Citation: *RM v Canada Employment Insurance Commission*, 2023 SST 1456

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

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

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (562041) dated February 21, 2023 (issued by Service Canada)

Tribunal member:	John Noonan
Type of hearing:	In person
Hearing date:	May 10, 2023
Hearing participants:	Appellant Appellant's representative
Decision date:	May 24, 2023
File number:	GE-23-645

Decision

[1] The appeal is dismissed.

Overview

[2] The Appellant, R. M., was upon reconsideration by the Commission, notified that it was unable to pay her Employment Insurance benefits from September 7, 2021 through to June 30, 2022 because she was taking a training course on her own initiative and has not proven her availability for work. The Appellant maintains that she was available for full-time work and she was working any available shifts that were offered to her. The Tribunal must decide if the Appellant has proven her availability pursuant to sections 18 and 50 of the Employment Insurance Act (the Act) and sections 9.001 and 9.002 of the Employment Insurance Regulations (the Regulations).

Issues

[3] Issue # 1: Did the Appellant have a desire to return to the labour market as soon as suitable employment is offered?

Issue #2: Was she making reasonable and customary efforts to obtain work?

Issue #3: Did she set personal conditions that might unduly limit her chances of returning to the labour market?

Analysis

[4] The relevant legislative provisions are reproduced at GD4.

[5] There is a presumption that a person enrolled in a course of full-time study is not available for work. This presumption of fact is rebuttable by proof of exceptional circumstances **(Cyrenne 2010 FCA 349)**

[6] This presumption applies to an individual is not available for work when she is taking a full-time course on her own initiative. To rebut this presumption, the

Appellant must demonstrate that her main intention is to immediately accept suitable employment as evidenced by job search efforts, that she is prepared to make whatever arrangements may be required, or that she is prepared to abandon the course. She must demonstrate by her actions that the course is of secondary importance and does not constitute an obstacle to seeking and accepting suitable employment.

[7] A person who attends a full-time course without being referred by an authority designated by the Commission must demonstrate that she is capable of and available for work and unable to obtain suitable employment, and must meet the availability requirements of all claimants who are requesting regular employment insurance benefits. She must continue to seek employment and must show that course requirements have not placed restrictions on her availability which greatly reduce chances of finding employment.

[8] The following factors may be relevant to the determination regarding availability for work:

(a) the attendance requirements of the course;

(b) the claimant's willingness to give up her studies to accept employment;

(c) whether or not the claimant has a history of being employed at irregular hours;

(d) the existence of "exceptional circumstances" that would enable the claimant to work while taking courses;

(e) the financial cost of taking the course.

[9] In order to be found available for work, a claimant shall: 1. Have a desire to return to the labour market as soon as suitable employment is offered, 2. Express that desire through efforts to find a suitable employment and 3. Not set personal conditions that might unduly limit their chances of returning to the labour market. All

three factors shall be considered in making a decision. **(Faucher A-56-96 & Faucher A-57-96)**

Issue 1: Did the Appellant have a desire to return to the labour market as soon as suitable employment is offered?

[10] No.

[11] In this case, by the Appellant's statements and submissions, she was attending a full time program of studies that required approximately 20 hours per week of her time.

[12] She was not approved by a designated authority to attend this program.

[13] The Appellant started full-time training in High School Grade 12 in September of 2021.

[14] She stated she attends class in person. She does not control the hours. She stated she devotes approximately 20 hours per week to studying and attending classes.

[15] The Appellant asserts that she is available despite her course schedule and has been seeking employment opportunities.

[16] This process is causing great stress and financial hardship as she was denied EI benefits while trying to stay in school.

[17] All that being said, for the period in question there is no evidence the Appellant was carrying out a comprehensive job search in an attempt to obtain full time employment rather than attend school, in fact it was submitted that she was looking for work at six places, five of which had no openings and her present place of employment.

[18] Her employer stated she was getting all hours possible given her school schedule which indicates she never offered to quit school; to take advantage of full time hours.

