Citation: *JM v Canada Employment Insurance Commission*, 2023 SST 2036

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

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

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (563750) dated January 13, 2023 (issued by Service Canada)

Tribunal member:	Katherine Parker
Type of hearing:	In person
Hearing date:	May 3, 2023
Hearing participant:	Appellant
Decision date:	July 17, 2023
File number:	GE-23-335

Decision

[1] The appeal is dismissed with modification.

[2] I find that the Canada Employment Insurance Commission (Commission) exercised its discretion judicially in deciding to verify and reconsider the Appellant's claim for benefits.[1] This means that the Commission acted properly when it retroactively determined that the Appellant wasn't entitled to Employment Insurance (EI) benefits.

[3] I find that the Appellant has shown that she was available for work while in school during the periods from, September 7, 2020, to August 26, 2021, inclusive.[2]

[4] I find that the Appellant hasn't shown that she was available for work after August 26, 2021.

[5] I find that the Appellant voluntarily left her job without just cause on October 6, 2021.

Overview

[6] The Canada Employment Insurance Commission (Commission) made a decision on October 28, 2022, that resulted in an overpayment of $18,438.[3]

[7] It decided that the Appellant wasn't entitled to benefits from September 7, 2020, to April 22, 2022. It said that she was in full-time training and wasn't looking for a job, which means she hadn't proven she was available for work.

[8] The Commission says that it relied on sections 18 and 153.161 of the Employment Insurance Act (Act) in deciding that the Appellant hadn't proven that she was available for work. It argues that under section 153.161 (2) of the Act,[4] it may, at any point after benefits are paid to a claimant, verify that the claimant is entitled to those

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[1] See sections 52 and 153.161 of the Employment Insurance Act (Act).
[2] See sections 18(1)(a) and 153.161 of the Act and sections 9,001 and 9,002(1) of the Employment Insurance Regulations (Regulations).
[3] See GD3-34.
[4] See Part VIII.5 of the Act: Temporary Measures to Facilitate Access to Benefits.

benefits by requiring proof that they were capable of work and available on any working day of their benefit period.

[9] It also decided that the Appellant was disqualified from receiving Employment Insurance (EI) regular benefits starting October 3, 2021, because she voluntarily left her employment on October 6, 2021, without just cause.

[10] On December 7, 2022, the Appellant made a request for reconsideration of these two decisions and asked that the decision to pay back $18,438 be reconsidered. The Commission upheld its decision on January 13, 2023.

[11] The Appellant made an initial claim for benefits on March 15, 2021. She stopped working because of a COVID outbreak at her workplace and wasn't paid for the week of March 15, 2021, to March 20, 2021. She continued working for her employer, but with reduced hours due to the pandemic, until April 27, 2021, when she was laid off due to a shortage of work. She worked in a job that was seasonal and she was usually laid off for the summer months.

[12] She returned to work August 26, 2021, to begin the new season. But she returned to reduced hours which she worked on the weekends. The Appellant quit her job on October 6, 2021.

[13] When the Appellant made her claim, she was a full-time student and had been since September 2020. She had been working full-time while attending classes. She could do this because her classes were 50% online. She was working every weekday from 4—8 p.m., and two shifts of eight hours each on the weekend. This is the same schedule she worked for this same employer during her last year of high school which was 2017–2018.

[14] The Commission became aware that the Appellant was in school and asked her to complete a training questionnaire which it received April 5, 2021. The Commission will request a training questionnaire when it is informed that an Appellant will be following or intend to follow a training course. The claimant is informed that they must prove they are ready to work every day and are capable of doing so and that they are

making efforts to find work. She completed another training questionnaire on September 10, 2021.

[15] The Commission received a Record of Employment (ROE) on May 12, 2021, for the claim filed on March 15, 2021, after benefits were paid. The last day of work didn't match the last day of worked identified by the Appellant in her application on March 15, 2021.

[16] The Commission received an ROE on December 13, 2021, from the Appellant's employer indicating she had quit on October 6, 2021.

[17] The employer was contacted on December 23, 2021, to verify the details of the March 2021, application for benefits because the dates didn't match. The Appellant had been receiving benefits between March 13, 2021, and April 27, 2021, even though her last day worked was April 27, 2021. She reported her hours weekly during this time.

[18] On October 26, 2022, the Commission contacted the Appellant to discuss her voluntary leaving, and the training program that began on September 6, 2020, and ended on April 22, 2022.

