Citation: *JS v Canada Employment Insurance Commission*, 2023 SST 145

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	J. S.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (501193) dated August 5, 2022 (issued by Service Canada)

Tribunal member:	Angela Ryan Bourgeois
Type of hearing:	Teleconference
Hearing date:	January 20, 2023
Hearing participant:	Appellant
Decision date:	February 20, 2023
File number:	GE-22-3058

Decision

[1] The appeal is dismissed.

[2] The Canada Employment Insurance Commission (Commission) was allowed to reassess the Claimant's availability for work.

[3] The Claimant hasn't shown that he was available for work while in school. This means that he wasn't entitled to receive Employment Insurance (EI) benefits from September 12, 2021, to April 25, 2022.

Overview

[4] This appeal is about whether the Claimant was available for work while attending university full-time, and whether the Commission was allowed to reassess his availability after paying him EI benefits.

[5] The Commission decided that the Claimant was disentitled from receiving EI regular benefits from September 12, 2021, to April 25, 2022, because he wasn't available for work.[1]

[6] I have to decide whether the Claimant has proven on a balance of probabilities that he was available for work.[2]

[7] The Commission says that the Claimant wasn't available because he was in university full-time, and could only work around his classes.

[8] The Claimant disagrees. He says he was looking for work, and could have worked as he is used to working irregular hours. He says it isn't right that the Commission has disentitled him on the same information that it had when he was approved for EI benefits.

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[1] See initial decision letter on page GD3-28, and reconsideration decision letter on page 3-38.
[2] In other words, he has to show that it is more likely than not that he was available for work.

Issues

[9] Was the Claimant available for work while in school?

[10] Was the Commission allowed to impose the retroactive disentitlement?

Analysis

[11] To receive EI benefits, claimants (including students) have to prove that they are "capable of and available for work" but aren't able to find a suitable job.[3] A claimant has to prove this on a balance of probabilities. This means they have to show that it is more likely than not that they were available for work.

[12] The Federal Court of Appeal has said that claimants who are in school full-time are presumed to be unavailable for work.[4] This is called the "presumption of non-availability." It means we can suppose that students aren't available for work when the evidence shows that they are in school full-time.

[13] First, I will look at whether the Commission was allowed to take a second look at the Claimant's availability and impose a retroactive disentitlement. Then I will consider the presumption of non-availability. Lastly, I will look at whether he was available under the law.

Retroactive disentitlement

[14] The Claimant says it isn't right for the Commission to come along after paying him EI benefits, and on the same information, say he wasn't entitled to those benefits.

[15] But the Commission has the power to reconsider a claim, before or after benefits are paid, whether or not there are new facts. It also has the power after benefits are

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[3] See section 18(1)(a) of the *Employment Insurance Act* (Act). There is also a section of law about making reasonable and customary efforts to find work. This is set out in section 50(8) of the Act. The Commission mentioned this section of law in its representations (pages GD4-2 and GD4-3), but it didn't explain how the Claimant failed to meet this condition, and it didn't mention a disentitlement under this section in its documents (GD3). As it seems likely the Commission didn't disentitle the Claimant under this section of law, I haven't considered it.

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

paid, to take another look at a student's availability to verify if they were entitled to those benefits.[5] This means the Commission is allowed to impose a retroactive disentitlement.

[16] It is up to the Commission to decide if it is going to reconsider a claim or verify a student's availability.[6] In deciding to take another look, it must act judicially. This means that in deciding whether to take another look, it cannot do any of the following:

- act in bad faith, in a discriminatory manner or for an improper purpose
- take into account an irrelevant factor
- ignore a relevant factor.[7]

[17] The Commission may have paid the Claimant EI benefits when it shouldn't have. But this doesn't mean that its decision to take another look at his availability wasn't made judicially.

[18] I find that the Commission acted for a proper purpose under the law—to verify the Claimant's availability and to reconsider its decision to pay benefits.

[19] I see no evidence that the Commission acted in bad faith, in a discriminatory manner or for an improper purpose, considered irrelevant factors or ignored relevant factors.

[20] Also, the reconsideration was made within the 36 months allowed to reconsider a claim.

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[5] Section 153.161(2) of the Act gives the Commission the power after benefits are paid to look back to verify whether a student was entitled to the benefits. Section 52 of the Act gives the Commission the power to reconsider a claim for benefits within 36 months after the benefits have been paid. The Commission may reconsider a claim even if there are no new facts. See *Brisbois v Canada (Employment and Immigration Commission),* A-582-79, *Briere v Commission (Attorney General),* A-637-86*, and Canada Employment Insurance Commission v OB,* 2022 SST 1371.
[6] In other words, it is a discretionary decision.
[7] See *Canada (Attorney General) v Purcell,* 1995 CanLII3558 (FCA).

