[TRANSLATION]

Citation: *ZS v Canada Employment Insurance Commission*, 2024 SST 229

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

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

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (611105) dated September 14, 2023 (issued by Service Canada)

Tribunal member:	Marc St-Jules
Type of hearing:	Videoconference
Hearing date:	January 16, 2024
Hearing participant:	Appellant
Decision date:	February 1, 2024
File number:	GE-23-3330

Decision

[1] The appeal is allowed in part.

[2] The Appellant hasn't shown just cause for voluntarily leaving her job when she did. She had reasonable alternatives to leaving. This means that her disqualification from receiving Employment Insurance (EI) benefits from November 22, 2020, is justified.

[3] I find that the Appellant has shown that she was available for work from November 30, 2020.

Overview

[4] On June 21, 2023, the Canada Employment Insurance Commission (Commission) made a decision. That decision was about benefits paid from September 2020 to July 2021. Since the benefits were already paid, that decision created an overpayment. The Commission decided that the Appellant wasn't entitled to EI benefits for the following three reasons:

1) She had left her job on November 28, 2020, without good cause. For this reason, she wasn't entitled to EI benefits from November 22, 2020.

2) The Appellant isn't entitled to EI benefits from November 29, 2020. The reason is that she had preferences and restrictions about the type of job she would accept. These preferences and restrictions meant that she was greatly limiting her chances of finding a job. For this reason, the Commission says that the Appellant wasn't available for work.

3) She wasn't available from September 27, 2020, to April 28, 2021, because she was taking a training course on her own initiative.[1]

[1] See GD03 at page 41. The Commission made an error in the letter, saying that the Appellant wasn't entitled from September 28, 2020, to April 28, 2020. These dates aren't possible. In the notice of decision dated September 14, 2023, the Commission used the dates from September 28, 2020, to April 28, 2021.

[5] On September 14, 2023, the Commission told the Appellant that the decision had changed in part. The disentitlement because of the course she was taking was removed. But the decisions regarding voluntary leaving and job preferences remained unchanged.

[6] This reconsideration decision reduced the overpayment. But the Appellant still has an overpayment of nearly $16,000.

[7] On November 24, 2023, the Appellant challenged the Commission's reconsideration decisions before the Social Security Tribunal of Canada (Tribunal).[2]

[8] The Appellant says that she didn't voluntarily leave her job. She wanted more hours, but she could not get any. Also, she was actively looking for work. She didn't limit herself to only remote jobs.

[9] The Appellant also says that the government paid her benefits. The Commission paid this money to her without any in-depth verification. So, that is the Commission's error, not hers.

Issues

[10] I will discuss the following three issues in my decision:

1) Is the Appellant disqualified from receiving benefits because she voluntarily left her job without just cause?

2) Was the Appellant available for work?

3) Did the Commission make this decision judicially?

[2] See GD2.

Analysis

Is the Appellant disqualified from receiving benefits because she voluntarily left her job without just cause?

[11] To answer this, I must first address the Appellant's voluntary leaving. I then have to decide whether she had just cause for leaving.

– Is this voluntary leaving?

[12] The Commission says that this is voluntary leaving.

[13] The Appellant disagrees. The company had laid off employees in March 2020. The Appellant says that she was called back to work. But the hours were very limited. She sometimes worked three hours a week.

[14] She says that she needed to work more hours to support herself. She is also financially responsible for her mother because her father passed away.

[15] I find that this is voluntary leaving for the following reasons:

- The first reason is that the Appellant testified that she gave her verbal notice a few weeks before the date she was going to stop working.
- The second reason is that the Appellant testified that she would have stayed if her employer had given her more hours.
- The third reason is that the employer notified the Commission that the Appellant voluntarily left her position.
- The fourth reason is that the Appellant says that she had to leave her job because her mother was immunocompromised. But in saying that she left because of her mother's health, she is also admitting to leaving.
- The fifth reason is that I don't have evidence that the Appellant was let go.

[16] The Federal Court of Appeal has a decision that I find relevant. In that decision, the Court referred to "[u]nder subsection 30(1), the determination of whether an employee has voluntarily left his employment is a simple one. The question to be asked is as follows: did the employee have a choice to stay or to leave?"[3]

[17] I find that the Appellant had a choice to stay. I realize that the Appellant disagrees. She says that she had no choice. But I find that, even though the Appellant didn't find the option of staying very appealing, it was still her choice.

– **Did the Appellant have no reasonable alternative to voluntarily leaving her job?**

[18] In this case, I find that the Appellant hasn't shown that she had just cause for leaving her job when she did. She didn't have reasons that the *Employment Insurance Act* (Act) accepts.