[19] On October 28, 2022, the Commission issued its decision that the Appellant was disqualified from receiving benefits from October 3, 2021, because she voluntarily left her job without just cause. It also decided that the Appellant was disentitled from September 7, 2020, to April 22, 2022, because she wasn't available for work.

Issue

[20] Did the Commission act properly when it went back and decided that the Appellant was disentitled from receiving Employment Insurance (EI) benefits from September 7, 2020, to April 22, 2022, (in other words, did it act judicially)? If not, I can either rescind the Commission's decision, or give the decision the Commission should have given.

[21] Is the Appellant disentitled from receiving benefits between September 7, 2020, and April 22, 2022, because she wasn't available.

[22] Did the Appellant voluntarily leave her job on October 6, 2021. If she did, was it with just cause?

Analysis

Did the Commission have the power to retroactively verify and review the Appellant's claim for benefits?

[23] The Appellant raised the issue of why the Commission retroactively reviewed her file. She said she didn't agree that the Commission could go back two years and cancel her entitlement. She said she submitted her reports weekly and identified school and work hours honestly. On her training forms, she indicated she was employed. She said the Commission should not have given her benefits if she wasn't entitled. She provided no new information when the Commission first contacted her on October 26, 2022.

[24] The Commission said it made the decision to disentitle the Appellant for being unavailable for work under this temporary measure which is subsection 153.161 (2) of the *Employment Insurance Act* (Act). It said this was an entitlement decision, not a reconsideration decision. This temporary measure gave the Commission a broad scope to decide when to verify past claims.

[25] The Commission says that entitlement decisions on availability made under section 153.161 (2) of the EI Act are not reconsideration decisions under sections 52 or 112 of the EI Act.

[26] The Commission's reconsideration powers are set out in section 52 of the EI Act. This section says that the Commission may reconsider a claim for benefits within 36 months after the benefits have been paid.[5]

[27] Th Case law has established that the only limitation on the Commission's power to reconsider under section 52 of the EI Act is time.

[5] In situations where the Commission is of the opinion that a false or misleading statement has been made, the Commission has 72 months to reconsider a claim.

[28] This means that the Commission may reconsider a claim under section 52 even if there are no new facts. In other words, it can withdraw its earlier approval and require claimants to repay the benefits paid under that approval.[6]

[29] During the pandemic, the government temporarily changed the EI Act. Section 153.161 was added to the EI Act and came into force on September 27, 2020. This provision applies to the Appellant, who established an initial claim for EI benefits effective March 15, 2021.

[30] Section 153.161 of the EI Act says:

> **Availability**
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> **Course, program of instruction or non-referred training**
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> **153.161 (1)** For the purposes of applying paragraph 18(1)(a), a claimant who attends a course, program of instruction or training to which the claimant is not referred under paragraphs 25(1)(a) or (b) is not entitled to be paid benefits for any working day in a benefit period for which the claimant is unable to prove that on that day they were capable of and available for work.
>
> **Verification**
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> **(2)** The Commission may, at any point after benefits are paid to a claimant, verify that the claimant referred to in subsection (1) is entitled to those benefits by requiring proof that they were capable of and available for work on any working day of their benefit period.

[31] This temporary provision says that, for the purposes of applying section 18(1)(a) of the EI Act, the Commission may verify that a claimant is entitled to benefits by requiring proof of their availability for work at any point after benefits are paid. This means that the verification of availability may not have happened while benefits were being paid.

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[6] Brisebois v Canada (Employment and Immigration Commission), A-582-79; Brière v Commission (Attorney General), A-637-86.

[32] Section 52 of the EI Act is written differently. It says that the Commission may reconsider a claim for benefits within 36 months of an earlier approval.

[33] The Commission argues that the Appellant's entitlement was not verified until October 26, 2022. However, I find no evidence that the entitlement decision was delayed. Instead, the Appellant's evidence shows that she always reported being in school as well as the amounts of money she had received while in school. It appears that the Commission already verified the Appellant's entitlement before paying her benefits.

[34] That being said, the Appeal Division had made decisions that section 153.161, has to be read together with section 52 of the EI Act.[7] One section allows the Commission to verify entitlement to benefits if it has not done so, and if it has, the other section allows it to reconsider its decision. Both sections are concerned with recovering amounts that claimants should not have received.

[35] In addition, the decision to seek verification under section 153.161 or to reconsider a claim under section 52 is discretionary. This means that, although the Commission has the power to seek verification of entitlement or to reconsider a claim, it doesn't have to do so.

