Citation: *MC v Canada Employment Insurance Commission*, 2023 SST 1045

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

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

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (523189) dated September 7, 2022 (issued by Service Canada)

Tribunal member:	Lilian Klein
Type of hearing:	Teleconference
Hearing date:	March 6, 2023
Hearing participants:	Appellant
Decision date:	May 2, 2023
File number:	GE-22-3330

Decision

[1] I'm dismissing the Claimant's appeal. This decision explains why.

[2] The Canada Employment Insurance Commission (Commission) used its discretion properly when it retroactively disentitled the Claimant from receiving benefits after it couldn't verify that he'd been available for work.

[3] The Claimant is disentitled from receiving employment insurance (EI) regular benefits because he didn't show he was available for work while studying full time. This means he can't keep the benefits that the Commission paid him.

Overview

[4] The Claimant in this appeal, M. C., is a university student. He began a claim for EI benefits on October 25, 2020. He got benefits until his course ended on April 30, 2021.

[5] On June 9, 2022, the Commission disentitled the Claimant from receiving those benefits since it couldn't verify his availability for work while studying full time.

[6] To get EI, all claimants must prove their availability for work by searching for jobs on every working day, without personal conditions. Students must prove availability too.

[7] The Claimant first told the Commission that he hadn`t looked for work since he was waiting for a recall to his job. He`s since said that he'd been looking for work throughout his claim for benefits. He argues that he's always worked full time when studying full time.

The issues I must decide

[8] First, did the Commission use its discretion properly when it retroactively disentitled the Claimant from receiving benefits after it had already paid them?

[9] Second, was the Claimant available for work during his claim?

Post-hearing documents

[10] After the hearing, the Claimant submitted details about his job search. I accepted them as relevant and shared them with the Commission, but it made no further comments.

Analysis

1. The Commission used its discretion properly

[11] I must first decide whether the Commission used its discretionary powers properly when it retroactively disentitled the Claimant from receiving benefits.

[12] Under one section of the law, the Commission may **reconsider** a claim within 36 months after benefits were paid or payable where new facts become known.[1] That's one way that it can review a claim. But there's another way too.

[13] Under a new temporary section of the law, the Commission may also **verify** that students were available for work **at any time** after it pays them benefits.[2] This section was enacted to speed up access to benefits for students during the pandemic. It allowed for payment **before** verification of availability but reserved the right to later check that.

[14] The Tribunal's Appeal Division (AD) says I must first decide if the Commission **reconsidered** its decision on the Claimant's case **or verified** his availability.[3]

[15] I find that the Commission performed a **verification** of its decision that the Claimant could get EI regular benefits. This was over a year after it paid these benefits. It paid them despite his reports that he hadn`t been looking for work.

[16] When the Commission decides to take another look at your claim, this is a **discretionary decision**. That's because the Commission uses its discretion when choosing the decisions that it's going to verify. It doesn't automatically look back at every claim after it's already paid benefits to a claimant.

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[1] Section 52 of the *Employment Insurance Act* (EI Act) deals with reconsiderations of original decisions. The 36-month deadline is increased to 72 months if there was false or misleading information on the application.
[2] See section 153.161(2) of the EI Act and *RV v Canada Employment Insurance Commission*, 2022 SST 1543. Verification under this section of the EI Act can occur "at any point after benefits are paid."
[3] See *Canada Employment Insurance Commission v OB*, 2022 SST 1371.

[17] When making a discretionary decision, the Commission must act judicially. This means it must show that it

- acted in good faith without discrimination, or for improper purposes
- considered all relevant factors
- ignored all irrelevant factors.[4]

[18] I find that the Commission acted for a proper purpose under the law: to verify the Claimant`s availability for work while he'd been a full-time student.

[19] I see no evidence that the Commission acted in bad faith, in a discriminatory manner or for an improper purpose. It didn`t ignore relevant factors. It didn`t look at irrelevant factors either. The law allowed it to verify the Claimant`s availability for work **at any time** after it paid him benefits, even over a year later.

[20] So, the Commission used its discretion properly when it verified the Claimant's entitlement to benefits, retroactively disentitled him and calculated an overpayment.

[21] I will now look at whether the Claimant was available for work while studying full time.

2. You must be available for work

[22] All claimants must show that they are capable of and available for work **on every working day** for which they want to claim benefits.[5] Students must also prove availability.[6] They must show it's more likely than not that they're available for work.

