Citation: *AG v Canada Employment Insurance Commission*, 2024 SST 1014

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

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

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (613166) dated October 31, 2023 (issued by Service Canada)

Tribunal member:	Ambrosia Varaschin
Type of hearing:	In person
Hearing date:	April 24, 2024
Hearing participants:	Appellant Appellant's Support Person Interpreter
Decision date:	May 29, 2024
File number:	GE-24-399

Decision

[1] The appeal is dismissed. The Tribunal disagrees with the Appellant.

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

Overview

[3] The Appellant originally applied for sickness benefits, before converting her claim to regular EI benefits. She was paid 15 weeks of sickness benefits from October 4, 2020, to January 16, 2021, and 32 weeks of regular benefits from February 21, 2021, to October 2, 2021.[1]

[4] The Canada Employment Insurance Commission (Commission) decided that the Appellant was disentitled from receiving Employment Insurance (EI) regular benefits as of February 21, 2021, because she wasn't available for work. A claimant has to be available for work to get EI regular benefits. Availability is an ongoing requirement. This means that a claimant has to be searching for a job.

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

[6] The Commission says that the Appellant has provided conflicting evidence and statements about her ability to work. So, she might not be available because she was incapable due to illness and/or injury.

[7] The Commission also says that even if the Appellant is capable of working at a suitable job, the Appellant is disentitled from benefits because she is unable to provide evidence of her customary efforts.

[8] The Appellant disagrees and states that the Commission's delay in reviewing her claim for benefits is unfair. She says that she was capable of work, but her health

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[1] See GD03-18 through 21.

conditions severely limited the options for suitable work. She says that she did look for work, but didn't keep many records because it was several years ago.

Issue

[9] Can the Commission reconsider its original decision?

[10] If the Commission is allowed to reconsider its original decision, I must decide if the Appellant was capable and available for work.

Analysis

Can the Commission retroactively review the Appellant's entitlement to EI?

[11] I find that the law gives the Commission the power to retroactively review the Appellant's entitlement to benefits. I also find that the Commission used this power judiciously because it respected the time limits described in the law.

[12] The Appellant argues that it is unfair that the Commission delayed until July 28, 2023, to review her entitlements to benefits she received in 2021. She says this has limited her ability to provide evidence of a job search and accurately recall facts and events.

[13] The *Employment Insurance Act* (EI Act) says the Commission **may** reconsider any claim for benefits within 36 months of them being paid, or 72 months if it is of the opinion that false or misleading statements were made.[2] This is called a discretionary power. The Commission must use this power fairly. In legal terms, this means the Commission must exercise its discretion judicially.[3]

[14] I must respect the Commission's discretionary power. Usually, this means that I can't change the Commission's decision even if I disagree with it. But, if the Commission didn't "exercise its discretion judicially" (in other words, make its decision

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[2] See section 52 of the EI Act.
[3] See *T-Giorgis v Canada (Attorney General),* 2024 FCA 47; *Puig v Canada (Attorney General),* 2024 FCA 48; and *Molchan v Canada (Attorney General)*, 2024 FCA 46.

fairly), then I can decide that the Commission doesn't have to power to reconsider its original decision.

[15] So, I asked the Commission to explain why it reconsidered its original decision, and how that decision was made judicially.

[16] To ensure a consistent and fair application of Section 52 of the EI Act, the Commission developed a *Reconsideration Policy*. It says that the Commission will only reconsider claims where:

- 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.[4]

[17] The Commission says that it reviewed the Appellant's entitlement to benefits because, on November 2, 2021, she told the Commission that she was not available for work from September 6, 2021, because she injured her arm.[5] Since the Appellant had said she was available for work and was already regular EI benefits for the period of September 5 to October 2, 2021, the Commission initiated an investigation.[6]

