



Citation: *HM v Canada Employment Insurance Commission*, 2023 SST 1834

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

## **Decision**

**Appellant:** H. M.

**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** Canada Employment Insurance Commission  
reconsideration decision (481417) dated June 5, 2023  
(issued by Service Canada)

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**Tribunal member:** Audrey Mitchell

**Type of hearing:** Teleconference

**Hearing date:** December 19, 2023

**Hearing participant:** Appellant

**Decision date:** December 21, 2023

**File number:** GE-23-2841

## Decision

[1] The appeal is dismissed. The Tribunal disagrees with the Appellant.

[2] The Appellant hasn't shown that he was capable of and available for work. This means that he can't receive Employment Insurance (EI) benefits. The Appellant has to repay the overpayment.

## Overview

[3] The Canada Employment Insurance Commission (Commission) decided that the Appellant is disentitled from receiving EI regular benefits from June 21, 2021, because he isn't capable of and available for work. A claimant has to be available for work to get EI regular benefits. Availability is an ongoing requirement. This means that a claimant has to be searching for a job.

[4] I must decide whether the Appellant has proven that he is capable of and available for work. The Appellant has to prove this on a balance of probabilities. This means that he has to show that it is more likely than not that he is capable of and available for work.

[5] The Commission says the Appellant isn't available because he hasn't made efforts to find a job. It also says that although he may want to work, the Appellant isn't capable of working due to his health.

[6] The Appellant says he will look for a job and will keep a record of his job search efforts. He asks that the overpayment of benefits be waived.

## Matter I have to consider first

### **The Appellant didn't send the Commission's reconsideration decision**

[7] The Appellant has to send the Tribunal a copy of the Commission's reconsideration decision or the date of the reconsideration with his notice of appeal.<sup>1</sup>

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<sup>1</sup> See section 24(1)(e) of the *Social Security Rules of Procedure*.

He didn't do so. I have a copy of the Commission's file that has this decision. So, I don't need the Appellant to send it.<sup>2</sup>

## Issues

[8] Is the Appellant capable of and available for work?

[9] Does the Appellant have to repay the overpayment?

## Analysis

### Available for work

[10] Two different sections of the law require claimants to show that they are available for work. The Commission decided that the Appellant is disentitled under both sections. So, he has to meet the criteria of both sections to get benefits.

[11] First, the *Employment Insurance Act* (Act) says that a claimant has to prove that they are making "reasonable and customary efforts" to find a suitable job.<sup>3</sup> The *Employment Insurance Regulations* (Regulations) give criteria that help explain what "reasonable and customary efforts" mean.<sup>4</sup>

[12] The Commission says it disentitled the Appellant under section 50 of the Act along with section 9.001 of the Regulations for failing to prove his availability for work. In its submissions, it says showing availability requires a claimant to prove that they are making reasonable and customary efforts to find suitable employment.

[13] The Commission's notes say the Appellant said he didn't look for work. But the notes don't reflect that the Commission asked the Appellant to prove his availability by sending a detailed job search record.

[14] I find a decision of the Appeal Division on disentitlements under section 50 of the Act persuasive. The decision says the Commission can ask a claimant to prove that

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<sup>2</sup> See section 8(4) of the *Social Security Rules of Procedure*.

<sup>3</sup> See section 50(8) of the *Employment Insurance Act* (Act).

<sup>4</sup> See section 9.001 of the *Employment Insurance Regulations* (Regulations).

they have made reasonable and customary efforts to find a job. It can disentitle a claimant for failing to comply with this request. But it has to ask the claimant to provide this proof and tell the claimant what kind of proof will satisfy its requirements.<sup>5</sup>

[15] I don't find that the Commission asked the Appellant to provide his job search record to prove his availability. So, I don't find that he is disentitled under this part of the law.

[16] Second, the Act says that a claimant has to prove that they are "capable of and available for work" but aren't able to find a suitable job.<sup>6</sup> Case law gives three things a claimant has to prove to show that they are "available" in this sense.<sup>7</sup> I will look at those factors below.

[17] 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:<sup>8</sup>

- 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.

[18] When I consider each of these factors, I have to look at the Appellant's attitude and conduct.<sup>9</sup>

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<sup>5</sup> *L. D. v. Canada Employment Insurance Commission*, 2020 SST 688

<sup>6</sup> See section 18(1)(a) of the Act.

<sup>7</sup> See *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96.

<sup>8</sup> 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.

<sup>9</sup> 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.

– **Wanting to go back to work**

[19] The Appellant has shown that he wants to go back to work as soon as a suitable job was available.

[20] The Appellant left work because he had a heart attack. He said that after he received 15 weeks of sickness benefits, he returned to work. But his employer had hired someone in the Appellant's place and told the Appellant he should apply for long-term disability.

[21] The Commission denied the Appellant's application for benefits. After that, the Appellant said he wanted to work and didn't want EI benefits or long-term disability benefits.

[22] The Appellant testified that he tried to get another job. But because he could not carry or lift more than five kilograms, he could not take the job. He said he went to one company to look for a job. But the job required heavy lifting, so he couldn't work for that company.

[23] I find that the Appellant was limited in what he could do due to his heart attack and surgery he had after that. But I accept his statements that he wanted to work. I find that his attempt to return to his former job and an attempt to get another similar job supports this.

[24] Although the Appellant didn't do a lot to find work, I'm satisfied that he wants to return to work as soon as a suitable job was offered.

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

[25] The Appellant isn't making enough effort to find a suitable job.