[19] One is expected to carry out a **comprehensive job search** even if doing so seems futile.

[20] I find that these actions, or lack of, on the part of the Appellant do not show, throughout the entire periods in question, a sincere desire to return to the labour market as soon as suitable employment is offered.

Issue 2: Was she making reasonable and customary efforts to obtain work?

[21] No.

[22] Again, there is no evidence the Appellant was carrying out a **comprehensive** job search.

[23] While she maintains that she was available, she is still, in order to be eligible to receive benefits, required to carry out a reasonable job search.

[24] She has, as a result, restricted her job search to looking for employment with only 6 employers during the entire period in question.

[25] The Appellant's job search activity during the periods in question cannot be considered a reasonable and customary job search as per section 9.001 of the Regulations.

[26] I find that the Appellant has, throughout the entire periods of this process, not shown that she was making reasonable and customary efforts to obtain suitable employment that would have her abandon her course of studies and return to the work force.

Issue 3: Did she set personal conditions that might unduly limit her chances of returning to the labour market?

[27] Yes.

[28] The Appellant stated that her intention was abandon her studies to return to the workforce as soon as possible abut based on her lack of reasonable job search activity

and the fact she was in her final year of high school, I find this to be inconsistent with the facts before me.

[29] The successful completion of her high school program would have been a prerequisite for her admission into the community college where she plans to attend the mechanic program in September.

[30] She submitted that she would abandon her course for full time employment however this is inconsistent with the facts before me. One must, in order to show such intent, be able to show that a customary and reasonable job search was being carried out, six contacts over 10 months does not show such intent.

[31] The Appellant has failed to rebut the presumption of non-availability.

[32] I find that the Appellant in this case while not following a course of instruction approved by an authority designated by the Commission, by spending 20 plus hours per week on her program of studies and not choosing to carry out a reasonable job search, did set personal conditions that might unduly limit her chances of returning to the labour market.

[33] Furthermore, the Federal Court of Appeal has confirmed that a claimant who restricts her availability and is only available for employment outside of her course schedule has not proven availability for work within the meaning of the EIA. **Duquet v. Canada (AG), 2008 FCA 313; Canada (AG) v. Gauthier, 2006 FCA 40**

[34] By itself, a mere statement of availability by the claimant is not enough to discharge the burden of proof**. CUBs 18828 and 33717**

[35] While this Member supports the Appellant's efforts to complete her education and find suitable employment as a result, I find that she has failed to present evidence of "exceptional circumstances" that would rebut the presumption of non-availability while attending a full time course. She is therefore not eligible to receive benefits from September 7, 2021 through to June 30, 2022.

[36] Neither the Tribunal or the Commission have any discretion or authority to override clear statutory provisions and conditions imposed by the Act or the Regulations on on the basis of fairness, compassion, financial or extenuating circumstances.

[37] The Commission acknowledges that due to the COVID-19 pandemic, some requirements related to availability for work while attending training programs have been relaxed until September 2021. Prior to 27 September 2020, a claimant's availability for work would have been reviewed by a Commission representative when the claimant indicated he (or she) was involved in a non-referred course of training or instruction. As of 27 September 2020, availability is no longer automatically reviewed when a claimant submits an application for benefits, or a bi-weekly claimant report, and reports that he (or she) is attending non-referred training but is still available for work as required. Rather than being reviewed by an agent, the training is automatically allowed. However, the Commission still has the authority to review a claimant's availability, and impose a retroactive or current disentitlement, if it is determined that his (or her) availability for work, as required by the legislation and established jurisprudence, has not been proven. If a claimant makes a statement or provides information that brings his (or her) availability while attending a non-referred course of instruction into question, the Commission can, pursuant to subsection 50(8) of the Act, "require the claimant to prove that the claimant is making reasonable and customary efforts to obtain suitable employment."

[38] In other words, the Commission chose to review the Appellant's availability after approving her claim and is now denying benefits based on the same, honest information given by the Appellant with her application. The Commission relies on subsection 50(8) of the Act, to give it the authority to do so.

