says he did not look for any work because of his fear of contracting Covid. Yet, he also testified that he picked up some work hours in the family automotive repair business. Clearly, the Appellant and his family would have faced the same level of exposure and the risk of contracting Covid-19 as other employers, in order to keep the business open.

[52] The Appellant chose not to seek any other employment, even employment that may have allowed for remote working arrangements. I am not satisfied that his fear of contracting Covid-19 was a factor that would support excusing him from the obligation to show his availability for work.

[53] The Appellant raised no other issues concerning how the Commission may not have acted judicially when it verified his claim. From my examination of the Commission's actions, I cannot find any evidence that would support it acted with improper motive or purpose, nor can I find any evidence that it acted in a discriminatory manner when it verified the Appellant's claim. Simply, it applied the law as it was required to do.

Availability

[54] Two different sections of the law require claimants to show that they are available for work. The Commission decided that the Appellant was disentitled under both sections during all three periods.

[55] First, the *Employment Insurance Act* (Act) says that a claimant must prove that they are making "reasonable and customary efforts" to find a suitable job.[5] The *Employment Insurance Regulations* (Regulations) give criteria that help explain what "reasonable and customary efforts" mean.[6] I will look at those criteria below.

[56] Second, the Act says that a claimant must 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 an

[5] See section 50(8) of the *Employment Insurance Act* (Act).
[6] See section 9.001 of the *Employment Insurance Regulations* (Regulations).
[7] See section 18(1)(a) of the Act.

appellant has to prove to show that they are "available" in this sense.[8] I will look at those factors below.

[57] The Commission decided that the Appellant was disentitled from receiving benefits because he wasn't available for work based on these two sections of the law during three distinct periods.[9]

[58] In addition, the Federal Court of Appeal has established that claimants who are in school full-time are presumed to be unavailable for work.[10] This is called the "presumption of non-availability." It means that we can suppose that students are not available when evidence shows that they are in school full-time.

[59] First, I will examine whether the presumption that a full-time student is not available for work applies to the Appellant. Then I will move on to consider the two sections under which the Appellant was disentitled.

Presumption

[60] I find that the Appellant is a full-time student. He has not rebutted the presumption and so it does apply to him. This means that he was unavailable for work during the three periods that the Commission disentitled him.

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

[62] The Appellant agrees that he is a full-time student. He acknowledged this on all three of his completed student questionnaires. In addition, during his testimony, he confirmed,

- that he took between five and six courses per semester.
- that during the Covid-19 pandemic, he was required to attend lectures every day on-line.

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[8] See *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96.
[9] See GD3-26, 27 and 28.
[10] See *(Canada (A.G.) v. Cyrenne,* 2010 FCA 349)

- on any given day, a lecture could be scheduled anytime in the morning and afternoon.
- that he devoted up to 24 hours each week to his studies.
- his questionnaires show that he paid $19,000.00 to attend school during the three semesters in question.

[63] So, I accept that the Appellant was in school full-time. I see no evidence that would lead me to a difference conclusion. The presumption applies to the Appellant.

[64] But the presumption that full-time students aren't available for work can be rebutted (that is, shown to not apply). If the presumption were rebutted, it would not apply. There are two ways the Appellant can rebut the presumption. He can show that he has a history of working full-time while also in school.[11] Or he can show that there are exceptional circumstances in his case.[12]

[65] The Appellant offered no evidence of having worked while in school full-time prior to the circumstances of this appeal. I am satisfied that he has not shown a history of having held down a job while at the same time pursuing full-time studies.

Exceptional Circumstances

[66] The Commission says the Appellant told them that he had not looked for work at all during two of the periods of disentitlement and only sought part-time employment that could be worked around his school schedule such as on Saturday mornings in the third period.

[67] The Appellant says that he was required to participate in daily on-line learning activities as part of his program. He said that he could do his assignments at any time but that the assignments took a significant amount of time to complete. The Appellant did not present any circumstances that would lead me to believe he could both work and complete his studies. In fact, the Appellant confirmed that the reason he did not

[11] See (*Canada (A.G.) v. Rideout*, 2004 FCA 304).
[12] See (*Canada (A.G.) v. Cyrenne,* 2010 FCA 349).

seek employment while he was in school was because he needed to devote the necessary time to complete his studies.