[19] The Commission says that the Appellant didn't have a medical condition. Also, no doctor recommended that she leave her job to protect her mother. The Commission says that the Appellant could have discussed her concerns with her employer.

[20] The Commission says that voluntary leaving is a personal choice. Even though it is fine that she wanted to protect her mother by leaving her job, that can't serve as just cause within the meaning of the Act.

[21] The Commission says that, by continuing to work, even with few hours, the Appellant maintained her employment relationship.

[22] The Appellant says that she had no choice. She spoke with her employer's human resources department. She testified that she was contacting her employer for more hours. She testified that she contacted her employer regularly.

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[3] *Canada (Attorney General)* v *Peace*, 2004 FCA 56.

[23] The Appellant also offered to work at more than one store. The Appellant testified that she lived in Laval, but her employer had several stores in the area. The Appellant offered to work other jobs or in other departments for her employer.

[24] The Appellant also says that she had to leave her job, since her mother is at risk because she is diabetic. The fact that the Appellant worked with the public meant that there was a higher risk that she would expose her mother to COVID.

[25] The Appellant gave a few reasons for leaving her job.

- On May 24, 2023, the Appellant said that she had left her job for another job with Desjardins.[4]
- In early June 2023, the Appellant said that she was possibly going to work for Garda.[5]
- On June 15, 2023, the Appellant said that she left her job because she was staying with her mother. Her mother is immunocompromised. Since the Appellant was working with the public, her mother was at risk of coming into contact with COVID. She came to an agreement with her employer not to work.[6]

[26] I am not concerned about the Appellant saying that she left her position for other jobs when in fact she didn't. This is because the events occurred in 2020 and the Appellant needed time to conduct her own investigation to provide an accurate statement.

[27] I found the Appellant to be credible. She gave her answers under affirmation and without hesitation. Apart from the example above, I find that there is no reason to doubt her statements at the hearing or her statements to the Commission.

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[4] See GD03 at page 37.
[5] See GD03 at page 37.
[6] See GD03 at page 34.

[28] My concern is that the Appellant says she quit because she was worried about her mother. It is fine that she wanted to take precautions for her mother. But the Appellant testified that if she had been given more hours, she would not have quit.

[29] This leads me to conclude that the lack of hours was the main reason for the voluntary leaving.

[30] The Appellant testified that she regularly asked her employer for more hours. If she had been given those hours, she would not have quit.

[31] I find that the Appellant had options to avoid leaving her job. The first would have been to keep her job while looking for work. I agree that having a few hours is hard, but a few hours is better than no hours.

[32] The Record of Employment (ROE) shows two weeks with earnings below $60 in one week. But there are 10 weeks with earnings between $107 and $150. I agree that conserving this working relationship by looking for a more suitable job was a reasonable alternative.

[33] I find that another reasonable alternative would have been to request a short-term leave of absence. That would have made it possible to actively look for a job.

[34] In concluding this part of the decision, I find that the Appellant didn't have reasons that the Act accepts for leaving her job.

Availability for work

[35] Two different sections of the law require claimants to show that they are available for work. The Commission decided that the Appellant was disentitled under both of these sections.

[36] First, the Act says that a claimant has to prove that they are making "reasonable and customary efforts" to find a suitable job.[7] The *Employment Insurance Regulations*

[7] See section 50(8) of the *Employment Insurance Act* (Act).

(Regulations) give criteria that help explain what "reasonable and customary efforts" mean.[8] I will look at those criteria below.

[37] 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.[9] Case law gives three things a claimant has to prove to show that they are "available" in this sense.[10] I will look at those factors below.

[38] The Commission decided that the Appellant was disentitled from receiving benefits because she wasn't available for work based on these two sections of the law.

[39] I will now consider these two sections to decide whether the Appellant was available for work.

– **Reasonable and customary efforts to find a job**

[40] The Regulations set out criteria for me to consider when deciding whether the Appellant's efforts were reasonable and customary.[11]

[41] I have to consider the Appellant's efforts to find a job. The Regulations list nine job search activities that I have to consider. Here, I include five of the nine activities:[12]

- assessing employment opportunities
- preparing a résumé or cover letter
- registering for job search tools or with online job banks or employment agencies
- attending job search workshops or job fairs

[8] See section 9.001 of the *Employment Insurance Regulations* (Regulations).
[9] See section 18(1)(a) of the Act.
[10] See *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96.
[11] See section 9.001 of the Regulations.
[12] See section 9.001 of the Regulations.

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[42] I have no evidence that the Commission asked the Appellant to prove that she was making reasonable and customary efforts to find a job.

