



Citation: *SC v Canada Employment Insurance Commission*, 2022 SST 1805

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

Decision

Appellant: S. C.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (481132) dated May 12, 2022 (issued by Service Canada)

Tribunal member: Angela Ryan Bourgeois

Type of hearing: Teleconference

Hearing date: December 2, 2022

Hearing participant: Appellant

Decision date: December 6, 2022

File number: GE-22-2918

Decision

[1] The appeal is dismissed.

[2] The Appellant (Claimant) hasn't shown that she was available for work from August 1, 2022, to March 4, 2022. This means that she wasn't entitled to receive Employment Insurance (EI) benefits.

Overview

[3] This appeal is about whether the Claimant has proven her availability for work. A claimant has to be available for work to get EI regular benefits. This means that a claimant has to be searching for a job. Availability is an ongoing requirement.

[4] The Claimant applied for EI benefits on August 2, 2021. She reported that she was not, and would not, be taking a course.¹

[5] In August and September 2021, she completed training questionnaires. In the questionnaires she reported that she was going to university part-time and that she was available for work.

[6] In March 2022, the Canada Employment Insurance Commission (Commission) looked into the Claimant's availability.

[7] In speaking with the Commission, the Claimant stated that she was a full-time student working toward a Bachelor of Arts degree with a major in psychology.²

[8] Then the Claimant completed a third training questionnaire. In this one, she reported that she was attending school full-time from April 1, 2021, to August 1, 2022. She was obligated to attend scheduled classes. She was available for work but if she found a full-time job she would finish her course.

¹ See page GD3-6.

² See page GD3-18. She confirmed this at the hearing.

[9] The Commission decided that the Claimant was disentitled from receiving EI regular benefits from August 2, 2021, because she wasn't available for work.

[10] After talking to the Commission, the Claimant realized she had to make a separate application to be referred for her training.

[11] She promptly applied to NB EI Connect and got the necessary referral for her training. But NB EI Connect wouldn't backdate the referral to September 2021.

[12] The training referral was effective Sunday, March 6, 2022, so the Commission ended the disentitlement on March 4, 2022 (the Friday before).³

[13] As the Commission had already paid the Claimant EI benefits, the disentitlement meant she had been overpaid over \$11,000.

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

[15] The Commission says that the Claimant wasn't available because she was in school full-time.

[16] The Claimant disagrees. For August 2021, she says she has proven her availability because she was diligently looking for a way to be paid for her practicum.

[17] For the rest of the disentitlement period, she wants me to backdate her training referral to September 1, 2021. She says her training would have been approved from then onward if she had only known to apply earlier.⁴ She thought she was authorized to go to school while on EI because she had to complete the training questionnaires, and the reporting is the same whether her training is approved.

³ See page GD9-2.

⁴ She provided evidence from Working NB to support her position. See page GD5-2.

Issue

[18] Was the Claimant available for work from August 2, 2021, to March 4, 2022?

Analysis

[19] The *Employment Insurance Act* (Act) says that to be entitled to EI regular benefits a claimant has to prove that they are “capable of and available for work” but aren’t able to find a suitable job.⁵ To prove their availability, the Commission can ask a claimant to show that they are making “reasonable and customary efforts” to find suitable employment.⁶

[20] There is also a presumption that claimants taking a training course aren’t available for work. This is where I’ll start.

Presumption of non-availability from September 1, 2021

[21] The courts have said that I should presume that the Claimant isn’t available for work while she is taking a training course full-time.⁷

[22] In her September 2021 training questionnaire, the Claimant stated that she was a part-time student. But I find that she was a full-time student as of September 1, 2021, because this is what she told me at the hearing, and what she told the Commission. Her course transcript which she recited at the hearing shows that she was in school full-time.

[23] So I can presume that she wasn’t available for work from September 1, 2021.

[24] The Claimant can rebut the presumption by proving exceptional circumstances.⁸

⁵ See section 18(1)(a) of the *Employment Insurance Act* (Act).

⁶ See section 50(8) of the Act.

⁷ See *Canada (Attorney General) v Cyrenne*, 2010 FCA 349.

⁸ See *Canada (Attorney General) v Rideout*, 2004 FCA 304, and *Canada (Attorney General) v Cyrenne*, 2010 FCA 349. One exceptional circumstance could be a history of working while taking a course.

[25] She hasn't rebutted the presumption because the evidence shows that she wasn't looking for work and if she'd found a full-time job that conflicted with her courses, she would have finished her course.⁹

[26] The Claimant thought she had been approved to get EI benefits while in school, but this isn't an exceptional circumstance that would rebut the presumption.

[27] Even if the Claimant had rebutted the presumption of non-availability, she doesn't meet the availability requirements under the Act, so she'd still be disentitled from receiving EI benefits. I explain why in the next section.

Availability from August 2, 2021 to March 4, 2022

– What the Claimant said about her availability

[28] The Claimant stated that she was available for work in August 2021, because she was looking for a job. She was in contact with multiple people to try to find a way that she could get paid for her practicum. Her practicum was with a non-profit organization that didn't have the means to pay her.

[29] The Claimant stated that she couldn't have worked between September 1, 2021, and March 4, 2021, because she was busy with her courses, practicum and internship. She was paid for her internship and wasn't looking for another job.

[30] During the hearing, we reviewed her class schedule from September 1, 2021, to March 4, 2021. First semester, she had regular classes, sometimes she attended in person, and sometimes online. All of her tests were in person. On top of her classes Monday to Friday, she spent 15 hours a week on her paid internship, and another 15 to 25 hours a week working with clients for her practicum. The second semester was much like the first, but she could watch the recorded classes on her own schedule.

