Citation: *EM v Canada Employment Insurance Commission*, 2023 SST 1095

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

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

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (0) dated December 22, 2022 (issued by Service Canada)

Tribunal member:	Gary Conrad
Type of hearing:	Teleconference
Hearing date:	May 25, 2023
Hearing participant:	Appellant
Decision date:	June 17, 2023
File number:	GE-23-106

Decision

[1] The appeal is dismissed.

[2] When the Canada Employment Insurance Commission (Commission) decided to pay the Appellant Employment Insurance (EI) benefits starting November 2020 and after learning of her schooling in February 2021, they made initial decisions.

[3] However, the Commission has the power to review these initial decisions, which they did, and when they exercised this power, they did it judicially. This means that I cannot interfere with their decision to review the Appellant's claim.

[4] Further, the Appellant has not rebutted the presumption of unavailability as a full-time student, and she has not proven she was available while taking her university.

[5] This means the disentitlements imposed by the Commission are upheld.

Overview

[6] The Appellant applied for employment insurance (EI) benefits in November 2020.

[7] In February 2021, the Appellant called the Commission and spoke to them about her schooling.

[8] In November 2021, the Commission determined the Appellant was not available for work due to her schooling, so they could not pay her benefits.

[9] The Appellant asked the Commission to reconsider this decision.

[10] After reviewing their decision and speaking with the Appellant, the Commission modified their decision. They still considered the Appellant to be unavailable for work due to her schooling, but only for certain periods of time.

[11] The Appellant appealed this decision to the General Division of the Social Security Tribunal (Tribunal).

[12] The General Division dismissed her appeal.

[13] The Appellant appealed the decision of the General Division to the Appeal Division of the Tribunal.

[14] The Appeal Division determined that the General Division made several errors when it rendered its decision and returned the matter to the General Division to be reconsidered.

Matter I have to consider first

50(8) Disentitlement

[15] In their submissions the Commission states they disentitled the Appellant under section 50(8) of the *Employment Insurance Act* (Act). Section 50(8) of the Act relates to a person failing to prove to the Commission that they were making reasonable and customary efforts to find suitable employment.

[16] In looking through the evidence, I do not see any requests from the Commission to the Appellant to prove her reasonable and customary efforts, or any explanations from the Commission to the Appellant about what kind of proof she would need to provide in order to prove her reasonable and customary efforts.

[17] While not bound by it, I find the reasoning in *TM v Canada Employment Insurance Commission*, 2021 SST 11 persuasive, in that it is not enough for the Commission to discuss job search efforts with the Appellant, instead they must specifically ask for proof from the Appellant and explain to her what kind of proof would meet a “reasonable and customary” standard.

[18] I also do not see any discussion about reasonable and customary efforts during the reconsideration process[1] or explicit mention of disentitling the Appellant under section 50(8) of the Act, or anything about the Appellants lack of reasonable and customary efforts, in the reconsideration decision.

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[1] GD03-35

[19] Based on the lack of evidence the Commission asked the Appellant to prove her reasonable and customary efforts to find suitable employment under section 50(8) of the Act, the Commission did not disentitle the Appellant under section 50(8) of the Act. Therefore, it is not something I need to consider.

Issues

[20] Did the Commission make initial decisions to approve the Appellant for benefits?

[21] If so, can they go back and review those decisions?

[22] If they can review them, did they act judicially when they made their decision?

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

Analysis

Did the Commission make initial decisions?

[24] The Appellant says that her application for benefits was approved by the Commission and the Commission was aware of her enrollment in University and continued to pay her benefits even though she said on her claimant reports that she was in University.[2]

[25] The Commission says that when the Appellant applied for benefits on November 24, 2020, she put “no” on her application when asked about taking training.

[26] The Commission says it was not until February 2021 when the Appellant reported her training to them that they started to review her availability. They further state the law allows them to verify the Appellant’s entitlement to benefits at any point after they pay benefits.

[27] I find that the Commission did make an initial decision on the Appellant’s availability both at the start of the Appellant’s claim (November 24, 2020) and after they

[2] GD02-5

learned the Appellant was in school (February 22, 2021) when they decided to continue paying the Appellant benefits.