[43] Although the Commission and the Appellant discussed her job search efforts a little, I find the reasoning in *TM v Canada Employment Insurance Commission*, 2021 SST 11 persuasive. It isn't enough for the Commission to discuss job search efforts with the Appellant. Instead, it must specifically ask the Appellant for evidence and explain what kind of evidence would meet a "reasonable and customary" standard.

[44] I see no discussion of reasonable and customary efforts between the Commission and the Appellant. The Commission admits that it didn't require proof of job search efforts.[13] There is no explicit mention of the Appellant's disentitlement under subsection 50(8) of the Act. So, that isn't something I have to consider.

Capable of and available for work

[45] 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:[14]

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.

[13] See GD04 at page 11.
[14] 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.

[46] When I consider each of these factors, I have to look at the Appellant's attitude and conduct.[15]

– **Wanting to go back to work**

[47] The Appellant has shown that she wanted to go back to work as soon as a suitable job was available. The problem for the Appellant is that she didn't find a suitable job.

[48] My reason for making this finding is based on the following facts.

[49] The Appellant testified that she wanted to work. She needed to work. Her own financial obligations and the financial assistance she has to provide her mother require her to work.

[50] The Appellant says she worked almost full-time before the pandemic and after going back to work in June 2021. She did so even when she was in school full-time.

[51] The Commission says that the Appellant didn't want to go back to work.[16] It says that the Appellant was applying for full-time jobs, but her priority was to work 25 hours per week at most.

[52] The Commission discussed the fact that the Appellant's statements appear to have changed. She initially told the Commission that she didn't want to work more than 25 hours. The Appellant now claims that she was available for full-time work.

[53] The Commission argues that the Appellant's first statement should be more credible. It says that these first spontaneous statements are more credible than those made after an unfavourable decision is communicated to an applicant. The Commission says that the Federal Court of Appeal supports this position.[17]

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[15] 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.
[16] See GD04 at page 11.
[17] *OP Clinique dentaire O. Bellefleur (Employer) v Canada (Attorney General)*, 2008 FCA 13.

[54] The Commission considers the Appellant's version of events to be less credible, since she changed her version of events throughout her testimony.

[55] I disagree with the Commission. I prefer the Appellant's testimony for a few reasons.

[56] I heard the Appellant myself. What the Commission wrote is the interpretation of the Appellant's comments.

[57] I don't agree that the Appellant changed her statements when she spoke with the Commission. I agree that she has given more than one reason for voluntarily leaving. But this was almost three years later.

[58] The Appellant testified that she would have stayed with her employer if she had had more hours. But the hours she had weren't enough. This indicates that she wants to work.

[59] The Appellant testified that she needed to work. In support of this, she described her situation at this time. She is still working and studying full-time. This is on top of the fact that she is pregnant. Even though her expected delivery date is in a few weeks, she continues to work and study full-time.

[60] So, I find that the Appellant wanted to go back to work. This satisfies the first *Faucher* factor.

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

[61] The Appellant has made enough effort to find a suitable job. It is the Appellant's responsibility to actively look for a suitable job so that she can get EI benefits.

[62] The Commission doesn't argue that the Appellant didn't carry out a job search. In fact, it recognized that it didn't ask the Appellant to provide her job search details.

[63] The Appellant testified that she was actively looking for work. She applied to about 10 companies per week. The Appellant testified that she is unable to provide her

job search details. Her search was mostly through Indeed, but she doesn't have access to her account anymore.

[64] So, I have to assess a job search with few facts. The Act is clear—it is the claimant who must prove their availability for work.[18]

[65] Based on the information that the Appellant provided, I find that these efforts were enough to meet the requirements of this second factor. Even though I don't have the job search details, it doesn't mean that the Appellant didn't look.

[66] I believe the testimony she gave under affirmation. At the hearing, she answered questions consistently and without hesitation.

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

[67] The Appellant didn't set personal conditions that might have unduly limited her chances of going back to work.

[68] The third *Faucher* factor applies only to **personal** conditions set by a claimant. In other words, it applies to conditions that are under the claimant's control.

[69] The Commission also argues that the Appellant was applying only for full-time work but wasn't willing to accept full-time work. This shows that the Appellant would not be able to accept a job offered to her.[19]

[70] Case law has established that when a claimant has personal restrictions in their job search, the Commission must warn them to reduce or remove those restrictions. Case law says that the Commission must give the Appellant a reasonable period to expand her job search efforts (CUB 4708, 15389, 16823, and CUB 18846).

[71] These are umpire decisions. Umpire decisions aren't binding on the Tribunal. I can still consider them. In the Appellant's case, I will follow these decisions. I have not

[18] See section 18(1)(a) of the Act.
[19] See GD04 at page 12.

found any binding case law from a higher court that shows that a warning is in fact required.

