Citation: *AA v Canada Employment Insurance Commission*, 2023 SST 2035

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	A. A.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (538577) dated January 26, 2023 (issued by Service Canada)

Tribunal member:	Bret Edwards
Type of hearing:	Teleconference
Hearing date:	June 28, 2023
Hearing participant:	Appellant
Decision date:	July 12, 2023
File number:	GE-23-577

Decision

[1] The appeal is dismissed. I disagree with the Appellant.

[2] The Appellant hasn't shown he was available for work while in school. This means he can't receive Employment Insurance (EI) benefits.

Overview

[3] The Canada Employment Insurance Commission (Commission) decided the Appellant was disentitled from receiving EI regular benefits as of January 6, 2021 because he wasn't available for work. An appellant has to be available for work to get EI regular benefits. Availability is an ongoing requirement. This means that an appellant has to be searching for a job.

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

[5] The Commission says the Appellant wasn't available because he was in school full-time.

[6] The Appellant disagrees and says that he was working part-time on the weekend while in school and was available to work full-time outside of his school schedule. He also says he doesn't understand why the Commission decided to go back and review his claim after it had already decided to pay him benefits.

Matters I have to consider first

The Appellant asked for an interpreter

[7] The Appellant requested an interpreter as English wasn't his first language. At the hearing, the Appellant confirmed that he understood some English and only needed the interpreter to translate the things he didn't understand. So, the hearing was partially

conducted through an interpreter to ensure the Appellant had a meaningful opportunity to understand the proceedings.

I will accept the document sent in after the hearing

[8] The Appellant sent in a document after the hearing.[1] I will accept the document as it relates to the Appellant's availability while in school.

50(8) Disentitlement

[9] In its submissions the Commission states it disentitled the Appellant under subsection 50(8) of the *Employment Insurance Act* (Act).[2] Subsection 50(8) of the Act states the Commission may require an appellant to prove reasonable and customary efforts to find suitable employment.

[10] In other words, the Appellant only needs to prove reasonable and customary efforts under subsection 50(8) if the Commission exercises its discretion to require it.

[11] I've looked through the evidence and don't see any requests from the Commission to the Appellant to prove his reasonable and customary efforts, or any claims from the Commission that if he did, his proof was insufficient.

[12] I further find the Commission didn't make any detailed submissions on how the Appellant failed to prove to them that he was making reasonable and customary efforts. The Commission only summarized what the legislation says about subsection 50(8) of the Act and what it says about reasonable and customary efforts.[3]

[13] Based on the lack of evidence that the Commission asked the Appellant to prove his reasonable and customary efforts to find suitable employment, I find the Appellant isn't disentitled under this part of the law.

---

[1] GD6-1.
[2] GD4-3.
[3] GD4-3.

Issue

[14] Can the Commission go back and review the Appellant's claim for benefits?

[15] Did the Commission act judicially when it made its decision to go back and review the Appellant's benefits?

[16] Was the Appellant available for work while in school?

Analysis

Can the Commission go back and review the Appellant's claim for benefits?

[17] Yes, it can. The law allows the Commission to do this.

[18] There are two sections of the law that allow the Commission to go back and review a claim.

[19] First, during the global Covid-19 pandemic, the government temporarily amended the Act and added section 153.161, effective September 27, 2020.[4]

[20] This temporary pandemic measure gave the Commission the power to verify that an appellant taking a "course, program of instruction or non-referred training" is entitled to EI benefits by requiring proof they were available for work on any working day during their benefit period **at any point after benefits are paid**. This means the **verification of entitlement** happens **after** benefits are paid.

[21] This provision applies to the Appellant because his claim for regular EI benefits started as of October 4, 2020[5], and section 153.161 of the EI Act applies to any claim

---

[4] The Commission didn't mention section 153.161 in its initial submissions. I then asked the Commission to clarify if section 153.161 applies to the Appellant's situation. The Commission said it did. For the Commission's response to my request, see GD7-1 to GD7-17.
[5] This was the start of the Appellant's claim for **regular** EI benefits. Prior to that, he was receiving EI Emergency Response Benefits, which were governed by different rules than regular EI benefits. See the Commission's summary of relevant facts related to the Appellant's claim on GD4-1.

for regular EI benefits that started between September 27, 2020 and September 25, 2021.