[28] I note that the text of section 153.161(1) of the Act[3] says that a person is not entitled to be paid benefits for any working day in a benefit period for which they are unable to prove they are capable of and available for work. This provision suggests the Commission cannot pay benefits without any evidence a person was available for work. Payment must be based on some evidence of availability.

[29] Further, I find the Appeal Division decision SF v *Canada Employment Insurance Commission*, 2022 SST 1095 persuasive that the Commission cannot split its decision-making responsibility into two parts and indefinitely postpone making a decision about the Appellant's entitlement to benefits.

[30] I find that the Commission clearly made a decision to pay the Appellant benefits when they started her benefit period on November 24, 2020, as they started paying her EI from that date so must have considered her available. However, at that time they say they were unaware of her training.

[31] I find that once the Appellant called the Commission on February 22, 2021, the Commission became aware of her schooling at that point, yet they kept paying her benefits.

[32] I find this shows the Commission also made a decision at that time (February 22, 2021) on the Appellant's availability as they continued to pay her EI benefits until the end of October 2021, despite being aware of her schooling. As per section 153.161(1) of the Act, payment must be based on some evidence of availability.

[33] So, I find that the Commission did make an initial decision on the Appellant's availability both at the start of the Appellant's claim (November 24, 2020) and after they learned the Appellant was in school (February 22, 2021).

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[3] This in force at the time the Appellant's benefit period started so it is applicable to her claim.

Can the Commission go back and review a previous decision?

[34] Yes, the Commission can go back and review their initial decisions to pay the Appellant benefits.

[35] I find that the Commission may, at any point after benefits are paid, verify that the Appellant is available for work within her benefit period. There is no time limit on when they can do this, and there are no requirements that must be fulfilled to allow them to do this, and no restrictions stated on the Commission's power to review the Appellant's availability.[4]

[36] If the Commission wants to review the Appellant's claim they can, and that is what they chose to do.

Did they act judicially when they made their decision?

[37] Yes, the Commission did act judicially when they made their decision to review the Appellant's claim to verify her availability.

[38] While the law allows the Commission to go back and review their initial decisions, their decision to do so is discretionary.

[39] This means they do not have to do a review, but they can choose to do a review if they want to, as the law says the Commission "may" verify a claimant's availability after benefits have been paid, not that they "must" review availability after paying benefits.[5]

[40] Since their decision to review a claim is discretionary, I can only interfere with, in other words change, the Commission's decision, if they did not exercise their discretion properly when they made the decision.[6]

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[4] See 153.161(2) of the *Employment Insurance Act*
[5] See 153.161(2) of the *Employment Insurance Act*
[6] *Canada (Attorney General) v Kaur*, 2007 FCA 287. The Commission's decision can only be interfered with if it exercised its discretionary power in a non-judicial manner or acted in a perverse or capricious manner without regard to the material before it: *Canada (Attorney General) v Tong*, 2003 FCA 281.

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

Bad faith

[42] The Appellant says the Commission acted in bad faith. She says that they waited far too long after paying her benefits to make their decision. She also says that the person she spoke with at the Commission was very non-communicative, did not listen to what she was saying, and made her feel like the decision was already made.

[43] Bad faith is a legal term which means an intentional dishonest act by not fulfilling some legal obligation or purposely misleading someone. I find the Commission did not do either of those things.

[44] In the Appellant's application she reported no schooling.[7] It was not until February 22, 2021, that she spoke to them about her schooling.

[45] Schooling can have an impact on a person's availability. I find it would not be dishonest, or misleading, for the Commission to choose to review their initial decisions to pay the Appellant benefits to see if the information she provided them on her schooling would impact her availability.

[46] I find the fact the Commission delayed their verification decision of the Appellant's availability while in school for over 8 months from when they first were told of her schooling,[8] also does not mean their decision was made in bad faith.

Discretion is exercised in a non-judicial manner if the decision-maker acted in bad faith, or for an improper purpose or motive, took into account an irrelevant factor or ignored a relevant factor or acted in a discriminatory manner: *Attorney General of Canada v Purcell*, A-694-94.