[72] I find that the Appellant's preference to get a remote job or one with a maximum of 25 hours per week aren't personal restrictions that prevent her from getting a job. If that were the case, a warning to the Appellant would be in order. Since she wasn't warned to expand her job search, I find that the Appellant met this third *Faucher* factor.

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

[73] Based on my findings on the three factors, I find that the Appellant has shown that she was capable of and available for work but unable to find a suitable job.

The Commission's discretion to retroactively reconsider a claim

[74] I find that the Commission is allowed to reconsider a claim for EI benefits, but this must be done within a limited time. This means that it can use its discretion to decide whether or not to reconsider a claim for EI benefits. But the Commission must always act "judicially" when it does.

[75] The Commission uses the Digest of Benefit Entitlement Principles (Digest) to determine when to reconsider a claim. It isn't a law and I am not bound by it, but it is the Commission's internal policy.

[76] The Commission's reconsideration policy in the Digest indicates that it was developed to ensure a consistent and fair application of section 52 of the Act. A claim will only be reconsidered when:

a) benefits have been underpaid

b) benefits were paid contrary to the structure of the Act

c) benefits were paid as a result of a false or misleading statement

d) the claimant should have known that they weren't entitled to benefits

[77] Discretionary decisions of the Commission can be set aside if the Commission acted in bad faith, in a discriminatory manner, for an improper purpose, by taking into account irrelevant factors, or by ignoring relevant factors.

[78] I find it more likely than not that the Commission exercised its discretion properly (judicially) in this case.

[79] The Appellant argues that the Commission paid her benefits after she met the criteria and that the Commission should not ask her to pay them back now.

[80] I agree that the claim was established because the Appellant had proven she met the requirements. But claimants also have a responsibility in the process. The Appellant accepted the rights and responsibilities.[20] As part of these rights and responsibilities, claimants are required to disclose any separation from employment.

[81] In the Appellant's case, she accepted her rights and responsibilities. Also, the Commission asked the Appellant during her report whether she had stopped working for an employer during the period of that report.[21] That was an opportunity for the Appellant to reveal that she had quit.

[82] The Commission conducts reviews when ROEs are issued. If a ROE is issued that overlaps with an application, earnings or a reason for separation can be reviewed. The Commission has 36 months to carry out this review.[22] But that can be extended to 72 months when a claimant has made a false statement.[23]

[83] In the Appellant's case, her file was reviewed within 36 months. This is within the time limits set out in the law.

[84] I don't find that the Commission acted in bad faith, in a discriminatory manner, or for an improper purpose. Also, it didn't take into account irrelevant factors or consider

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[20] See GD3 at 3-10. Rights and Responsibilities start on page 6.
[21] See GD3 at page 22.
[22] See section 52(1) of the Act.
[23] See section 52(5) of the Act.

relevant ones. Its decision to reconsider entitlement was made within the time limits allowed by the law.

[85] This means that the Commission's decision to retroactively establish an overpayment and issue a notice of debt for the overpayment remains.

– **Overpayment**

[86] I have no discretion to change the overpayment in any way.

[87] I can understand why the Appellant is worried about the overpayment. But I can't make a decision about writing off the debt.

[88] Unfortunately, the fact that the Commission initially paid her benefits doesn't remove her rights and responsibilities under the Act. This includes proving that she was eligible for the EI Emergency Response Benefit (EI ERB).

[89] I sympathize with the Appellant about the overpayment, but I have no discretion to waive it. The law simply doesn't allow the Tribunal to relieve her from any liability for the overpayment. I also cannot ignore the Act, even if the result may seem unfair to the Appellant.

[90] Although I can't change the overpayment in any way because of lack of jurisdiction, the Appellant is left with the following two options:

a) She can ask the Commission to consider writing off the debt because of undue hardship. If she doesn't like the Commission's response, she can file a Notice of Application for judicial review with the Federal Court of Canada, but there is a 30-day timeframe for appealing to the Federal Court.

b) She can call the Debt Management Call Centre at the Canada Revenue Agency (CRA) at 1-866-864-5824 and ask about debt relief due to financial hardship. The debtor will need to present information about her financial circumstances for consideration.

[91] I can only apply the law as it is set out in the Act and Regulations. While I understand the Appellant's situation, I can't change the law or make a different decision.

Conclusion

[92] The Appellant has shown that she was available for work within the meaning of the law.

[93] But the Appellant hasn't shown just cause for leaving her job.

[94] This means that the appeal is allowed in part.

Marc St-Jules
Member, General Division – Employment Insurance Section