Assuming that full-time students aren't available for work

[23] There's a presumption that claimants in school full time aren't available for work.[7] This means we can presume (take for granted) that full-time students aren't available for work **unless they can show otherwise**.

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[4] See *Canada (Attorney General) v Purcell*, 1995 CanLII3558 (FCA).
[5] S 18(1)(a) of the *Employment Insurance Act* (EI Act) says you cannot get benefits for a working day unless you prove that on that day you were capable of and available for work and unable to obtain a suitable job.
[6] In March 2020, the EI Act was amended in response to COVID-19. S 153.161 of the EI Act confirms that students in non-referred training must prove that they are capable of and available for work.
[7] See *Canada (Attorney General) v Cyrenne*, 2010 FCA 349.

[24] So, I will start by looking at whether I can assume that the Claimant was **unavailable** for work. Then I will look at whether he was actively **available** for work.

[25] The Claimant was a full-time student. So, the presumption applies to him.

[26] The Commission says the Claimant can't rebut this presumption because he didn't show that he was trying to find work.

[27] But I find that the Claimant can rebut the presumption based on his work history of 25 hours a week while studying full time. Generally, claimants can only rebut this presumption where they have experience working full time while studying full time[8] or have exceptional circumstances.[9]

[28] I rely on a decision of Tribunal's Appeal Division (AD) in a similar fact situation.[10] In that case, the AD found the part-time nature of a claimant's previous employment and her ability to maintain that level of work while studying full-time was an exceptional circumstance. The AD said this was enough to rebut the presumption of non-availability.

[29] That's why I find that the Claimant **can rebut the presumption** with his 25 hours of work per week. But I must still consider whether he was **actively available for work**.

[30] The Commission says claimants must make "reasonable and customary" efforts to find work. The Claimant completed training questionnaires, but the Commission didn't ask him follow-up questions about a job search until after his course was over.

[31] For this reason, I won't be considering a disentitlement for failing to conduct a reasonable and customary job search. [11] I'll only consider the disentitlement that the Commission imposed under the following test for availability.[12]

[32] Under this test, the Claimant had to prove these three things:

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[8] See *Canada (Attorney General) v Rideout*, 2004 FCA 304.
[9] *Cyrenne*, see above.
[10] See *J. D. v Canada Employment Insurance Commission*, 2019 SST 438. I do not have to follow the decisions of the Tribunal's Appeal Decision (AD), but their logic can guide me, as in this case.
[11] Since the Commission did not ask for a job search during her claim, the Claimant cannot be disentitled under s 50(1) of the EI Act. See *LD v Canada Employment Insurance Commission,* 2020 SST 688.
[12] This test is under sections 18(1)(a) and 153.161 of the EI Act.

i) He wanted to return to work as soon as he could find a suitable job.

ii) He tried to make this happen through enough efforts to find work.

iii) He had no personal conditions that might unduly limit his chances of finding a suitable job.[13]

[33] I must consider each of these factors to decide the question of availability. I will also look at the Claimant's attitude and conduct.[14]

The Claimant wanted to return to work

[34] On the first factor, I accept that **the Claimant wanted to return to work** since his work history while studying reflects a strong work ethic. His texts to his employer and Commission's payment history show that he took shifts where available during his claim. So, his attitude and conduct demonstrate a wish to return to the labour market.

The Claimant didn't make enough effort to find work

[35] But on the second factor, the Claimant **hasn't shown that he made enough efforts to find work** while waiting for a recall to his previous job. He's shown that he stayed connected with his employer to get shifts where possible, but little beyond that.

[36] Waiting for a recall without looking for other jobs doesn't show enough effort to find work, especially when jobs in your usual sector have dried up, at least temporarily.

[37] I accept that **the Claimant made some effort** to find a job like the one he'd lost due to COVID-19. I see this effort in his undated list of bars and restaurants that he visited to ask for work. I accept that he had one interview for a job; the employer verified this. I also accept his sworn testimony that he applied for a job with a security company.

[38] Beyond that, the Claimant was vague about his actions apart from saying he'd searched online for jobs. He kept no records of his job search despite clear instructions on his application for benefits that he had to keep a record for up to six years.[15]

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[13] This is a plain-language version of the factors used to assess availability for work. See the original language in *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96.
[14] *Canada (Attorney General) v Whiffen*, A-1472-92; *Carpentier v Canada (Attorney General)*, A-474-97.
[15] The benefit application says you must keep job search records in case the Commission later asks for them to verify your availability for work.

[39] The Claimant says he deleted the accounts he'd created with Linked-In, Indeed and Glassdoor, so he can't access his job searches or applications. He didn't register with any employment agencies. His job search activity in June 2021 is after the period under review.

