Citation: *CA v Canada Employment Insurance Commission*, 2023 SST 1082

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

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

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (477061) dated June 2, 2022 (issued by Service Canada)

Tribunal member:	Bret Edwards
Type of hearing:	Teleconference
Hearing date:	April 26, 2023
Hearing participant:	Appellant
Decision date:	May 8, 2023
File number:	GE-23-411

Decision

[1] The appeal is dismissed. I disagree with the Appellant about his availability.

[2] The Appellant hasn't shown he was available for work while he was in school (from January 12, 2021 to December 10, 2021). This means he is disentitled from receiving Employment Insurance (EI) benefits during that period.

Overview

[3] The Canada Employment Insurance Commission (Commission) decided the Appellant was disentitled from receiving EI regular benefits from January 12, 2021 to December 10, 2021 because he wasn't available for work. An appellant has to be available for work to get EI regular benefits. Availability is an ongoing requirement. This means that an appellant has to be searching for a job.

[4] I have to decide whether the Appellant has proven he was available for work. The Appellant 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.

[5] The Commission says the Appellant wasn't available because he was in school full-time and didn't look for work while he was in school.

[6] The Appellant disagrees and says his school schedule allowed him to work and he did work while he was in school. He also says he was looking for work while he was in school.

Matters I have to consider first

I will accept the documents sent in after the hearing

[7] The Appellant sent in documents after the hearing.[1] I agreed to accept these documents during the hearing as they relate to the Appellant's availability while he was in school.

The Appellant wasn't referred for school

[8] The Appellant and the Commission initially disagreed on whether the Appellant had been approved for training. The Appellant argued Alberta Student Aid had approved his training.[2] But the Commission said Alberta Student Aid wasn't a recognized body and had simply given him a loan for school, so there was no evidence he had been approved for training.[3]

[9] At the hearing, the Appellant testified he now understood he had not been approved for training and didn't want to dispute this issue anymore. But he also testified he felt the Commission had given him the impression in the first place that his training had been approved because it hadn't brought up any issues with his first training questionnaire (which mentioned Alberta Student Aid) after he sent it.[4]

[10] Since the Appellant and Commission now agree about his training not being approved, I won't consider this issue any further here.

[11] As for the Appellant's comments about the Commission staying silent when he first sent them information about his schooling, I will consider this below when I look at whether the Commission acted judicially when it made its decision to go back and review the Appellant's claim for benefits.

50(8) Disentitlement

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[1] RGD5-1 to RGD5-11.
[2] GD2-17.
[3] GD4-5 to GD4-6.
[4] For the Appellant's first training questionnaire, see GD3-38.

[12] The Commission says it didn't disentitle the Appellant under subsection 50(8) of the *Employment Insurance Act* (Act).[5] Subsection 50(8) of the Act states that the Commission may require a person to prove that they were making reasonable and customary efforts to find suitable employment.

[13] Since the Commission didn't disentitle the Appellant under subsection 50(8) of the Act, I find the Appellant isn't disentitled under this part of the law. Therefore, it isn't something I need to consider here.

Issue

[14] Can the Commission go back and review the Appellant's claim for benefits?

[15] Did the Commission act judicially when it made its decision to go back and review the Appellant's benefits?

[16] Was the Appellant available for work?

Analysis

Can the Commission go back and review the Appellant's claim for benefits?

[17] Yes, it can. The law allows the Commission to do this.

[18] There are two sections of the law that allow the Commission to go back and review a claim.

[19] First, during the global Covid-19 pandemic, the government temporarily amended the Act and added section 153.161, effective September 27, 2020.[6]

[20] This temporary pandemic measure gave the Commission the power to verify that an appellant taking a "course, program of instruction or non-referred training" is entitled to EI benefits by requiring proof they were available for work on any working day during

[5] GD4-7.
[6] The Commission discusses this temporary section in its submissions. See GD4-6 to GD4-7.

their benefit period **at any point after benefits are paid**. This means the **verification of entitlement** happens **after** benefits are paid.

[21] This provision applies to the Appellant because his claim for regular EI benefits started as of October 4, 2020[7] and he submitted a renewal claim for benefits on December 17, 2020, and section 153.161 of the EI Act applies to any claim for regular EI benefits that started between September 27, 2020 and September 25, 2021.

[22] I therefore find the Commission was acting within the parameters Parliament set up during the pandemic and could go back and ask the Appellant to verify his entitlement to EI benefits by proving his availability for work while he was in school from January 12, 2021 to December 10, 2021.

[23] A different section of the Act also allows the Commission to change the original decision to pay EI benefits if an appellant is unable to verify their entitlement.