[21] So I find that the Commission acted judicially when it decided to take another look at the Claimant's availability.

Presuming full-time students aren't available for work

[22] The presumption that students aren't available for work applies only to full-time students.

[23] The presumption applies to the Claimant because he was a full-time student. There is no dispute about this.

[24] The presumption that full-time students aren't available for work can be rebutted (that is, shown to not apply).

[25] There are two ways the Claimant can rebut the presumption. He can show that he has a history of working full-time while also in school.[8] Or he can show that there are exceptional circumstances in his case.[9]

[26] I find that the Claimant has rebutted the presumption of non-availability. This is because he worked very close to full-time hours, about 25 hours a week, throughout high school. This is enough to rebut the presumption of non-availability.

[27] Rebutting the presumption doesn't mean that the Claimant has proven his availability. It just means that I can't presume he wasn't available for work. So now I have to consider the availability factors.

Capable of and available for work

[28] For the Claimant to prove that he was capable of and available for work and unable to find a suitable job, he has to show the following three things:

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

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[8] See *Canada (Attorney General) v Rideout*, 2004 FCA 304.
[9] See *Canada (Attorney General) v Cyrenne*, 2010 FCA 349.

b) He made efforts to find a suitable job.

c) He didn't set personal conditions that might have unduly limited his chances of going back to work. [10]

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

– **Wanting to go back to work**

[30] The Claimant has shown that he wanted to go back to work as soon as a suitable job was available. He did this by looking for and applying for jobs on Indeed.

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

[31] I find that the Claimant's efforts do not meet the requirements of this second factor. This is why.

[32] The Claimant looked for a job. He looked on Indeed and applied for jobs, but he couldn't tell me where and when he applied. He thinks he applied for landscaping jobs, overnight jobs, warehouse work and labour jobs. He asked around about work, and talked to his former employer. He wanted to work to make some money and to build up his resume.

[33] The Claimant's job search doesn't show that he was doing enough to find a job. It isn't enough to say that you applied for work. A claimant must prove that he was actively looking for work, and if he applied for work, he needs to be able to say where and when he applied. The Claimant shouldn't have been surprised about the job search requirement because the application for EI benefits states that a detailed record of job search efforts as to be kept for six years.[12]

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[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 pages GD3-11 to GD3-12.

[34] I know the Claimant has worked a seasonal job for the past few years. But being laid off from a job doesn't relieve him from the obligation to be looking for work.[13]

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

[35] The Claimant could have only worked around his course schedule. This is a personal condition that would have unduly limited his chances of going back to work.

[36] 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.[14]
- Trying to adapt a work schedule around a school schedule doesn't meet the availability requirements under the Act.[15]
- Being available only at certain times on certain days restricts availability and limits the chances of finding a job.[16]

[37] The Claimant doesn't meet this third factor. He spent up to 50 hours a week on his studies. He attended online and in-person classes. He could have only worked around his class schedule and study time. This was a limitation that would have unduly limited his chances of getting back to work.

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[13] The Federal Court of Appeal says that a claimant cannot merely wait to be called into work but must seek employment in order to be entitled to benefits. See *De Lamirande* v. *Canada (Attorney General)*, 2004 FCA 311.
[14] 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.
[15] See *Horton v Canada (Attorney General)*, 2020 FC 743, paragraph 36.
[16] 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 Act.

[38] The Claimant says he could have worked around his class schedule. He is used to working irregular hours. But doing so simply doesn't meet the availability requirements under the law.

– **The Claimant has not proven his availability**

[39] Because the Claimant's job search efforts weren't enough and he had personal conditions that unduly limited his chances of going back to work, he hasn't proven that he was capable of and available for work but unable to find a suitable job. This means he was disentitled from receiving EI benefits.

Overpayment

[40] The law says that when a claimant receives EI benefits which they weren't entitled to receive, they have to repay them.[17]

[41] So the Claimant has to repay the EI benefits he received during the disentitlement from September 12, 2021, to April 25, 2022.

[42] The Tribunal isn't allowed to waive or reduce the overpayment. But the Claimant 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 its financial hardship provisions.

Conclusion

[43] The Commission was allowed to take a second look at the Claimant's availability and to impose a retroactive disentitlement.

[17] Overpayments must be repaid under sections 43 and 44 of the Act.

[44] The Claimant hasn’t proven that he was available for work within the meaning of the law. Because of this, the Claimant wasn’t entitled to receive EI benefits from September 12, 2021, to April 25, 2022.

[45] The appeal is dismissed.

Angela Ryan Bourgeois
Member, General Division - Employment Insurance Section