



Citation: *SC v Canada Employment Insurance Commission*, 2023 SST 2065

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

## Decision

**Appellant:** S. C.

**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** Canada Employment Insurance Commission reconsideration decision (584017) dated July 20, 2023 (issued by Service Canada)

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**Tribunal member:** John Noonan

**Type of hearing:** Teleconference

**Hearing date:** November 10, 2023

**Hearing participants:** Appellant  
Appellant's Representative / Father

**Decision date:** December 6, 2023

**File number:** GE-23-2245

## Decision

[1] The appeal dismissed.

## Overview

[2] The Appellant, S. C., a worker / student in, NL, was upon reconsideration by the Commission, notified that it was unable to pay him Employment Insurance benefits from March 8, 2021 to June 24, 2022 and from September 8, 2021 onward because he was taking a training course on his own initiative and has not proven his availability for work. The Appellant maintains that he was available for and actively seeking employment and provided two business names and contact information where he applied for work. 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 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] The Appellant attempted to apply for CERB benefits through CRA but was advised by an agent there to Apply through Service Canada.

[12] In this case, by the Appellant's statements, submissions and application, he was attending a full-time program of studies, High School, during the period in question.

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

[14] As per his submissions, the Appellant is only available around his course schedule and on weekends.

[15] He had initially stated he was available for work in the Avalon region, presumably the northeast Avalon, X's, X and area. However when questioned he said that due to the condition of the vehicle and Covid restrictions he focused on employment opportunities in his home town area.

[16] The Appellant completed his high school program and registered in a program of studies at the college level, Non Destructive Testing.

[17] The Appellant's focus was obviously to apply himself to his course of studies in an effort to become eligible for college entry.

[18] At his hearing the Appellant's witness, his father, testified that the family decided that if the Appellant needed to leave school to pursue full time employment then that would be the correct course of action.

[19] That being said the Appellant was still required to carry out a comprehensive job search while in receipt of benefits. The possibility of having to leave school is remote if no job applications were made on a regular basis.

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

[20] No.

[21] He now contends that he would accept any work.

[22] He indicated he applied for three positions during the period in question, one of which hired him. The other two were, in fact, not in his home area. The nearest Canadian Tire is in X and the nearest X's is in the X both requiring travel which he asserts he could not do.

[23] The Appellant's lack of any reasonable job search activity since his school term began could not be and is not considered a reasonable and customary job search as per section 9.001 of the Regulations.

[24] 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.

[25] The Appellant was understandably focused on his course, and not seeking employment.

[26] I find that these actions, or lack thereof, on the part of the Appellant do not show, during the period in question, 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?**

[27] Yes.

[28] The Appellant now states that he would abandon his course but was willing to accept full time employment in the evenings and on the weekends but, based on his lack of reasonable job search activity and the fact he and his family have invested time

and money into his program of studies, I find this to be inconsistent with the facts before me.

[29] He testified that his attendance was required about one hour per day due to Covid restrictions on in person attendance. He asserts the information given by the school was inaccurate.

[30] However, this does not relieve him from conducting a reasonable and comprehensive job even as the courts have ruled it seems futile to do so.

[31] He is available for work evenings plus Saturday and Sunday each week.

[32] The courts have ruled that Appellant's who are only available for work around their course schedule have not proven availability as per the Act and Regulations.

[33] The Appellant's initial statement to Service Canada that he was only available outside his required course schedule must be seen as placing serious restrictions on his availability. **(Duquet 2008 FCA 313) (Gauthier 2006 FCA 40).**

[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 and / or post secondary enrollment in the future.

[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 stress on the family this ordeal and the resulting overpayment has caused I can but offer the following.

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

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

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

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

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

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

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

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

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

[48] The Appellant here started his course of instruction with the full knowledge and implied consent of the Commission. The Commission paid benefits based on that knowledge and consent then waited over a full year to rescind approval and request the



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

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

[50] 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.

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

[52] 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.

[53] 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.

[54] 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 his request to write off the overpayment, he needs to do so through the Federal Court of Canada.

[55] 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 him financial hardship, she can call the Debt Management Call Centre of CRA at 1-866-864-5823. He may be able to make alternative repayment arrangements based on his individual financial circumstances.

## **Conclusion**

[56] I find that, having given due consideration to all of the circumstances, the Appellant has not successfully rebutted the assertion that he was not available for work while attending a full time program of studies and as such the appeal regarding availability is dismissed.

John Noonan

Member, General Division – Employment Insurance Section