[7] GD03-3 to GD03-13

[8] The Appellant first contacted them about her schooling on February 22, 2021, (GD03-14) and their decision regarding their review of their initial decision was made on November 8, 2021 (GD03-30)

[47] I do not see sufficient evidence to convince me the Commission delayed making a decision to review the Appellant's claim in order to verify her availability because they intended to mislead her or because they were being intentionally dishonest.

[48] I further find that the fact she ended up speaking to someone that was less than pleasant at the Commission also does not prove bad faith. It takes much more than a surly representative from the Commission to prove they were committing an intentional dishonest act by not fulfilling some legal obligation or purposely misleading the Appellant.

[49] So, while I can understand the frustration of the Appellant, having told the Commission all about her schooling and then having the Commission tell her 8 months later, that she does not qualify, it is important to remember that I am **not** looking at the Commission's decision to pay the Appellant benefits and whether that was done in bad faith. I am looking at whether the Commission's decision to **review** the Appellant's claim to verify her availability was done in bad faith.

[50] I find the Commission choosing to verify the Appellant's availability by reviewing the information she provided to them, despite it being many months after it was provided, is not intentionally dishonest or misleading and is a relevant part of their role in administering the EI program to ensure people who get paid benefits are actually entitled to receive them.

Improper purpose or motive

[51] The Appellant says the Commission acted for an improper purpose or motive because they continued to pay her benefits for so long and then decided to ask for her to repay those benefits. She said it feels like the Commission was doing their review just to try and get money out of people.

[52] I find the Commission did not act for an improper purpose or motive.

[53] The Commission is in charge of administering the EI program. One of the things they need to do in their administrative capacity is determine if people can qualify to establish a benefit period and if they are able to be paid benefits.

[54] Qualifying to establish a benefit period and being able to be paid benefits are two different concepts. A claimant may meet the requirements to establish a benefit period, but there may be something preventing them from being paid benefits.

[55] In the Appellant's case they found she could qualify to establish a benefit period and at the time she applied, she did not mention anything about schooling, so the Commission seemingly had no issue with her ability to be paid benefits at that time.

[56] The law says that if the Appellant is attending school, she cannot be paid benefits for any working day in a benefit period where she is unable to prove that on that day she was capable of and available for work.[9]

[57] The Appellant did report to the Commission that she was attending school.

[58] Since the Commission is the administrator of the EI program, it is up to them to determine if the Appellant would be able to be paid benefits while attending school. To do that they would need to see if she had proven she was capable of and available for work on the working days she was in school.

[59] Verifying the Appellant's availability to see if there is anything that would prevent her from being paid benefits, which the Commission is allowed to do under the law, is not acting for an improper purpose or motive, but is instead acting in their capacity of administrating the EI program to try and ensure that only the people who meet the requirements to get paid benefits receive EI, which is a proper purpose. The fact the Commission waited so long to do this also does not make their actions for an improper reason or motive.

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[9] Section 153.161(1) of the *Employment Insurance Act* is applicable to the Appellant's claim since her benefit period started when it was still in force.

Ignore Relevant factor

[60] The Appellant says the Commission ignored a relevant factor when they made their decision to review her claim. The Appellant says the Commission ignored the fact that she was working for multiple periods during her benefit period.

[61] I find the Commission did not ignore a relevant factor.

[62] I find the Commission did in fact consider all the information about the Appellant's work, as this was part of the information she gave to them on February 22, 2021,[10]and the Commission says it was this information that led to their decision to review her claim.[11]

Considered an irrelevant factor

[63] The Appellant says that the Commission did consider an irrelevant factor as they decided that she was unavailable due to not being able to work a nine-to-five job.

[64] I find the Commission did not consider any irrelevant factors when they made their decision to go back and review the Appellant's claim.

[65] I find that whether the Appellant is available due to being unable to work a nine-to-five job was, as per the Appellant's testimony, related to the Commission's decision on the Appellant's availability. That is not what I am looking at here.

[66] What I am considering here is whether their decision to **review** her claim was done judicially. I do not see any irrelevant factors considered by the Commission when they made their decision to review her claim.