[24] Section 52 of the Act allows the Commission to reconsider (change) a claim for EI benefits within 36 months after the benefits have been paid.[8]

[25] The Commission acted within this limit for the Appellant's claim. The EI benefits at issue here were paid for the period from January 12, 2021 to December 10, 2021. The Commission first asked the Appellant to verify his availability for work during this period on December 15, 2021[9], and changed its decision on his entitlement to EI benefits during this period on December 31, 2021.[10] This was within 36 months of the first week of EI benefits (starting January 10, 2021) paid to the Appellant.

[26] I therefore find the Commission was acting within the law and could go back to verify and reconsider (change) its decision on the Appellant's entitlement to EI benefits.

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[7] This was the start of the Appellant's claim for **regular** EI benefits. Prior to that, he was receiving EI Emergency Response Benefits, which were governed by different rules than regular EI benefits.
[8] Or within 72 months if the Commission believes an appellant made a false or misleading statement in connection with their claim for EI benefits.
[9] GD3-50.
[10] GD3-56.

[27] So, sections 52 and 153.161 of the Act allow the Commission to go back and verify an appellant's entitlement to the EI benefits they received and to assess an overpayment, if appropriate.[11]

Did the Commission act judicially when it made its decision to go back and review the Appellant's benefits?

[28] While the Commission can go back and review the Appellant's claim for benefits for the period from January 12, 2021 to December 10, 2021, its decision to do so is discretionary.

[29] This means that it doesn't have to do a review, but it can choose to do so if it wants. Both sections that allow the Commission to review a claim say it may review a claim, not that it must review a claim.

[30] What this means is that I can only interfere with (change) the Commission's decision if it didn't exercise its discretion properly when it made the decision.[12]

[31] For the Commission to have used its discretion judicially, it must not have done the following things when it made the decision to review the Appellant's claim for benefits for the period from January 12, 2021 to December 10, 2021:

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

[32] The Appellant testified the Commission initially approved his claim for benefits and then almost a year later told him he wasn't actually able to get benefits. But he also

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[11] The Tribunal's Appeal Division has come to this conclusion too. See *SF v Canada Employment Insurance Commission*, 2022 SST 1095 and *Canada Employment Insurance Commission v PJ*, 2022 SST 1311.

[12] See *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: see *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: see *Attorney General of Canada v Purcell*, A-694-94.

testified he now understands the Commission relaxed its requirements during the pandemic, so he doesn't hold a grudge against them for this.

[33] The Commission argues it didn't act in bad faith. It says it automatically approved the Appellant's claim for benefits in January 2021 under Interim Order No. 10, which was a temporary measure introduced during the pandemic.[13]

[34] The Commission says the Appellant then submitted another benefits application in October 2021 that showed he had been referred for schooling but didn't include any supporting documentation. It reviewed this application and gathered new information as part of this process, which led it to find he wasn't actually entitled to benefits while he was in school.[14]

[35] The Appellant applied for EI benefits on December 17, 2020. I note the Appellant answered "no" to the question "are you taking or will you be taking a course or training program?", which required a "yes" or "no" response.[15] I also note the Appellant accepted the attestation before submitting his application, which declared that the information he gave to the questions on his application were true to the best of his knowledge.[16]

[36] I note the Appellant began to receive EI benefits during the week of January 10, 2021.[17]

[37] I also note the Appellant then submitted a training questionnaire on January 16, 2021, which showed he had started school with government approval from Alberta Student Aid as of January 11, 2021.[18]

[38] In my view, since the Appellant didn't say on his application for benefits that he was currently in school, he can't say the Commission knew about his schooling when he began to receive benefits. This wasn't the case. He submitted his training questionnaire

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[13] GD4-6.
[14] GD4-6 to GD4-7.
[15] GD3-8.
[16] GD3-12.
[17] GD3-98.
[18] GD3-38.

after his claim had been automatically approved and he had already begun to receive benefits.

[39] I also don't have any evidence the Commission actually looked at the Appellant's schooling before he began to receive benefits. The Commission says it didn't do this, and there's no information in the Commission's record of its conversations with the Appellant that would lead me to believe it did this.

[40] I'm disappointed the Commission waited as long as it did to go back and review the Appellant's claim for benefits. It had new information from the Appellant about his schooling and could have acted sooner. But I still find it followed the law and that is not bad faith.

[41] The law allows the Commission to review a claim for any reason. The fact it may have paid the Appellant benefits initially doesn't prevent it from deciding to review his claim. So, I find the Commission's choice to exercise this power granted to it by the law is not bad faith.