⁹ As per her testimony and page GD3-26.

– **Availability factors**

[31] Case law sets out three factors for me to consider when deciding whether the Claimant is capable of and available for work but unable to find a suitable job. The Claimant has to prove the following three things:¹⁰

- a) She wanted to go back to work as soon as a suitable job was available.
- b) She made efforts to find a suitable job.
- c) She didn't set personal conditions that might have unduly (in other words, overly) limited her chances of going back to work.

[32] When I consider each of these factors, I have to look at the Claimant's attitude and conduct.¹¹

[33] I find that the Claimant hasn't shown that she had a desire to return to the labour market as soon as a suitable job was offered. This is because she was only looking for a way to get paid for her practicum. She wasn't looking for any suitable job. This isn't enough to satisfy the first factor.

[34] To meet the second factor, the Claimant has to show that she was actively looking for a job. As she was only looking for a way to be paid for her practicum, she hasn't met this second factor.

[35] In looking at the third factor, I considered that the law says:

- Availability has to be shown during regular hours for every working day, Monday to Friday.¹²

¹⁰ 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.

¹¹ 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.

¹² See *Canada (Attorney General) v. Cloutier*, 2005 FCA 73, and section 32 of the *Employment Insurance Regulations*. See also the Umpire case law at CUB 743352A, CUB 68818, CUB 52688, CUB 37951, CUB 38251, CUB 25041.

- Trying to adapt a work schedule around a training schedule doesn't meet the availability requirements under the Act.¹³
- Being available only at certain times on certain days restricts availability and limits the chances of finding a job.¹⁴

[36] The Claimant doesn't meet the third factor, because she could have only worked around the schedules and responsibilities of her course, internship, and practicum. She wouldn't have left her course to accept full-time work. These are limitations that would have unduly limited her chances of getting back to work.

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

– **Reasonable and customary efforts**

[38] The law sets out criteria for me to consider when deciding whether the Claimant's efforts were reasonable and customary.¹⁵ I have to look at whether her efforts were sustained and whether they were directed toward finding a suitable job. In other words, the Claimant has to have kept trying to find a suitable job.

[39] The Claimant testified that she only looked for work in August 2021, when she was trying to find a way to be paid for her practicum.

[40] I don't doubt that the Claimant was diligent in these efforts as she was successful in finding the internship program.

[41] But her efforts can't be considered reasonable and customary because they weren't directed at finding *any* suitable job – just a way to be paid for her practicum. This isn't enough to prove reasonable and customary efforts to find a suitable job.

¹³ See *Horton v Canada (Attorney General)*, 2020 FC 743, paragraph 36.

¹⁴ The Federal Court of Appeal says this in *Duquet v Canada (Employment and Immigration Commission)*, 2008 FCA 313. See also *Horton v Canada (Attorney General)*, 2020 FC 743, paragraph 35, where the court says that a claimant who is only available for work outside their course schedule is restricting their availability, and is not available for work within the meaning of the EI Act.

¹⁵ See section 9.001 of the *Employment Insurance Regulations*.

Referred training

[42] Sometimes a claimant is referred for training by the Commission or another designated authority.¹⁶

[43] When such a referral is made, a claimant is deemed to be unemployed and capable of and available for work while taking training.

[44] As the Claimant's training was authorized as of March 6, 2022, the Commission was satisfied that she met the availability requirements as of then.¹⁷ It ended the disentitlement the Friday before, on March 4, 2022.

[45] The Claimant wants me to backdate her training referral to September 1, 2021.

[46] In support of her request, she submitted a letter from Working NB that stated that if it had received her application for the NB EI Connect program at the start of her training period, it would have supported her training plan and submitted the referral as of then.

[47] The Tribunal doesn't have jurisdiction to refer claimants for training or to change the referral made by a designated authority. Nor does the Tribunal have jurisdiction to review the Commission's decision about a referral.¹⁸

[48] So I can't backdate the Claimant's referral. I can't say the Claimant was referred for training as of September 1, 2021, when the designated authority (NB EI Connect) only authorized her training as of March 6, 2022.¹⁹

[49] And, unfortunately, without an authorization from NB EI Connect, the Claimant doesn't meet the availability requirements between August 2, 2021, and March 4, 2022.

¹⁶ This is done under section 25 of the Act.

¹⁷ The Commission was satisfied that the Claimant met the availability requirements through section 25 of the Act. See reconsideration decision letter on page GD3-37.

¹⁸ See section 25 of the Act. The Federal Court of Appeal in *Paxton v Canada (Attorney General)*, 2002 FCA 360, confirmed that the Commission has the sole authority to settle questions under section 25 of the Act.

¹⁹ See page GD9-2.

Overpayment

[50] The Claimant doesn't want to repay the overpayment. She says she would have been approved for NB EI Connect if she had applied earlier. Repayment will cause financial hardship.

[51] But the law says that when a claimant receives EI benefits they weren't entitled to receive, they have to repay them.²⁰

[52] So the Claimant has to repay the EI benefits she received during the disentitlement.

[53] I don't have the authority to waive or reduce the overpayment. But she could still:

- Ask the Commission if the overpayment can be written off because of financial hardship
- Contact Canada Revenue Agency's Debt Management call centre (1-866-864-5823) about a repayment schedule and ask about the financial hardship provisions.

Conclusion

[54] The Claimant hasn't shown that she was available for work within the meaning of the law from August 2, 2021, to March 4, 2022. So she wasn't entitled to receive EI benefits then. The resulting overpayment must be repaid.

[55] The appeal is dismissed.

Angela Ryan Bourgeois
Member, General Division – Employment Insurance Section

²⁰ Overpayments must be repaid under section 43 and 44 of the Act.