[18] The Appellant had exhausted her entitlement to sickness benefits on January 16, 2021. From February 21, 2021, to October 2, 2021, the Appellant answered, "yes" to the question, "Were you ready, willing and capable of working each day, Monday through Friday during each week of this report?" But, as a result of the investigation, the Commission decided that the Appellant made one or more false statements about being capable and available for work for each of her reports.[7]

[19] Since the Commission was of the opinion that benefits were paid as a result of a false or misleading statement, the Reconsideration Policy allowed it to review its

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[4] See 17.3.3 of the *Digest of Benefit Entitlement Principles* (Digest).
[5] See GD03-23.
[6] See GD16-1.
[7] See GD03-116.

previous entitlement decisions within the 72-month timeframe. A false or misleading statement can be intentional, negligent, or an honest mistake.

[20] The Commission was well within the timeframe to reconsider benefits paid between February 21 and October 2, 2021. The Commission communicated its decision that the Appellant wasn't available for work on July 28, 2023, and notified her of the overpayment on August 5, 2023.[8] Since the period in question begins on February 21, 2021, the Commission reviewed its original decision within 31 months, which is well under the 72 months allowed in the EI Act.

[21] So, the Commission has the power to review the Appellant's entitlement to benefits.

Availability

[22] 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. So, she has to meet the criteria of both sections to get benefits.

[23] First, the EI Act says that a claimant has to prove that they are making "reasonable and customary efforts" to find a suitable job.[9] The *Employment Insurance Regulations* (Regulations) give criteria that help explain what "reasonable and customary efforts" mean.[10] I will look at those criteria below.

[24] 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.[11] Case law gives three things a claimant has to prove to show that they are "available" in this sense.[12] I will look at those factors below.

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[8] See GD03-118 through 120.
[9] See section 50(8) of the *Employment Insurance Act* (Act).
[10] See section 9.001 of the *Employment Insurance Regulations* (Regulations).
[11] See section 18(1)(a) of the Act.
[12] See *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96.

[25] 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.

[26] I will now consider these two sections myself to determine whether the Appellant was available for work.

Reasonable and customary efforts to find a job

[27] The law sets out criteria for me to consider when deciding whether the Appellant's efforts were reasonable and customary.[13] 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.

[28] 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 activities are the following:[14]

- assessing employment opportunities
- preparing a résumé or cover letter
- registering for job-search tools or with online job banks
- networking
- contacting employers who may be hiring

[29] The Commission says that the Appellant hasn't proven she was looking for a job. The law says that claimants need to be able to prove they were making "reasonable and customary efforts" to find work.[15]

[30] The Appellant disagrees. The Appellant says that she was looking for work, but the COVID-19 pandemic greatly restricted how many suitable jobs were available for her. The Appellant says she is limited to lifting less than 5 lbs because of arm injuries. The Appellant also says English is her second language, so she can only do basic office work like data entry and filing. She says that there were very few retail or food service

[13] See section 9.001 of the Regulations.
[14] See section 9.001 of the Regulations.
[15] See subsection 50(8) of the EI Act.

jobs available in 2021 because of the pandemic, and the ones she found required her to lift much more than she could. She says she didn't find any basic office jobs to apply for.

[31] As evidence of her job search, the Appellant provided:

- A screenshot showing her resume was updated on August 29, 2021.[16]
- A resume.[17]
- Screenshots taken from her email inbox, showing Indeed job alerts from February 21 to October 1, 2021.[18]
- A screenshot taken from her email inbox, showing she emailed her resume to an invoice clerk position on February 6 (no year).[19]

[32] I can't accept the screenshot showing an application for an invoice clerk position because it doesn't indicate to whom the email was sent, and the year is absent. Given the format of the rest of the included emails, it is more likely than not that the email was sent on February 6, 2024, rather than during the applicable time period. Regardless, without a full date and a recipient, I can't accept this as proof of a job application made between February 21 and October 2, 2021.