[68] The Claimant hasn't rebutted the presumption of non-availability.

[69] 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 proceed to decide the sections of the law dealing with availability, even though I have already found that the Claimant is presumed to be unavailable.

Reasonable and customary efforts to find a job (Section 50(8) of the EI Act and 9.001 of the Regulations)

[70] I find that the Appellant has not shown that he made reasonable and customary efforts to find a job during any of the three periods of disentitlement.

[71] The law sets out criteria for me to consider when deciding whether the Claimant's efforts were reasonable and customary.[13] I must look at whether his efforts were sustained and whether they were directed toward finding a suitable job. In other words, the Appellant must have kept trying to find a suitable job.

[72] I must also consider the Appellant's efforts to find a job. The Regulations list nine job-search activities I must consider. Some examples of those activities are the following:[14]

- assessing employment opportunities
- registering for job-search tools or with on-line job banks or employment agencies
- applying for jobs
- attending interviews.

[73] The Commission says that the Appellant didn't do enough to try to find a job.

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[13] See Section 9.001 of the Regulations.
[14] See section 9.001 of the Regulations.

[74] It submits that the Appellant made applications for work in May 2021, and November 2021. It says that the Appellant confirmed to them that he was not seeking work during his full-time school periods because he needed to participate in his program classes. It says that the efforts of the Appellant are insufficient to demonstrate reasonable and customary efforts to find a job.

[75] The Appellant both submitted and testified that he did not look for full-time work in either of the first two periods of disentitlement because he was focussed on completing his studies. His training questionnaires confirm that he began looking for a job in November 2021. He testified that this change to applying for jobs was because he was restless and needed to work. He offered that he had worked in the family business from time to time but that there was not enough work to support him and the other employees.

[76] The Appellant confirmed that he did not seek employment because he was focussed on completion of his studies. He said that he did apply for a few jobs in late 2021, but that he was seeking part-time work that could be done around his studies. He testified that if he had been offered a job that conflicted with his studies, he would not have taken it and quit school. He would have stayed in school and finished his courses.

[77] I am satisfied that the Appellant did not look for a job during the first two periods of entitlement. His job application in May 2021 is beyond the end date of the disentitlement period and is more consistent with seeking a summer job when there were no classes. There is one screen shot noting an employer offering available jobs; however, the text only shows that the Appellant received the information about the job openings. There is no evidence that he applied for any of the jobs listed.

[78] His four job applications in November 2021 were all made on the same day and occurred after the Appellant was contacted about his claim on October 4, 2022. There is no evidence of a job search in the third period prior to November 2021. He could not provide any further evidence of a job search during the three periods of disentitlement.

[79] To demonstrate reasonable and customary efforts to find a job, a claimant must show a sustained and sincere effort to find a job. This effort must be continuous to remain eligible for EI benefits. I am satisfied that the Appellant's efforts to find employment during the three periods of disentitlement were not sustained nor sufficient to meet the requirement of a reasonable and customary effort to find a job.

[80] The Appellant hasn't proven that his efforts to find a job were reasonable and customary.

Capable of and available for work (Section 18(1)(a) of the EI Act)

[81] Case law sets out three factors for me to consider when deciding whether the Appellant was capable of and available for work but unable to find a suitable job. The Appellant has to prove the following three things:[15]

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.

[82] When I consider each of these factors, I must look at the Claimant's attitude and conduct.[16]

Wanting to go back to work

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

[84] The Appellant stated that he was willing and wanted to work. He said he does not like to be idle and prefers to be doing something.

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[15] 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.
[16] 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.

[85] The Commission says that the Appellant was focussed on his completing his program and did not look for work because he was in school full-time.

[86] The Appellant completed three student questionnaires, one for each of the three periods for which he was disentitled from receiving benefits. In each questionnaire the Appellant confirmed that if he found full-time work that conflicted with his studies, he would not take the job and would finish his courses. He testified that his primary focus was on completing his studies and graduating.