[10] GD03-15, see the notes of the call where they clearly put in the information the Appellant gave them about her working while going to school during her claim.
[11] RGD03-1

Discriminated against

[67] The Appellant says that she feels she was discriminated against as she feels that they went after her because she was a student and did not give her a chance to rebut the presumption of being unavailable as a student.

[68] I find the Commission did not discriminate against the Appellant when they decided to review her claim. I do not see any evidence the Commission singled out the Appellant based on any particularly characteristic.

[69] The fact the Commission reviewed her claim because she was a student is not discriminatory, as verifying a student's availability is necessary in order for the Commission to know whether a student is entitled to benefits.[12]

[70] I further find that rebutting the presumption of unavailability for full-time students is related to the decision on the Appellant's availability and what I am looking at here is the decision to **review** her claim. So, whether she did or did not get a chance to try and rebut the presumption with the Commission is not discriminatory, as it is not related to the Commission's decision to review her claim.

Did the Commission act judicially?

[71] I find the Commission did act judicially when they made their decision to go back and review the Appellant's claim to verify her availability as they did not act in bad faith, or for an improper purpose or motive; did not take into account an irrelevant factor or ignore a relevant factor; and did not act in a discriminatory manner when they made the decision to review their initial decision.

[72] This means I cannot interfere in their decision to go back and review the Appellant's claim.

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[12] Section 153.161(1) of the *Employment Insurance Act*

Availability for work

The Appellant was a student

[73] Before I begin my analysis of whether the Appellant was available for work, I need to address the fact she was enrolled in a course.

[74] The Federal Court of Appeal has said that claimants who are taking a full-time course are presumed to be unavailable for work.[13] This is called "presumption of non-availability." It means I can suppose that students aren't available for work when the evidence shows that they are in a full-time course.

[75] However, since this assumption only applies to full-time students, I first need to determine if the Appellant was a full-time student.

[76] The Appellant says that she was a full-time student. The Commission says the same. I accept as fact that the Appellant was a full-time student as both parties are in agreement and I see nothing that would demonstrate otherwise.

[77] Since the Appellant is a full-time student this means she is presumed to be unavailable. However, there are two ways the Appellant can rebut the presumption. She can show that she has a history of working full-time while also in school.[14] Or, she can show that there are exceptional circumstances in her case.[15]

Rebutting the presumption

[78] I note the Appellant has not argued there were any exceptional circumstances in her case. I also do not see any exceptional circumstances in her case that would rebut the presumption of a full-time student being unavailable.

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[13] See *Canada (Attorney General) v Cyrenne*, 2010 FCA 349.
[14] See *Canada (Attorney General) v Rideout*, 2004 FCA 304.
[15] See *Canada (Attorney General) v Cyrenne*, 2010 FCA 349.

[79] Instead, the Appellant argues that she has a history of working full-time while attending school.

[80] The Appellant says that she has consistently been working while attending university since 2018. She says she would work whatever hours she could around her school schedule as she needed money to pay her rent and bills. Her hours varied but she always worked around 20 to 35 hours a week.

[81] The Appellant says that she usually worked at cafes as their operating hours worked well with her school schedule.

[82] She says that she would try and set her classes in such a way that it would allow her to maximize her shifts at her job or jobs (sometimes she had more than one job at a time). She said that one place she worked was not open on Monday so she would put two classes on that day.

[83] The Appellant says that there was a period of time where she was working Friday, Saturday, Sunday and Monday for 8 hour shifts around her schooling. She says she did that for six months straight.

[84] I find the Appellant has not rebutted the presumption by showing a history of full-time work while attending university.

[85] First, what I am considering are working days, and weekends are not working days,[16] so the fact she may have been working on Saturday and Sunday, would not be taken into consideration in rebutting this presumption.

[86] Second, I find the Appellant has not demonstrated that without taking into account weekends, she has consistently been working what would be considered full-time hours while attending university. Even if I were to grant that there may have been

[16] The concept of availability in the EI Act relates to working days. See section 18(1)(a) of the EI Act. See also Section 32 of the EI Regulations which says Saturday and Sunday are not working days.

some weeks where the hours could have been close to what is considered full-time[17] without including weekend hours, that still is not sufficient to rebut the presumption.