[42] The Appellant testified he doesn't feel the Commission acted for an improper purpose or motive. He testified he now understands the Commission relaxed its requirements during the pandemic and doesn't hold a grudge for this, as noted above.

[43] I find the Commission didn't act for an improper purpose or motive. The Appellant doesn't think it did, and I see no evidence that would lead me to conclude it did.

[44] The Appellant testified the Commission took into account an irrelevant factor because it didn't look at all the facts, and if it did, it could see he was working and looking for work.

[45] I find the Commission didn't take into account an irrelevant factor.

[46] I understand the Appellant's argument, but it doesn't relate to this issue. Instead, it relates to the next issue, which is whether the Commission ignored a relevant factor, and I will discuss it there.

[47] For this issue, I find the Appellant hasn't pointed out anything the Commission included that he thinks it shouldn't have. I also don't see anything the Commission considered that is irrelevant, so without more evidence, I can't conclude it took into account an irrelevant factor.

[48] I find the Commission didn't ignore a relevant factor.

[49] I understand the Appellant's concerns the Commission ignored the fact he started working in November 2021 and his efforts to look for work in deciding to review his availability, but I don't have any evidence the Commission did this.

[50] The Commission also doesn't have to only look at an appellant's work status before it reviews their availability. It can consider other factors as part of this process, including whether someone has supplied information on a school questionnaire, as the Appellant has done in this case.

[51] The Appellant testified he doesn't feel the Commission discriminated against him.

[52] I find the Commission didn't discriminate against the Appellant. The Appellant doesn't feel it did, and I see no evidence that would lead me to conclude it did do this.

[53] I therefore find the Commission's decision to review the Appellant's availability was done judicially.

[54] So, I will now move on to analyze the Appellant's availability from January 12, 2021 to December 10, 2021.

Was the Appellant available for work for the period from January 12, 2021 to December 10, 2021?

[55] The Appellant was a student during his disentitlement period. According to the Federal Court of Appeal, there is a presumption that full-time students are not available for work.[19]

[19] See *Canada (Attorney General) v Cyrenne*, 2010 FCA 349.

[56] So, the first thing I need to do is see if this presumption applies to the Appellant.

[57] The Appellant agrees he was a full-time student, and I see no evidence that shows otherwise. So, I accept the Appellant was in school full-time and the presumption applies to him.

[58] But the Appellant can rebut the presumption, which means it won't apply, if he can show he has a history of working full-time while also in school.[20] Or, he can show that there are exceptional circumstances in his case.[21]

[59] I note the Appellant provided a letter of employment that says he was working full-time from November 2, 2021 to January 12, 2022.[22] He also provided paystubs that show he worked 61 hours between November 2, 2021 and November 15, 2021, 75 hours between November 16, 2021 and November 30, 2021, and 79 hours between December 1, 2021 and December 15, 2021.[23]

[60] I find the Appellant hasn't rebutted the presumption that he isn't available for work.

[61] I acknowledge the Appellant has provided evidence he was working some of the time he was in school, specifically from November 2, 2021 to December 10, 2021.

[62] But I still find the Appellant hasn't provided enough evidence to show he has a history of working full-time while also in school. This is because recent case law says this history should be proven over the years.[24]

[63] In other words, I find the Appellant hasn't shown he has a history of working full-time while also in school because there is no evidence that he ever did this before November 2021.

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[20] See *Canada (Attorney General) v Rideout*, 2004 FCA 304.
[21] See *Canada (Attorney General) v Cyrenne*, 2010 FCA 349.
[22] RGD2-18.
[23] GD3-52 to GD3-54.
[24] See *Canada (Attorney General) v Lamonde*, 2006 FCA 44, *Landry v Canada (Deputy Attorney General)*, [1992] F.C.J. No. 965 (FCA).

[64] I also find the Appellant hasn't shown any exceptional circumstances that would rebut the presumption. He didn't say anything at the hearing that would lead me to believe he has any exceptional circumstances.

[65] So, the Appellant hasn't rebutted the presumption that he is unavailable for work.

[66] 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'm going to continue on to decide the section of the law dealing with availability, even though I have already found the Appellant is presumed to be unavailable.

Capable of and available for work

[67] I have to consider whether the Appellant was capable of and available for work but unable to find a suitable job.[25] Case law sets out three factors for me to consider when deciding this. The Appellant has to prove the following three things:[26]

a) He wanted to go back to work as soon as a suitable job was available.

b) He 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.

[68] When I consider each of these factors, I have to look at the Appellant's attitude and conduct.[27]

– Wanting to go back to work

[69] The Appellant has shown he wanted to go back to work as soon as a suitable job was available.

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[25] See section 18(1)(a) of the Act.
[26] 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.
[27] 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.