[39] Regarding the Appellant's request that the overpayment be waived, this is a decision that can only be made by the Commission, the Tribunal has no jurisdiction in this matter.

[40] However, the Tribunal can comment on the circumstances that led to the overpayment.

[41] ***The common characteristics found in the situations and circumstances leading to an overpayment write off, are that the claimant cannot be held directly responsible for the events which led to the overpayment. In other words, the claimant did not play a role in or have any real control over the events except to request and receive the benefits in good faith*.**

[42] In this case the Commission approved benefits with the same information it is now using to deny and recoup those benefits. The Appellant here played no role in the approval process as she had honestly and correctly responded to all questions asked of her.

[43] ***It is important to prevent situations where a claimant is required to pay for delays or errors caused by the Commission, when the situation is completely out of the claimant's control.***

[44] Whether an error or adherence to the above policy of the Commission, the decisions regarding the approval of benefits were out of her control and were completely in the hands of the Commission,

[45] ***Overpayments that occur when the Commission does not make a decision on a claim within a reasonable period of time may result in a portion of the overpayment being written off. This refers to situations where a claimant provided information, and before the Commission processed the information, benefits were incorrectly paid. The portion of the overpayment that would not have occurred, had there been no delay, can be written off. A Commission error occurs when benefits are wrongly paid because the Commission did not action the claim appropriately (Digest 17.2.0). This may occur when there is information on file which the Commission ignores, or when errors in the calculation of one or more elements of the claim occur (EI Regulation 56(2)(b)(i)).***

[46] The Appellant here started her course of instruction with the full knowledge and implied consent of the Commission. The Commission paid benefits based on that knowledge and consent then waited over a full year, November 8, 2022, to rescind

approval and request the Appellant repay the overpayment incurred. The entire amount of the overpayment was paid due to the Commission's delay in actioning the information before it as submitted on numerous occasions by the Appellant.

[47] It is the Commission who holds the authority to request CRA reduce or write-off an overpayment but this is not automatic, application must be made to the Commission. **One must outline the details that having such a debt would have and is having on the claimant's finances, stress related to the debt and what caused the debt.**

[48] The Commissions decision regarding same is not appealable to the Tribunal. Only the Commission decision that caused the overpayment is subject to the reconsideration under section 112 of the Employment Insurance Act (the Act). The claimant's responsibility to repay an overpayment and the interest charged on an overpayment is not subject to reconsideration because these are not decisions of the Commission, and the claimant's liability is as a "debtor" as opposed to a "claimant". The claimant's recourse regarding these issues is to seek judicial review with the Federal Court of Canada.

[49] **This process must be initiated by the Appellant, she must apply to the Commission to have the debt written off,**

[50] I do not have the authority to reduce or write off the overpayment. The Tribunal does not have the jurisdiction to decide on matters relating to debt reduction or write off.

[51] The Appellant requests that the overpayment be erased. I agree with the stated position of the Commission and I note that the law states that their decision regarding writing off an amount owed can't be appealed to the Social Security Tribunal. This means that I cannot determine matters relating to a request for a write-off or reduction of an overpayment.

[52] The Federal Court of Canada has the jurisdiction to hear an appeal relating to a write-off issue. This means that if the Claimant wishes to pursue an appeal regarding her request to write off the overpayment, she needs to do so through the Federal Court of Canada.

[53] As a final matter, I cannot see any evidence in the file that the Commission advised the Appellant about the debt forgiveness program through Canada Revenue Agency (CRA). If immediate repayment of the overpayment pursuant to section 44 of the EI Act will cause her financial hardship, she can call the Debt Management Call Centre of CRA at 1-866-864-5823. She may be able to make alternative repayment arrangements based on her individual financial circumstances

Conclusion

[54] I find that, having given due consideration to all of the circumstances, the Appellant has not successfully rebutted the assertion that she was not available for work from September 7, 2021 and as such the appeal regarding availability while attending a course of instruction is dismissed.

John Noonan

Member, General Division – Employment Insurance Section