[36] The law says that discretionary powers must be exercised judicially. This means that, when the Commission decides to reconsider a claim, it cannot act in bad faith or for an improper purpose or motive, consider an irrelevant factor or ignore a relevant factor, or act in a discriminatory manner.[8]

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[7] See *Canada Employment Insurance Commission v AD*, *2023 SST*, AD-23-105.
[8] See Canada (Attorney General) v Purcell, 1995 CanLII 3558 (FCA).

[37] The Commission developed a policy to help it exercise its discretion to reconsider decisions under section 52 of the EI Act. The Commission says that the reason for the policy is "to ensure a consistent and fair application of section 52 of the [EI Act] and to prevent creating debt when the claimant was overpaid through no fault of their own." The policy says that a claim will only be reconsidered when:

- benefits have been underpaid
- benefits were paid contrary to the structure of the [EI Act]
- benefits were paid as a result of a false or misleading statement
- the claimant ought to have known there was no entitlement to the benefits received.[9]

[38] The policy says that a period of non-availability is not a situation where benefits were paid contrary to the structure of the EI Act.[10]

– **Did the Commission act properly (judicially) when it reconsidered the Appellant's availability?**

[39] In a recent decision, the Appeal Division (AD)[11] found that without section 153.161 of the EI Act, the Commission would have had to consider the above factors and its own policy when making the discretionary decision to reconsider the Appellant's claim.

[40] It found that during the temporary pandemic measures, the Commission's discretionary decision whether to reconsider a claim had to be made with the legislative intent of section 153.161 of the EI Act in mind.

[41] The AD decision said that in implementing this section during the pandemic, Parliament clearly wanted to insist on the Commission's power to verify that a claimant taking a course, program of instruction, or training was entitled to EI benefits, even after

[9] See Digest of Benefit Entitlement Principles, Chapter 17—Section 17.3.3.
[10] See Digest of Benefit Entitlement Principles, Chapter 17—Section 17.3.2.
[11] See Canada Employment Insurance Commission v AD, 2023 SST, AD-23-105, paragraphs 33–37.

the payment of benefits. I am persuaded by the AD's finding that this means the Commission exercised its discretion within the parameters set by Parliament during the pandemic.[12]

[42] The Appellant didn't make any false or misleading statements and could not have known that she was not entitled to the benefits received.

[43] I have no doubt that the Appellant acted in good faith and repeatedly reported her training to the Commission. The Commission reconsidered the claim on the facts that were available to it when the initial entitlement decision was made, and benefits were paid.

[44] Considering the above factors, I find that the Commission exercised its power judicially and, as a result, it acted properly when it retroactively determined that the Appellant was not entitled to EI benefits.

Availability for work while in school

[45] Two different sections of the law require Appellants to show that they are available for work. The Commission decided that the Appellant was disentitled under both of these sections. So, she has to meet the criteria of both sections to get benefits.

[46] First, the *Employment Insurance Act* (Act) says that an Appellant has to prove that they are making "reasonable and customary efforts" to find a suitable job.[13] The *Employment Insurance Regulations* (Regulations) give criteria that help explain what "reasonable and customary efforts" mean.[14] I will look at those criteria below.

[47] Second, the Act says that an Appellant has to prove that they are "capable of and available for work" but aren't able to find a suitable job.[15] Case law gives three things an

[12] See paragraph 35 of the AD decision, AD-23-105.
[13] See section 50(8) of the *Employment Insurance Act* (Act).
[14] See section 9.001 of the *Employment Insurance Regulations* (Regulations).
[15] See section 18(1)(a) of the Act.

Appellant has to prove to show that they are "available" in this sense.[16] I will look at those factors below.

[48] 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.

[49] In addition, the Federal Court of Appeal has said that Appellants who are in school full-time are presumed to be unavailable for work.[17] This is called "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.

[50] I will start by looking at whether I can presume that the Appellant wasn't available for work. Then, I will look at whether she was available based on the two sections of the law on availability.

Presuming full-time students aren't available for work

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

– Appellant was a full-time student

[52] The Appellant was a full-time student. But the presumption that full-time students aren't available for work can be rebutted (that is, shown to not apply). If the presumption were rebutted, it would not apply.

[53] There are two ways the Appellant can rebut the presumption. She can show that she has a history of working full-time while also in school.[18] Or, she can show that there are exceptional circumstances in her case.[19]

[54] The Appellant says she worked full-time in her last year of high school. She worked every day from 4 p.m. to 8 p.m., and two eight-hour shifts on the weekend. She

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[16] See *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96.
[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.

worked 7 days a week. She also worked full-time between September 7, 2020, and March 13, 2021, while attending school full-time. She said her courses were 50% on-line in the beginning because of the pandemic.