[40] That's why I find that the Claimant hasn't given enough evidence to outweigh his earlier declarations that he wasn't looking for work and he had a job to return to. He made them on his training questionnaires dated November 6, 2020, and January 14, 2021.

[41] The courts say a claimant's first spontaneous declarations are more credible than statements made later when benefits are at risk.[16] With in mind, I have no reason to find that the Claimant wasn't being truthful when he made his first declarations. Without more evidence of a job search, I can't simply dismiss them.

[42] I find it more likely than not that those first declarations were true, especially given the employer's optimistic predictions about rehiring the Claimant.

[43] So, the Claimant can't prove he was available for work just because his course schedule didn't stop him from working or he'd always worked while studying. It's also not enough to say that there were no jobs available due to COVID-19. Claimants still had to show by their efforts that they looked for work **on every working day**, even if they thought they had little chance of finding a job.[17] The Claimant hasn't shown that he did this.

The Claimant had personal conditions

[44] The Claimant also had **personal conditions** that unduly limited his chances of finding work that may have been available at the time.[18]

[45] The Claimant expressed a preference for working "reasonably close" to where he lives. He says he doesn't have a car, so he used to walk the 50 minutes to his previous job. That way, he wouldn't crease his uniform. He says he'd have accepted up to an hour's commute by bus "if it came to that." But he hasn't shown that his job search extended much beyond employers in the nearby area where he used to work.

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[16] See *Bellefleur v Canada (Attorney General)*, 2008 FCA 13.
[17] See *Lamirande v Canada (Attorney General)*, 2004 FCA 311.
[18] I don't count the Claimant's month-long quarantine in March 2021 as a personal condition. But if you're not available for work because you're sick or in quarantine, the correct benefits are sickness benefits.

[46] So, based on his evidence, I find that the Claimant mostly limited his job search to restaurants concentrated in one area of the city at a time when that work was scarce.[19]

[47] Preferring to work near to home is understandable but it's a **personal condition** when you limit your job search according to that preference. That's why I find that the Claimant had a personal condition on where he would work.

[48] The Claimant had **another personal condition**. He says he couldn't apply to grocery stores or a nearby Walmart that might have been hiring because his girlfriend is immunocompromised. But he didn't show that a doctor told him he must limit **his** work exposure for her sake or that a mask wouldn't be enough protection in those settings.

[49] Health issues aren't **personal** conditions. But in this case, the Claimant was setting a personal condition on the jobs he'd accept due to **someone else's** health condition. He says supermarkets and Walmart would be riskier places to work to due to high customer traffic. So, he didn't drop off his resume or consider jobs at those places.

[50] It was a **personal condition** not to test the market for other jobs that might have been available at a time when there was little work in the hospitality and security sectors.

[51] So, the Claimant had personal conditions that would have **unduly** limited his chances of finding work.

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

[52] Based on my findings on the above three factors, I find that the Claimant hasn't shown that he was capable of and available for work and unable to find a suitable job.

[53] I sympathize with the Claimant's difficult circumstances and the financial challenges of repaying his overpayment. But the law says students who want benefits must show by their actions that they're available for work, as interpreted above. I don't have the power to change that law.[20]

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[19] See GD07-01 for the Claimant's list of bars and restaurants that he approached for work.
[20] See *Canada (Attorney General) v Knee*, 2011 FCA 301.

[54] Unfortunately, I don't have the power to forgive or reduce the Claimant's debt either. But he still has options.

[55] The Claimant can ask the Commission to consider writing off all or part of his debt because of undue hardship.[21] If the Commission's refuses, he can appeal to the Federal Court of Canada.

[56] The Claimant can also contact the CRA's Debt Management Call Centre at 1-866-864-5823 to explain his financial situation and ask for full or partial debt forgiveness. Or he can ask for a long-term repayment plan that he can realistically manage.

Conclusion

[57] The Commission used its discretion properly when retroactively disentitling the Claimant from receiving benefits after he couldn't prove availability for work during the verification process.

[58] The Claimant hasn't shown that he was capable of and available for work while a full-time student from October 26, 2020, to April 2021. The disentitlement means he must repay the benefits that he was overpaid.

[59] This explains why I must dismiss the Claimant's appeal.

Lilian Klein

Member, General Division – Employment Insurance Section

[21] Section 56(1)(f)(ii) of the *Employment Insurance Regulations* refers to cases where repayment could cause undue hardship.