[22] I therefore find the Commission was acting within the parameters Parliament set up during the pandemic and could go back and ask the Appellant to verify his entitlement to EI benefits by proving his availability for work while he was in school as of January 6, 2021.

[23] A different section of the Act also allows the Commission to change the original decision to pay EI benefits if an appellant is unable to verify their entitlement.

[24] Section 52 of the Act allows the Commission to reconsider (change) a claim for EI benefits within 36 months after the benefits have been paid.[6]

[25] The Commission argues section 52 of the Act doesn't apply here because an entitlement decision under section 153.161(2) of the Act isn't the same as a reconsideration decision under section 52 of the Act. It also argues that to treat these things as the same would be an error of law.[7]

[26] I disagree. I find section 153.161(2) and section 52 of the Act must be read together when looking at whether the Commission can go back and review an appellant's claim. Both sections discuss the Commission's power to go back and review a claim, even if each frames this power slightly differently. Several recent decisions from the Tribunal's Appeal Decision also reach the same conclusion[8], and I give significant weight to them here to help support my finding.

[27] In other words, I find section 52 of the Act is something I also must consider when looking at whether the Commission can go back and review the Appellant's claim.

---

[6] Or within 72 months if the Commission believes an appellant made a false or misleading statement in connection with their claim for EI benefits.
[7] GD7-3.
[8] See *Canada Employment Insurance Commission v AD*, 2023 SST 506, paragraph 27; *SF v Canada Employment Insurance Commission*, 2022 SST 1095; and *Canada Employment Insurance Commission v PJ*, 2022 SST 1311.

[28] When I look at section 52 of the Act in this case, I find the Commission acted within the 36-month limit for the Appellant's claim as set out in this section. The EI benefits at issue here were paid for the period from January 6, 2021 to October 2, 2021.[9] The Commission first asked the Appellant to verify his availability for work during this period on February 3, 2022[10], and changed its decision on his entitlement to EI benefits the same day.[11] This was within 36 months of the first week of EI benefits (starting January 6, 2021) paid to the Appellant.

[29] I therefore find the Commission was acting within the law and could go back to verify and reconsider (change) its decision on the Appellant's entitlement to EI benefits.

[30] So, sections 52 and 153.161 of the Act allow the Commission to go back and verify an appellant's entitlement to the EI benefits they received and to assess an overpayment, if appropriate.[12]

Did the Commission act judicially when it made its decision to go back and review the Appellant's benefits?

[31] While the Commission can go back and review the Appellant's claim for benefits for the period from January 6, 2021 onwards, its decision to do so is discretionary.

[32] This means that it doesn't have to do a review, but it can choose to do so if it wants. Both sections that allow the Commission to review a claim say it may review a claim, not that it must review a claim.

[33] What this means is that I can only interfere with (change) the Commission's decision if it didn't exercise its discretion properly when it made the decision.[13]

---

[9] GD3-24 to GD3-25.
[10] GD3-20 to GD3-21.
[11] GD3-22.
[12] The Tribunal's Appeal Division has come to this conclusion too. See *SF v Canada Employment Insurance Commission*, 2022 SST 1095 and *Canada Employment Insurance Commission v PJ*, 2022 SST 1311.
[13] See *Canada (Attorney General) v Kaur*, 2007 FCA 287. The Commission's decision can only be interfered with if it exercised its discretionary power in a non-judicial manner or acted in a perverse or capricious manner without regard to the material before it: see *Canada (Attorney General) v Tong*, 2003 FCA 281. Discretion is exercised in a non-judicial manner if the decision-maker acted in bad faith, or for

[34] For the Commission to have used its discretion judicially, it must not have done the following things when it made the decision to review the Appellant's claim for benefits for the period from January 6, 2021 onwards:

- acted in bad faith
- acted for an improper purpose or motive
- took into account an irrelevant factor
- ignored a relevant factor
- acted in a discriminatory manner

[35] The Appellant testified he doesn't feel the Commission acted in bad faith.

[36] The Commission also argues it didn't act in bad faith. It says it automatically approved the Appellant's training questionnaire on January 15, 2021 under Interim Order No. 10, which was a temporary measure introduced during the pandemic.[14]

[37] The Commission says it reviewed the Appellant's entitlement to benefits in February 2022 for a separate issue, which led it to also review his entitlement to benefits once he started school on January 6, 2021 and determine he wasn't actually eligible for benefits from this period onwards.[15]

[38] I find the Commission didn't act in bad faith.