[87] A claimant does not have to be solely seeking full-time employment, however, neither can a claimant discount full-time employment as an option. A full-time job can be suitable employment. The Appellant testified that either he did not seek employment because of the demands of his program or only sough part-time work that did not conflict with his studies.

[88] His actions do not demonstrate an intention to return to work as soon as a suitable job was available

Making efforts to find a suitable job

[89] The Appellant hasn't made enough effort to find a suitable job.

[90] 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.[17]

[91] The Claimant's efforts to find a new job included registering for "Indeed" (an on-line job search application). He also applied for five jobs, one in May of 2021 and four in the fall of 2021. I explained these reasons above when looking at whether the Appellant had made reasonable and customary efforts to find a job.

[92] His efforts do not demonstrate the required level of sustained effort to find suitable employment. The search must be both sincere and sustained with a focus on

[17] 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.

finding employment. His efforts weren't enough to meet the requirements of this second factor.

Unduly limiting chances of going back to work

[93] I find that the Appellant set personal conditions that unduly limited his chances of going back to work.

[94] The Commission says that the Appellant set conditions that limited his chances of finding suitable employment when he confirmed that he was only available to work outside of his course schedule. It says that the Appellant restricted his availability to certain times and days to accommodate his studies and is a restriction that limits his availability for work.

[95] The Appellant confirmed his focus being on his studies and that he was only willing to accept employment that did not conflict with his studies.

[96] The Appellant admitted not seeking any employment during the first two periods for which he was disentitled. He said that for the entire period of his program he would not accept work that conflicted with his classes. He was not prepared to quit school to return to the labour market if a suitable job presented itself.

[97] In the last period of disentitlement, the Appellant clearly noted that he was only available Saturday mornings. This was a condition that severely limited his chances of finding suitable employment. He did make four applications for work n November 2021 but confirmed in testimony that he was only seeking part-time employment that did not conflict with his school schedule, again posing a limitation upon his availability to find suitable employment.

[98] I am satisfied that the Appellant restricted his availability when he set conditions that limited when he would work. To remain eligible for EI benefits, a claimant must be seeking suitable employment and cannot limit when they will work to accommodate other interests.

So, was the Appellant capable of and available for work?

[99] Based on my findings on the three factors, I find that the Appellant hasn't shown that he was capable of and available for work but unable to find a suitable job during any of the three periods for which he was disentitled.

[100] The Appellant's main augment in this appeal was that the Commission erred when it both approved and continuously paid him benefits knowing that he was not entitled. During the period it continued to pay him, he believed he was entitled to some form of benefits because of the Covid-19 pandemic.

[101] He says that the Commission should bear at least some of the blame for the consequences he now faces.

[102] The Commission has shown that it acted within its authority as provided for by law. In the interests of ensuring benefits reached those in need, the EI Act was amended to allow for the immediate payment of benefits subject to later verification.

[103] I have found that that the Commission acted judicially when it verified the Appellant's claims.

[104] Also, the Appellant has not shown that he was available during any of the periods for which he was disentitled.

[105] I empathize with the Appellant's circumstances; however, I am neither permitted to rewrite legislation nor interpret it in a manner that is contrary to its plain meaning regardless of how compelling the Appellant's case may be.[18]

[106] This means that the Appellant is disentitled to receive EI benefits during any of the noted periods under both sections of the Act noted above. Any overpayment remains subject to recovery unless the Commission should exercise its discretion to write off some or all his debt.

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[18] See (*Canada (A.G.) v. Knee,* 2011 FCA 301)

[107] The Appellant says that he is currently unable to repay the $13,100.00 overpayment debt. In these circumstances he can do one of two things. The Appellant can formally ask the Commission to consider writing off his debt for reasons of undue hardship. If he is unsatisfied with the Commission's response, he can appeal to the Federal Court of Canada.

[108] The second thing the Appellant can do is to arrange a repayment schedule or ask about other debt relief by calling the Debt Management Call Centre at the Canada Revenue Agency at 1-866-864-5823.

Conclusion

[109] The Appellant hasn't shown that he was available for work within the meaning of the law. Because of this, I find that the Appellant can't receive EI benefits during the periods he was disentitled.

[110] This means that the appeal is dismissed.

Mark Leonard
Member, General Division – Employment Insurance Section