[87] Some weeks here or there with close to full-time hours does not create a history of working full-time. Instead, it shows that working full-time while she was in school would be the exception rather than the norm.

[88] Third, the Appellant has consistently stated that she is not willing to leave her course, as her goal is to find full-time work around her class schedule.

[89] Fourth, the fact the Appellant is scheduling all her work around her schooling does not help her rebut the presumption of unavailability while attending school full-time. Instead, it supports the presumption that she is unavailable while attending full-time schooling.[18]

[90] Fifth, while the Appellant's classes were online for most of the semesters in questions, she still had mandatory attendance at these online classes.

[91] Since the Appellant has failed to rebut the presumption of unavailability while attending school full-time this means she is presumed to be unavailable.

[92] However, this only means that the Appellant isn't presumed to be unavailable for work. I still have to decide whether the Appellant is actually available.

Capable of and available for work

[93] I have to consider whether the Appellant is capable of and available for work but unable to find a suitable job.[19] Case law sets out three factors for me to consider when deciding this. The Appellant has to prove the following three things:[20]

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

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[17] The Appellant argues that she worked between 20 to 35 hours a week while attending school (GD02-5)
[18] See *Horton v Canada (Attorney General)*, 2020 FC 743 para 35 and 36
[19] See section 18(1)(a) of the Act.
[20] 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.

b) She was making efforts to find a suitable job.

c) She did not set personal conditions that might have unduly (in other words, overly) limited her chances of going back to work.

[94] When I consider each of these factors, I have to look at the Appellant's attitude and conduct,[21] for all the periods of disentitlement (November 23, 2020, to April 24, 2021, and from September 8, 2021, to December 18, 2021.)

– **Wanting to go back to work**

[95] I find the Appellant has shown that she wants to work for both periods of the disentitlement.

[96] I find the fact that she was working during for periods of time during the disentitlements, along with her efforts to find other work when she was laid-off or to supplement her working hours, shows her desire to work.

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

[97] The Appellant did make sufficient efforts to find suitable work through both periods of the disentitlement.

[98] I can understand that the Appellant may have not found many places to apply at due to the impact of COVID lockdowns on the economy, but applications are not the sole metric by which job search efforts are judged.

[99] I accept the Appellant's testimony as credible that she was looking online at Indeed.com for other jobs, looking in-person for places that were hiring and was networking with others through a local jobs board on Instagram.

[100] I find her efforts to look for work were sufficient efforts as they were ongoing, and her actions were reasonable ways to look for work.

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[21] 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.

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

[101] The Appellant did set a personal condition that would overly limit her chances of returning to work, as her University was a personal condition that was overly limiting.

[102] I understand the Appellant's argument that she did not want to leave her course for a job as it was not necessary because she feels that she can work full-time around her course, but that does not demonstrate availability.

[103] The Federal Court has said that a student only being available around their course schedule means they are restricting their availability and are not available.[22]

[104] The Appellant testified that she would schedule her work around her class schedule and was looking for work that would work around her class schedule. This is why she liked working at cafes, she found their operating hours meshed well with her schooling.

[105] Further, while the Appellant's classes were online for the bulk of the semester in question, she still had mandatory attendance at these classes, so she still had to work around her class schedule.

[106] So, since any job would have to work around her class schedules, I find her schooling would overly limit her chances of returning to the labour market as it would restrict jobs she could accept.

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

[107] Based on my findings on the three factors, I find that the Appellant has not shown that she is capable of and available for work but unable to find a suitable job.

Conclusion

[108] The appeal is dismissed.

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[22] *Horton v Canada (Attorney General),* 2020 FC 743, para 35.

[109] The Commission made initial decisions when they decided to pay the Appellant benefits.

[110] The Commission has the power to review these initial decisions, which they did, and when they exercised this power, they did it judicially. This means that I cannot interfere with their decision to review the Appellant's claim.

[111] The Appellant has also not rebutted the presumption of being unavailable as a full-time student and has not proven that she is available for work.

[112] This means I am upholding the disentitlements imposed by the Commission.

Gary Conrad
Member, General Division – Employment Insurance Section