[39] I note there is no information on file to indicate the Appellant made the Commission aware of his schooling at any point before he submitted his training questionnaire on January 15, 2021.

[40] I also note the Appellant had been receiving EI regular benefits since October 4, 2020, which was when his EI ERB claim was automatically converted to EI regular benefits.[16]

---

an improper purpose or motive, took into account an irrelevant factor or ignored a relevant factor or acted in a discriminatory manner: see *Attorney General of Canada v Purcell*, A-694-94.

[14] GD7-1 to GD7-2.

[15] GD7-3. The Commission also says the Appellant established a claim for EI benefits as of March 22, 2020 and received EI Emergency Response Benefits (EI ERB) until the EI ERB entitlement period ended on October 3, 2020. His claim was then automatically converted to EI regular benefits as of October 4, 2020.[15]

[16] GD3-25.

[41] In my view, since the Appellant didn't make the Commission aware of his schooling at any point before he submitted his training questionnaire, he can't say the Commission knew about his schooling when he began to receive benefits. This wasn't the case. He submitted his training questionnaire after his claim had been automatically approved and he had already begun to receive benefits.

[42] I also don't have any evidence the Commission actually looked at the Appellant's schooling before he began to receive benefits. The Commission says it didn't do this, and there's no information in the Commission's record of its conversations with the Appellant that would lead me to believe it did this.

[43] The law allows the Commission to review a claim for any reason. The fact it may have paid the Appellant benefits initially doesn't prevent it from deciding to review his claim.

[44] I'm disappointed the Commission waited as long as it did to go back and review the Appellant's claim for benefits. It had new information from the Appellant about his schooling in January 2021 and could have acted sooner. But I still find it followed the law and that is not bad faith.

[45] The Appellant testified that he feels the Commission acted for an improper purpose or motive because the Commission agent who decided his reconsideration request didn't treat him fairly and gave him the impression that he was deciding his claim based on his personal convictions rather than the law.

[46] I find the Commission didn't act for an improper purpose or motive.

[47] I acknowledge the Appellant feels the Commission agent didn't fairly decide his reconsideration request. But I find this argument isn't relevant here. The Commission made its decision to go back **before** the reconsideration request phase. This means the Appellant is referring to something (the conversation with the Commission agent) that took place **after** the Commission had already decided to go back and review his claim, which means it can't be considered when looking at the Commission's actions at the time it made this decision.

[48] The Appellant testified that he feels the Commission didn't take into account an irrelevant factor.

[49] I find the Commission didn't take into account an irrelevant factor. The Appellant said it didn't do this. I also see no evidence that would lead me to believe it did do this.

[50] The Appellant testified the Commission ignored a relevant factor because it didn't take into account the COVID-19 pandemic and lockdowns and the fact he was doing his schooling online when it decided to go back and review his claim.

[51] I find the Commission didn't ignore a relevant factor.

[52] I acknowledge the Appellant feels the COVID-19 pandemic is a relevant factor that the Commission ignored when it decided to go back and review his claim.

[53] But I disagree. While the COVID-19 pandemic was definitely a time of stress, uncertainty and disruption for Canadians, there's no evidence to show that it was something the Commission should have directly taken into account when deciding to go back and review the Appellant's claim. The Commission made its decision amidst the COVID-19 pandemic, but I don't see a clear link between these two things beyond these general circumstances.

[54] The Appellant testified that he doesn't feel the Commission discriminated against him.

[55] I find the Commission didn't discriminate against the Appellant. The Appellant doesn't feel it did, and I see no evidence that would lead me to conclude it did do this.

[56] I therefore find the Commission's decision to review the Appellant's availability was done judicially. For the reasons discussed above, I find it didn't act in bad faith, didn't act for an improper purpose or motive, didn't take into account an irrelevant factor, didn't ignore a relevant factor, and didn't discriminate against the Appellant.

[57] So, I will now move on to analyze the Appellant's availability as of January 6, 2021.

Was the Appellant available for work as of January 6, 2021?

[58] The Appellant was a student during his disentitlement period. According to the Federal Court of Appeal, there is a presumption that full-time students are not available for work.[17]

[59] So, the first thing I need to do is see if this presumption applies to the Appellant.