[55] The Commission says she was a student and had no other work.[20] It said she used to work full-time but only worked weekends. It made the presumption of non-availability because she was a full-time student, and it didn't provide an analysis of availability.

[56] I find that the Appellant has proven she worked full-time while in high school and that she could carry a full course load when she started school on September 7, 2020. She provided evidence on her training form on April 5, 2021, she said she was employed.[21]

[57] The Appellant has rebutted the presumption that she is unavailable for work.

– **The presumption is rebutted**

[58] Rebutting the presumption means only that the Appellant isn't presumed to be unavailable. I still have to look at the two sections of the law that apply in this case and decide whether the Appellant is actually available.

Reasonable and customary efforts to find a job

[59] The first section of the law that I am going to consider says that Appellants have to prove that their efforts to find a job were reasonable and customary.[22]

[60] The law sets out criteria for me to consider when deciding whether the Appellant's efforts were reasonable and customary.[23] I have to look at whether her efforts were sustained and whether they were directed toward finding a suitable job. In other words, the Appellant has to have kept trying to find a suitable job.

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[20] See GD3-32.
[21] See GD3-17.
[22] See section 50(8) of the Act.
[23] See section 9.001 of the Regulations.

[61] I also have to consider the Appellant's efforts to find a job. The Regulations list nine job-search activities I have to consider. Some examples of those are the following:[24]

- assessing employment opportunities
- networking
- contacting employers who may be hiring

[62] The Commission says that the Appellant didn't do enough to try to find a job. But it didn't do an analysis of availability.

[63] The Appellant disagrees. She was working full-time until March 13, 2021. The Appellant was laid off during COVID outbreaks at her place of work, so she had no earnings the week of March 15, 2021. She then returned to reduced hours after that until April 27, 2021, when she was laid off for the summer. She was a seasonal employee and had a reasonable expectation to be called back.

[64] The Appellant says that her efforts were enough to prove that she was available for work.

[65] I find that the Appellant was available for work and worked the hours as needed until she was laid off on April 27, 2021. She then continued to seek employment during the summer months until her recall on August 26, 2021. I find that her efforts were sustained until August 27, 2021. Then she accepted weekends only so she could attend school full-time.

[66] The Appellant has proven that her efforts to find a job were reasonable and customary until her recall on August 27, 2021. After her return to school full-time she only accepted part-time work on the weekends. She wasn't searching for new work.

[24] See section 9.001 of the Regulations.

Capable of and available for work

[67] I also have to consider whether the Appellant was capable of and available for work but unable to find a suitable job.[25] Case law sets out three factors for me to consider when deciding this. The Appellant has to prove the following three things:[26]

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

b) She has 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.

[68] When I consider each of these factors, I have to look at the Appellant's attitude and conduct.[27]

– **Wanting to go back to work**

[69] The Appellant hasn't shown that she wanted to go back to work as soon as a suitable job was available when she returned to work after August 26, 2021.

[70] When she returned to school in September, 2021, she limited her availability to weekends. She was committed to a full-time schedule which was now 60% in person. The distance to her work from school was not manageable and she couldn't accept evening shifts without quitting a class. This is a commendable goal and objective. By focusing on her studies she achieved her objectives and was successful at finding a new career.

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

[71] The Appellant did make enough effort to find a suitable job until August 27, 2021. After that, she wanted to focus on her school and said in her training questionnaires and

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[25] See section 18(1)(a) of the Act.
[26] 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.
[27] 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.

to the Commission that she wouldn't be able to accept employment until she graduated in April, 2022.

[72] I have considered the list of job-search activities given above in deciding this second factor. For this factor, that list is for guidance only.[28]

[73] The Appellant's efforts to find a new job included networking through her placements, and applying for jobs that could lead to a position in her new field of expertise. I explained these reasons above when looking at whether the Appellant has made reasonable and customary efforts to find a job.

[74] Those efforts were enough to meet the requirements of this second factor because she was seeking new employment in her field and demonstrated she networked, and eventually found a new job because of her placements.

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

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

[76] The Appellant says she hasn't done this because wanted to focus on her school. She couldn't travel to her work during the week without compromising her studies, and she was committed to her program.

[77] The Commission says the Appellant wasn't available weekdays when she returned to school in September, 2021. This is a requirement under the availability assessment.

