



Citation: *MG v Canada Employment Insurance Commission*, 2022 SST 1214

**Social Security Tribunal of Canada
General Division – Employment Insurance Section**

Decision

Appellant: M. G.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (455693) dated February 11, 2022 (issued by Service Canada)

Tribunal member: John Noonan

Type of hearing: Teleconference

Hearing date: May 31, 2022

Hearing participants: Appellant

Decision date: June 13, 2022

File number: GE-22-1029

Decision

[1] The appeal dismissed.

Overview

[2] The Appellant, M. G., a worker / student in, NL, was upon reconsideration by the Commission, notified that it was unable to pay him Employment Insurance sickness benefits from May 3, 2021 to August 20, 2021 because he was taking a training course on his own initiative and did not prove that he would have been available for work if he were not sick. In addition, he was informed that that benefits would not be paid effective September 27, 2021 because he was taking a training course on his own initiative and did not prove that he was available for work. The Appellant maintains that his doctor had taken him off work due to medical issues and he is still not able to work (GD3-34-35). The Tribunal must decide if the Appellant has proven his 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: Was the Appellant available for work?

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

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

Analysis

[4] The relevant legislative provisions are reproduced at GD-4.

[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 who is not available for work when he is taking a full-time course on his own initiative. To rebut this presumption, the Appellant must demonstrate that his main intention is to immediately accept suitable employment as evidenced by job search efforts, that he is prepared to make whatever arrangements may be required, or that he is prepared to abandon the course. He must demonstrate by his 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 he 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. He must continue to seek employment and must show that course requirements have not placed restrictions on his 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 his 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: Was the Appellant available for work?

[10] No.

[11] In this case, by the Appellant's statements and submissions, he was attending a full time program of studies in Sociology since May 3, 2021.

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

[13] He asserts that he was not available for work from May 2, 2021 through to August 21, 2021 due to being taken off work by his doctor for medical reasons. However Section 18(1)(b) of the Act dictates that in the case of sickness, the claimant must show that if not for the illness they would be available.

[14] He did receive sickness benefits during that period which resulted in an overpayment of \$7500.

[15] I must agree with the Commission when it cites "The Federal Court of Appeal confirmed the principle that sickness benefits are only payable where a claimant's own illness renders him or her incapable of work; and during a period where the claimant was available for work." **Canada (AG) v. X, A-479-94**

[16] The Appellant testified at his hearing that he was in school "on-line" each morning and had, when he returned to Corner Brook worked at Canadian Tire until illness forced hi to leave that employment.

[17] In this case the Appellant was in attendance at a full time course of studies during the sickness period therefore deemed not available for that reason.

[18] As per his submissions the Appellant is available upon completion of his daily course schedule as well as on weekends.

[19] Therefore I find the Appellant was not available for work from May 3, 2021 to August 20, 2021 because he was not able to establish that, if it were not for the illness, he would have been available for work (GD3-40 41). Additionally, he continued the program of studies effective September 27, 2021 where, again, he was unable to prove his availability.

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

[20] No.

[21] The Appellant stated on more than one occasion that he wished to complete his studies rather than find employment.

[22] He contends that he was not willing to drop his course but was interested in obtaining part time employment that would allow him to complete his studies.

[23] He has not been involved in a job search with the goal of obtaining full time employment.

[24] At his hearing he stated he was waiting for a medical specialist appointment regarding abdominal issues and was not involved in any job search activity as a result.

[25] The Appellant's lack of any job search activity since May 3, 2021 could not be considered a reasonable and customary job search as per section 9.001 of the Regulations.

[26] There is no evidence before me that the Appellant contacted prospective employers over the period involved looking for full time employment therefore his efforts cannot be considered a reasonable or customary job search.

[27] I find that the Appellant has, throughout the entire period of this process, not shown that he was making reasonable and customary efforts to obtain suitable employment.

[28] I find that these actions, or lack thereof, on the part of the Appellant do not show, effective May 3, 2021 through to August 20, 2021 and again as of September 27, 2021, a sincere desire to return to the labour market as soon as suitable employment is offered.

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

[29] Yes.

[30] The Appellant stated that his intention was to complete his course, and not to return to the workforce as soon as possible. And based on his lack of reasonable job search activity and the fact he has invested a lot of money into his program of studies, I find this to be consistent with the facts before me.

[31] He submitted that he was seeking part time employment that would accommodate his course schedule but was not willing to leave his studies until completion of his program.

[32] This condition combined with the Appellant's initial statement to Service Canada that he was only available for part time work outside his required course schedule must be seen as placing serious restrictions on his availability. **(Duquet 2008 FCA 313)**
(Gauthier 2006 FCA 40).

[33] At his hearing, the Appellant testified that he had finished his studies and was presently involved in a workplace placement as part of the completion requirements.

[34] I find that the Appellant in this case was not following a course of instruction approved by an authority designated by the Commission. He was taking the course as a result of his personal decision to attend this program and thus be more eligible for full time employment in his chosen field.

[35] If the claimant was not available for employment because of personal reasons, then it cannot be good cause to refuse suitable employment **(Bertrand A-613-81).**

[36] While this Member supports the Appellant's efforts to complete his education and find suitable employment as a result, I find that he has failed to present evidence of "exceptional circumstances" that would rebut the presumption of non-availability while attending a full time course. He is therefore not eligible to receive benefits.

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

[38] Regarding the Appellant's inquiry and statement at his hearing regarding that due to his financial status 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. The Commission's 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.

[39] 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. It is the Commission who holds the authority to reduce or write-off an overpayment.

[40] 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.

[41] 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.

[42] 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

[43] Neither the Tribunal nor the Commission have any discretion or authority to override clear statutory provisions and conditions imposed by the Act or the Regulations on the basis of fairness, compassion, financial or extenuating circumstances.

Conclusion

[44] I find that, having given due consideration to all of the circumstances, the Appellant has not successfully rebutted the assertions that he not able to establish that, if it were not for the illness, he would have been available for work from May 3, 2021 through to August 20, 2021 and that he was not available for work while attending a course of instruction effective September 27, 2021 and as such the appeal regarding both issues is dismissed.

John Noonan
Member, General Division – Employment Insurance Section