[60] The Appellant agrees he was a full-time student, and I see no evidence that shows otherwise. So, I accept the Appellant was in school full-time and the presumption applies to him.

[61] But the Appellant can rebut the presumption, which means it won't apply, if he can show he has a history of working full-time while also in school.[18] Or, he can show that there are exceptional circumstances in his case.[19]

[62] I find the Appellant hasn't rebutted the presumption that he wasn't available for work.

[63] I note the Appellant told the Commission and testified that he was working part-time (on weekends) while in school.[20] He also didn't say anything to the Commission or at the hearing about ever having worked full-time while in school before.

[64] Based on this information, I find the Appellant hasn't shown he has a history of working full-time while also in school because there is no evidence that he ever did this.

[65] I also find the Appellant hasn't shown any exceptional circumstances that would rebut the presumption. He didn't say anything at the hearing that would lead me to believe he has any exceptional circumstances.

[66] So, the Appellant hasn't rebutted the presumption that he is unavailable for work.

---

[17] See *Canada (Attorney General) v Cyrenne*, 2010 FCA 349.
[18] See *Canada (Attorney General) v Rideout*, 2004 FCA 304.
[19] See *Canada (Attorney General) v Cyrenne*, 2010 FCA 349.
[20] GD3-30.

[67] The Federal Court of Appeal hasn't yet told us how the presumption and the sections of the law dealing with availability relate to each other. Because this is unclear, I'm going to continue on to decide the section of the law dealing with availability, even though I have already found the Appellant is presumed to be unavailable.

Capable of and available for work

[68] I have to consider whether the Appellant was capable of and available for work but unable to find a suitable job.[21] Case law sets out three factors for me to consider when deciding this. The Appellant has to prove the following three things:[22]

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

b) He 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.

[69] When I consider each of these factors, I have to look at the Appellant's attitude and conduct.[23]

– Wanting to go back to work

[70] The Appellant has shown he wanted to go back to work as soon as a suitable job was available.

[71] The Appellant told the Commission and testified he was working part-time while in school, as discussed above. I find this shows he did want to work while in school as he was working at that time.

---

[21] See section 18(1)(a) of the Act.
[22] 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.
[23] 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.

[72] Based on this evidence, I find the Appellant had the desire to work during his disentitlement period.

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

[73] The Appellant made enough effort to find a suitable job.

[74] The Appellant testified he was actively looking for work while he was in school. He said he regularly looked for work and focused mostly on jobs in the security industry, which were one of the few industries that were continuing to hire during the COVID-19 lockdowns. He also worked part-time as a security guard during this period, as discussed above, and testified that he tried to get more hours from his employer.

[75] The Appellant also testified he looked for jobs outside the security industry too, but he couldn't find many that were hiring. He registered on the federal government jobs site to try and expand his search too. He applied for some jobs, but he couldn't remember how many since that was 2 years ago.

[76] I acknowledge the Appellant didn't provide any physical evidence of his job search while in school. He didn't submit a job search list or any copies of job applications he sent. But I still find his testimony about his efforts to find work makes up for this lack of evidence. This is because his testimony was clear and direct, and I feel that he did his best to explain his job search efforts and some of the challenges he faced as part of this process, particularly during the COVID-19 lockdowns. Based on his testimony, I'm satisfied he was looking actively for work.

[77] I therefore find the Appellant did make enough efforts to look for work during his disentitlement period. His testimony about his job search was persuasive enough to lead me to believe he was actively looking for work while in school.

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

[78] The Appellant did set personal conditions that might have unduly limited his chances of going back to work.

[79] The Appellant told the Commission and testified he started school on January 6, 2021.[24] He testified that he didn't take any time off between semesters during his first year, which means he was in school continuously (over three different semesters) from early January 2021 to late December 2021.

[80] The Appellant testified his school schedule from January 2021 to April 2021 was Mondays 11:30am to 1pm, Tuesdays 9am to 5pm, Wednesdays off, Thursdays 9:30am to 2pm, Fridays 9am to 4pm, and Saturdays and Sundays off.

[81] The Appellant testified his school schedule from May 2021 to August 2021 was Mondays 9am to 5pm, Tuesdays off, Wednesdays 1pm to 5pm, Thursdays 9am to 4pm, Fridays 10am to 2pm, and Saturdays and Sundays off.