[70] The Appellant told the Commission and testified he wanted to go back to work while he was in school. I see no evidence to counter what he said.

[71] The Appellant also provided evidence he was working while in school, specifically from November 2, 2021 to December 10, 2021, as noted above.

[72] Based on this evidence, I find the Appellant had the desire to work during his entire disentitlement period (while he was in school).

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

[73] The Appellant didn't make enough effort to find a suitable job for most of his disentitlement period.

[74] The Appellant testified he was actively looking for work while he was in school. He said he mostly looked online through the Indeed website, which sent him job listings almost every hour of every day. He also testified he ultimately found full-time work (starting on November 2, 2021) due to these efforts.

[75] The Appellant initially provided evidence he said shows he was looking for work while in school. But I note all of this evidence is from January 2020 to September 2020, which was before the Appellant's disentitlement period began (on January 12, 2021).[28]

[76] The Appellant testified he made a mistake in sending this evidence and would send the right documents after the hearing. I told him I would accept them, as discussed above.

[77] These are the documents the Appellant sent after the hearing:

- 4 job postings for delivery driver. All are undated.[29]
- 1 job posting for warehouse clerk. Dated March 25, 2021.[30]

[28] RGD2-2 to RGD2-17.
[29] RGD5-2 to RGD5-8.
[30] RGD5-10.

- 1 job posting for delivery driver. Dated December 12, 2021.[31]

[78] The Appellant says these documents are his job search results from Indeed and Glassdoor, but Glassdoor didn't include the dates.[32] This leads me to conclude the 4 undated job postings are from Glassdoor and the 2 job postings with dates are from Indeed.

[79] I find these documents don't show the Appellant was actively looking for work while he was in school, as he says he was.

[80] Even if I accept the Glassdoor job postings were from the time the Appellant was in school, I find there is no evidence he actually applied for any of these jobs. He has only shown he found these jobs online.

[81] I also note the Appellant only submitted 2 Indeed job postings even though he testified he got job postings from Indeed almost every hour of every day, as noted above. I find it's reasonable to believe if he got job postings from Indeed that often, he would have been able to submit more than 2 job postings or explain why he couldn't do that.

[82] Additionally, I note 1 of the Indeed job postings was from December 12, 2021, which is after the Appellant's disentitlement period ended (December 10, 2021). This means he submitted only 1 Indeed job posting from the time he was in school.

[83] I therefore find there are significant gaps in the Appellant's evidence of his efforts to find work while in school. He has provided only 5 job postings from the entire time he was in school, despite saying he regularly got job postings during this period. He also hasn't provided any evidence he even applied for any of these job postings. So, I don't give this evidence much weight here.

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[31] RGD5-11.
[32] RGD5-1.

[84] The Appellant testified the letter of employment for the job he started on November 2, 2021 shows he was looking for and applying for work while in school.

[85] I mostly disagree with the Appellant, unfortunately.

[86] I acknowledge the letter says the Appellant started working on November 2, 2021. I also acknowledge it says the employer found the Appellant's resume on Indeed in October 2021.

[87] But I find the letter doesn't shed any new light on the Appellant's efforts to find work while he was in school. It doesn't say anything about when the Appellant posted his resume or whether he updated it regularly. It also doesn't say anything about whether he applied for any jobs on Indeed before or after he started working in November 2021.

[88] Also, I find the Appellant has provided evidence (specifically 1 job posting) that he was using Indeed at some point while he was in school, as discussed above, so the letter just confirms something already known.

[89] In other words, I find the letter only shows the Appellant was using Indeed while he was in school, not **how often and to what extent** he was using it. I find this means it doesn't give a clear picture of his efforts to find work during this period. So, I don't give the letter much weight here either.

[90] I also find the Appellant's testimony about his efforts to look for work wasn't persuasive. He made it very clear at the hearing that he was active on job sites while he was in school and got multiple emails about job postings every day. But he then sent in very little evidence to actually support this testimony, as discussed above.

[91] So, I'm not satisfied the Appellant's testimony about his efforts to find work aligns with the evidence he later sent in. Because of this, I don't give his testimony much weight here either.

[92] Taken together, I find there isn't enough evidence to show the Appellant was actively looking for work while he was in school, as he says he was. This is because I'm

not satisfied his evidence (only 5 job postings) shows his job search was sufficient or his efforts to look for work were ongoing during this time. I'm also not persuaded by his testimony since it gave a different impression of his efforts to find work than what the rest of his evidence shows.

[93] I therefore find the Appellant didn't make enough efforts to look for work during his entire disentitlement period.