[33] I am not persuaded that email notifications are sufficient evidence for the purposes of proving the Appellant has met the standard set by section 50(8) of the EI Act. Even though registering for job alerts is one of the criteria considered by the EI Regulations when assessing a claimant's job search, the Regulations also require that the efforts are sustained and directed. Simply receiving email alerts and reading them is passive behaviour that requires little to no effort. There is no evidence that the Appellant acted on any of the emails or contacted any of those employers.

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[16] See GD14-1.
[17] See GD14-2 to GD14-4.
[18] See GD15-1 to GD15-3.
[19] See GD15-2.

[34] Interestingly, the Appellant's resume states that she has:

- A diploma in Office Administration.
- "Strong verbal and listening communication skills."
- Over 10 years in office administration
- "Quick and accurate data entry skills"
- The ability to "use word processing, spreadsheet, email, and other information management tools."
- And, in her position with the "Trend Up Store" she was responsible for "promoting and advertising products in social media and in store."[20]

This directly contradicts her testimony where she indicated that her English skills were limited to transcribing information (like data entry), and that she can't handle anything past basic administrative work.

[35] I find that the Appellant hasn't proven that her efforts to find a job were reasonable and customary. Claimants have the burden of proving they are making reasonable and customary efforts to find work.[21] The EI Act clearly states they must provide evidence of those efforts.[22]

[36] The Federal Court of Appeal has confirmed that claimants who argue that they have made reasonable efforts to find suitable employment must be able to provide particular details regarding those efforts. This includes the name of the company or department, the job title, the date it was applied for, and who they spoke to.[23]

[37] So, the Appellant hasn't proven she was making reasonable and customary efforts to find work.

[38] The Appellant inquired at the hearing if she would be able to "make up" the time she needed to be documenting and actively engaging in a job search. She says she

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[20] See GD14-2.
[21] See *Canada (Attorney General) v Renaud*, 2007 FCA 328; *Attorney General (Canada) v Floyd, Ellyn,* A-168-93; and *Campbell v Attorney General (Canada),* A-706-84.
[22] See subsections 49(1)(b) and 50(8) of the EI Act.
[23] See *Oh v Canada (Attorney General),* 2022 FCA 175.

would be willing to look for work now, and submit reports, in place of the period of time in question.

[39] The Appellant can't "make up" for her job search efforts, or lack thereof, after the fact. The law is unequivocally clear that claimants must be entitled for benefits at the time they receive them. And, part of being entitled to benefits requires claimants to prove they are capable and available for work, but unable to find a suitable job, for each working day.

Capable of and available for work

[40] I have to consider whether the Appellant was **capable of** and **available** for work but unable to find a suitable job.[24]

[41] In this case, the Appellant's capability of work is in question. So, I will start by examining whether she was capable for work from February 21, 2021.

– **Was the Appellant capable of work?**

[42] The Appellant **wasn't** capable of work from February 21 through October 2, 2021. In fact, the Appellant told the Commission that she still wasn't capable of work on October 31, 2023.[25]

[43] If you are capable of work, it means you can perform the functions of your regular or usual employment, or some other suitable employment.[26]

[44] The Appellant's usual employment was Office Assistant/School Assistant with the Calgary Board of Education and Sales Associate/Cashier at a retail store.[27]

[45] The Appellant requested, and received, an extended leave of absence from the Calgary Board of Education on September 14, 2020, for medical reasons. Her medical note, dated September 15, 2020, states that she has "complex medical issues," which

[24] See section 18(1)(a) of the Act.
[25] See GD03-136.
[26] See *Canada (Attorney General) v Leblanc,* 2010 FCA 60.
[27] See GD14-2.

include severe anxiety, and she is unable to work because she has “fearful anxiety,” “severe stress,” and is unable to focus or concentrate.[28]