[82] The Appellant testified his school schedule from September 2021 to December 2021 was Mondays 11am to 6pm, Tuesdays 11am to 6pm, Wednesdays 9am to 3pm, Thursdays off, Fridays 10am to 1pm, and Saturdays and Sundays off.

[83] The Appellant sent in a post-hearing document: an email to the Tribunal. In the email, he says his classes were optional.[25]

[84] But I note the Commission's records of its conversations with the Appellant don't indicate he told them his classes were optional.[26] He also didn't bring that up at the hearing. In my view, it's reasonable to believe the Appellant would have mentioned his classes were optional during one of his conversations with the Commission or at the hearing. But since he didn't do that, I conclude his classes weren't in fact optional as he now says.

[85] Also, even if the Appellant's classes were optional, I find he provided evidence that he was in fact going to his classes. He said several times at the hearing that he was able to work full-time if he worked 12 hours on the one weekday that he didn't have

[24] GD3-16.
[25] GD6-1.
[26] GD3-20 to GD3-21, GD3-30.

classes (which changed each semester, as discussed above) and on Saturdays and Sundays.

[86] In my view, the fact that the Appellant repeatedly stressed he was available to work full-time hours on his one weekday off and on weekends implies that he wasn't available on the other four weekdays when he had scheduled classes because he was going to these classes. Otherwise, I find it's reasonable to believe he would have said he could also work on the other weekdays (when he had scheduled classes), but he didn't say that.

[87] So, for these reasons, I don't give the Appellant's post-hearing document much weight here. Instead, I find his testimony indicates he was attending classes four days a week.

[88] Taken together, I find the Appellant's choices of finding work were very limited as he could only take jobs that would have worked around his school schedule since he was attending his classes.[27] He was in school 4 out of 5 weekdays for up to 7 or 8 hours on some days, so he couldn't work any Monday to Friday daytime job with a set (non-flexible) work schedule.

[89] While the Appellant testified that he was also available on the weekends, I'm only looking at his availability for working days and the law says the weekends aren't working days.[28]

[90] I therefore find the Appellant had restrictions that unduly limited his ability to find work once he started school on January 6, 2021.

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

[91] Based on my findings on the three factors, I find the Appellant hasn't shown he was capable of and available for work but unable to find a suitable job while he was in school, so as of January 6, 2021. He meets two of the three factors because he has

---

[27] See *Duquet v Canada (Employment and Immigration Commission*), 2008 FCA 313, *Canada (Attorney General)* v Primard, 2003 FCA 349.
[28] See section 32 of the *Employment Insurance Regulations*.

shown he had a desire to work during this period and made enough effort to find work. But he doesn't meet the third factor because he had restrictions that unduly limited his chances of finding work during this period.

[92] Since the Appellant didn't meet all three factors, this means he hasn't shown he was available for work once he started school.

[93] While I sympathize with the Appellant, who now faces a large overpayment, I don't have the power to erase it, no matter how compelling the circumstances.[29] The law doesn't allow me to do so, even if find that the circumstances are unfair. The overpayment is still the Appellant's responsibility to repay.[30]

[94] These options are available to the Appellant:

- He can ask the Commission to consider writing off the debt because of undue hardship.[31] Should the Commission's response not be in his favour, the Appellant can appeal to the Federal Court.
- He can contact the Debt Management Call Centre at CRA at 1-866-864-5823 about a repayment schedule or other debt relief measure.[32]

Conclusion

[95] The Appellant hasn't shown he was available for work within the meaning of the law once he started school, specifically as of January 6, 2021. Because of this, I find the Appellant can't receive EI benefits for this period.

[96] This means the appeal is dismissed.

Bret Edwards

Member, General Division – Employment Insurance Section

---

[29] See *Canada (Attorney General) v Villaneuve*, 2005 FCA 440.
[30] Sections 43 and 44 of the *Employment Insurance Act* state that an appellant bears the responsibility for an overpayment.
[31] Section 56 of the *Employment Insurance Regulations* gives the Commission broad powers to write off an overpayment when it would cause undue hardship were an Appellant to repay it.
[32] That's the phone number found on the Notice of Debt that was sent to the Appellant.