[78] I find that the Appellant set personal conditions that might have limited her chances of going back to work when she limited her availability to weekends only. This applies to her return to school after August 27, 2021.

[28] I am not bound by the list of job-search activities in deciding this second factor. Here, I can use the list for guidance only.

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

[79] Based on my findings on the three factors, I find that the Appellant hasn't shown that she was capable of and available for work after August 27, 2021.

Did the Appellant Voluntarily leave her job without just cause?

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

[81] The parties agree that the Appellant voluntarily left her job on October 6, 2021. The Appellant agrees that she quit. I see no evidence to contradict this.

The parties don't agree that the Appellant had just cause

[82] The parties don't agree that the Appellant had just cause for voluntarily leaving her job when she did.

[83] The law says that you are disqualified from receiving benefits if you left your job voluntarily and you didn't have just cause.[29] Having a good reason for leaving a job isn't enough to prove just cause.

[84] The law explains what it means by "just cause." The law says that you have just cause to leave if you had no reasonable alternative to quitting your job when you did. It says that you have to consider all the circumstances.[30]

[85] It is up to the Appellant to prove that she had just cause. She has to prove this on a balance of probabilities. This means that she has to show that it is more likely than not that her only reasonable option was to quit.

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[29] Section 30 of the *Employment Insurance Act* (Act) explains this.
[30] See *Canada (Attorney General) v White*, 2011 FCA 190 at para 3; and section 29(c) of the Act.

[86] When I decide whether the Appellant had just cause, I have to look at all of the circumstances that existed when she quit. The law sets out some of the circumstances I have to look at.[31]

[87] After I decide which circumstances apply to the Appellant, she then has to show that she had no reasonable alternative to leaving at that time.[32]

The circumstances that existed when the Appellant quit

[88] The Appellant says that two of the circumstances set out in the law apply. Specifically, she says that she was being sexually harassed, and she had to leave to care for a child.

[89] The Appellant argued that sections 29(c)(i), and (v) of the Act applied to her when she voluntarily left her job.

- The Appellant said she experienced sexual harassment from her superiors who were in the position of chef. They regularly touched her and made inappropriate comments.
- She was yelled at regularly and demeaned by the chefs.
- She was beginning a full-time placement at school, and she could no longer work weekends because she needed to look after her child. She is a single parent.

[90] I find that the work environment was not ideal. But the real reason for her departure was that she had little time to work because she was starting a full-time placement. Her placement was an important and essential requirement to complete her diploma. While the pursuit of high education and retraining is commendable, the Appellant left her job voluntarily for personal reasons.

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[31] See section 29(c) of the Act.
[32] See section 29(c) of the Act.

The Appellant had reasonable alternatives

[91] I must now look at whether the Appellant had no reasonable alternative to leaving her job when she did.

[92] The Appellant says that she had no reasonable alternative because the workplace was intolerable with the harassment and toxic management. She needed time to look after her child. Otherwise she would have been away from her child seven days a week. She had only been given weekend shifts so that wasn't acceptable.

[93] The Commission disagrees and says that the Appellant could have continued working because she had already worked there for four years. It said she should have found another job before quitting. It said she could have escalated her concerns to management, a doctor, or to the union. It said she could have requested to a leave of absence.

[94] I find that the Appellant didn't seek out all reasonable alternatives. I agree with the Commission that the Appellant had alternatives that she didn't use that could have changed the workplace for her. It is clear that the Appellant chose to quit her job because she chose the placement opportunity which was required to complete her diploma. The placement offered her valuable networks and possible job opportunities in her new field of expertise.

[95] Considering the circumstances that existed when the Appellant quit, the Appellant had reasonable alternatives to leaving when she did.

[96] This means the Appellant didn't have just cause for leaving her job.

Conclusion

[97] I find that the Commission used its discretion judicially under sections 52 and 153.161 of the EI Act when it disentitled the Appellant for being unavailable for work.

[98] I find that the Appellant isn't disentitled between September 7, 2020, and March 13, 2021, because she wasn't receiving on claim during this period, she received no EI benefits.

[99] I find that the Appellant is not disentitled from March 13, 2021, to August 26, 2021.

[100] I find that the Appellant is disentitled from August 27, 2021, to October 6, 2021.

[101] I find that the Appellant voluntarily left her job without just cause on October 6, 2021.

[102] This means that the appeal is dismissed with modification. The claim is returned to the Commission to recalculate the overpayment.

Katherine Parker
Member, General Division—Employment Insurance Section