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

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

[95] The Appellant testified he was available for work anytime while he was in school. He said he had a lot of flexibility as his courses were online only and there were not many classes he had to attend. He said this allowed him to be available for work during the day and study at night.

[96] But the Appellant also testified he couldn't work on days he had assignment deadlines because he had to spend the day finishing them (rather than studying at night as he did the rest of the time).

[97] I asked the Appellant how often he had assignment deadlines. He testified he had them about once a week.

[98] I also asked the Appellant what his work schedule was when he started working in November 2021. He said he almost always worked Monday to Friday from 8:30am to 5pm.

[99] I find the Appellant's schooling was a personal condition that overly limited his ability to return to the labour market during most of the time when he was in school, specifically when he had courses with assignment deadlines.

[100] I acknowledge the Appellant had a flexible school schedule that allowed him to be available most days.

[101] But I find the Appellant confirmed he couldn't work on average once a week because he had assignment deadlines. This means his availability was restricted each week to the days when he didn't have deadlines, which would have limited his chances of finding work as it would have kept him from taking jobs with a set (non-flexible) work schedule.

[102] In other words, I find the Appellant's chances of finding work were limited as he could only take jobs that would have worked around his school schedule (specifically his assignment deadlines).[33]

[103] While the Appellant testified that he was also available on the weekends, I am only looking at his availability for working days and the law says the weekends are not working days.[34]

[104] I acknowledge the Appellant testified he had a consistent work schedule (Monday to Friday 8:30am to 5pm) when he was working full-time while in school.

[105] But I find there is also evidence that the Appellant's school schedule changed shortly after he started work. His schedule shows his courses ended on November 14, 2021 and he had a practicum the last four weeks of his school program (from November 15, 2021 to December 12, 2021).[35]

[106] Since the Appellant's schooling switched from courses to practicum on November 15, 2021, I find it's reasonable to believe he didn't have any more assignment deadlines as of November 15, 2021 as a typical practicum usually involves more hands-on learning outside the classroom.

[107] In other words, I find the Appellant was likely only able to work a set schedule at his new job because he switched from courses to a practicum shortly after starting work there, which meant no more assignment deadlines. In my view, it's reasonable to

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[33] See *Duquet v Canada (Employment and Immigration Commission*), 2008 FCA 313, *Canada (Attorney General)* v Primard, 2003 FCA 349.
[34] Section 32 of the *Employment Insurance Regulations*.
[35] GD3-87 to GD3-89.

believe this wouldn't have been possible before November 15, 2021 since the Appellant still had courses and said he couldn't work on the days he had assignment deadlines.

[108] I therefore find the Appellant had restrictions that unduly limited his ability to find work during most of the time he was in school, specifically when he had courses from January 12, 2021 to November 14, 2021. But I find he didn't have any restrictions while he was doing his practicum at the end of his school program, specifically from November 15, 2021 to December 10, 2021.

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

[109] Based on my findings on the three factors, I find the Appellant wasn't available for work for the period from January 12, 2021 to December 10, 2021. He has shown he had a desire to work during this period and didn't have any restrictions that unduly limited his chances of finding work from November 15, 2021 to December 10, 2021 (once he started his practicum). But he hasn't shown he made enough effort to find work while he was in school or that he didn't have any restrictions that unduly limited his chances of finding work from January 12, 2021 to November 14, 2021 (since he still had courses and assignment deadlines then).

[110] While I sympathize with the Appellant, who now faces a large overpayment, I don't have the power to erase it, no matter how compelling the circumstances.[36] The law doesn't allow me to do so, even if find that the circumstances are unfair. The overpayment is still the Appellant's responsibility to repay.[37]

[111] These options are available to the Appellant:

- He can ask the Commission to consider writing off the debt because of undue hardship.[38] Should the Commission's response not be in his favour, the Appellant can appeal to the Federal Court.

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[36] See *Canada (Attorney General) v Villaneuve*, 2005 FCA 440.
[37] Sections 43 and 44 of the *Employment Insurance Act* state that an appellant bears the responsibility for an overpayment.
[38] Section 56 of the *Employment Insurance Regulations* gives the Commission broad powers to write off an overpayment when it would cause undue hardship were an Appellant to repay it.

- He can contact the Debt Management Call Centre at CRA at 1-866-864-5823 about a repayment schedule or other debt relief measure.[39]

Conclusion

[112] The Appellant hasn't shown he was available for work within the meaning of the law from January 12, 2021 to December 10, 2021. Because of this, I find the Appellant is disentitled from receiving EI benefits for this period.

[113] This means the appeal is dismissed.

Bret Edwards

Member, General Division – Employment Insurance Section

[39] That's the phone number found on the Notice of Debt that was sent to the Appellant.