[26] The Commission asked the Appellant if he had been applying for jobs. Its notes show that the Appellant said he hadn't looked for work. But as noted above, the Appellant testified that almost two years ago he looked for a job at a company that he named. He said he couldn't work for the company because he would have to operate a large machine and it required heavy lifting.

[27] I asked the Appellant if he had gone anywhere else to look for work other than at the company he named. He said he had not. He explained that there were companies that had work operating small machines, but he testified that he had experience operating medium and large machines and this was the work he preferred. He said he hadn't worked on small machines before.

[28] Given the Appellant's health following his heart attack and surgery, I find from the Appellant's testimony that work in his usual field of work would likely not have been suitable for him. So, since his evidence is that he tried to return to his former job and looked for a job at one other company, I don't find that he has done enough to find a suitable job.

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

[29] The Appellant hasn't set personal conditions that might unduly limit his chances of going back to work.

[30] The Commission didn't make submissions on this factor.

[31] I have already found that the Appellant wanted to work because he tried to return to his former job, and he tried to get another job in the field that he had experience. But it's likely that neither job was suitable. Despite this, I don't find that the Appellant set any personal conditions that might unduly limit his chances of going back to work.

**Capable of working**

[32] I also have to consider whether the Appellant is capable of working.<sup>10</sup>

[33] The Appellant received 15 weeks of sickness benefits. After that, he asked the Commission to convert his sickness benefits to regular benefits. He did so after applying for long-term disability benefits.

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<sup>10</sup> See section 18(1)(a) of the Act.

[34] In its initial decision, the Commission said the Appellant had to repay EI benefits he wasn't entitled to. The Commission did so because it says the Appellant said he wasn't capable of working.

[35] Notes in the Commission's reconsideration file show that the Appellant said he wanted to go back to work, but his doctor would not sign a letter authorizing his return to work. He said another doctor suggested that he not go to work due to his age.

[36] The Appellant sent a letter to the Commission. He said he wanted to work. He added that he could earn more money working than if he got EI or long-term disability benefits. But he said he had heart bypass surgery, so he can't work.

[37] The Appellant asked the Commission to reconsider its initial decision. He said he would look for a job. He also said he would notify the Commission if he got a job offer.

[38] I asked the Appellant about the Commission's submission that even though he said he wants to work, this doesn't show he is capable of working. The Appellant agreed that he could not work on large machines because of his health. He said he didn't have experience working on small machines.

[39] Despite the Appellant's attempt to return to his job, I'm not satisfied that he is capable of working. He testified about his heart attack and the surgery that he had afterwards. He said his doctor told him that he could lift no more than five kilograms and suggested that he retire. And he applied for long-term disability.

[40] Based on the above, and without signed, updated medical note that says whether the Appellant could work or not, I find that the Appellant isn't capable of work.

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

[41] Based on my findings above, I find that the Appellant hasn't shown that he is capable of and available for work but unable to find a suitable job.

## **Does the Appellant have to repay the overpayment?**

[42] Yes, the Appellant has to repay the overpayment.

[43] A person who has received more EI benefits than they are entitled to has to repay the benefits without delay.<sup>11</sup>

[44] The Appellant testified about the circumstances that led to his request for regular EI benefits. He said his employer told him he should apply for long-term disability. He said at the time, he didn't understand that there were two kinds of long-term disability, one from the government, and one through his employer. The Appellant said he applied for the government disability benefits by mistake.

[45] The Appellant said after waiting four or five weeks and not getting any benefits, he called Service Canada. He testified he was told he would have to wait four to six months for the government disability benefits, but he could continue with EI benefits.

[46] The Appellant said he did exactly what the Service Canada officer told him to do. He questioned why the Commission would give him money and now want to take it back.

[47] The Commission said pandemic-related temporary measures allowed for the conversion of sickness to regular benefits without a proper medical. It said the Appellant had an obligation to report accurately even if he was told to apply for regular benefits. The Commission stated that it had no choice but to disentitle the Appellant because he said he had never been available and had never made any efforts to look for work.

[48] The Appellant is asking that his overpayment be waived. He asked that if the overpayment can't be waived, that the Commission only take \$100 per month from his pension.

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<sup>11</sup> See section 44 of the Act.



[49] The Appellant doesn't say that the Commission calculated the overpayment incorrectly. He also doesn't say if he asked the Commission to write off the overpayment. But even if he did, I don't have the authority to review any decision of the Commission not to write off an overpayment.<sup>12</sup>

[50] The Appellant testified that the Commission could take \$100 per month from his pension to repay the overpayment. He also said it could take his Ontario Trillium Benefit. But the Appellant said if the Commission takes more, then he would not be able to eat.

[51] In the circumstances, I suggest that the Appellant do one of two things. He can formally ask the Commission to consider writing off his debt for reason of undue hardship.<sup>13</sup> If he doesn't like the Commission's response, he can appeal to the Federal Court of Canada.

[52] 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**

[53] The Appellant hasn't shown that he is capable of and available for work within the meaning of the law. Because of this, I find that the Appellant can't receive EI benefits. And the Appellant has to repay the overpayment.

[54] This means that the appeal is dismissed.

Audrey Mitchell

Member, General Division – Employment Insurance Section

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<sup>12</sup> Section 112.1 of the *Employment Insurance Act*.

<sup>13</sup> Section 56 of the Employment Insurance Regulations gives the Commission broad powers to write off an overpayment when it would cause undue hardship for a claimant to repay it.