[46] The Appellant was supposed to return to work on February 28, 2021. On January 27, 2021, the Appellant requested an extension to her leave from March 1 through June 29, 2021, because her mental health condition had remained unchanged. Since the school was closed over the summer break, this request meant that her return-to-work date would be the start of the next school year, at the end of August or beginning of September 2021.[29] The Appellant didn’t return to work, despite her position being available to her, in September. So, the Calgary Board of Education removed her from her position because she had been absent for over 12 months.[30]

[47] The Appellant provided a medical note that extended her medical leave until October at the earliest. On September 8, 2021, the Appellant was assessed for her fitness to work by a nurse practitioner. The note states that the Appellant is “to extend her medically directed leave of absence” until October 7, 2021. It also states that she would need to be “reassessed before medically cleared to return to full active duties.”[31]

[48] No evidence has been submitted that shows the Appellant has been cleared to resume working by a physician or nurse practitioner.

[49] The Appellant submitted a chronology of an arm injury that she testified was so severe she couldn’t even hold a knife to chop food. She says she injured herself on April 22, 2021, attended physiotherapy on June 16, 2021, June 24, 2021, July 15, 2021, July 22, 2021, and July 29, 2021. She says that she only qualified for 5 physiotherapy treatments at a time, so she restarted her treatments on December 20, 2021.[32]

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[28] See GD03-23 through 24.
[29] See GD03-133: “Did she indicate on that paperwork why she was requesting an additional period of leave? Phil advised she reference her medical note of September 2020.”
[30] See GD03-133: “Her position was not backfilled by anyone that prevented her from returning to work? No... the position was backfilled, but not indefinitely...had she been ready to return, she could have. Phil further added that in September 2021 she was removed from her position (not fired) as she had been absent from her position for more than 12 months.”
[31] See GD03-131.
[32] See GD14-5.

[50] The Appellant has admitted, multiple times, that her recollection of events and details is muddy at best. For example, the Appellant couldn't remember if the school she worked at was open or closed during 2021. And, from the outset of the Commission's investigation through to the hearing, the Appellant was unable to recall the date she injured her arm. She initially said she injured it before her leave of absence, then before the school term started in 2021, then in the summer, and at the hearing she testified she believed it was sometime in July. Then she submitted documents that stated she injured it in April 2021.

[51] The Appellant also told the Commission that "she needed to write it down so that she could keep everything straight," and that she needed to "take some time to try to remember what happened."[33] The Appellant required reminding of the dates she received sickness benefits, and stated multiple times that she was unsure of details or dates during the time she received regular benefits while speaking with the Commission.[34] The Appellant was similarly unable to recall key details and dates throughout her testimony at the hearing.

[52] The Appellant has made multiple contradictory statements, and statements that are contradicted by evidence or other statements. For example, she stated she injured her arm before the 2021 school year and the Calgary Board of Education would not take her back,[35] and that they "did not get in touch with her to find out when she could return to work following her telling them she could not work in Sept 2020 due to depression."[36] However, she clearly contacted the Calgary Board of Education to extend her leave of absence in January 2021. It then appears that she chose not to return to her position or request another extension of her leave of absence, despite having a medical note issued that she could not return to work.[37]

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[33] See GD03-125 and 126.
[34] See GD03-127,
[35] See GD03-23.
[36] See GD03-127.
[37] See GD03-133.

[53] The Appellant also told the Commission that she applied "for many retail jobs, restaurants, clothing stores, etc. and she handed out resumes in the local mall."[38] But, at the hearing, the Appellant testified that she didn't apply to many jobs, because COVID-19 meant most retail locations and restaurants were closed. She testified that she saw a few cashier jobs, but she didn't apply for them because of her lifting limitations, and saw many office jobs but didn't apply to them because of her language barrier or because she couldn't type well.

[54] Since the Appellant's recollections vary significantly between her own statements, and that of others, I can't give them very much weight. I must therefore rely on the medical evidence provided, and the statements from her employer's human resources officer for accurate dates and details.

[55] I find the Appellant was not capable of work for illness or injury as of September 14, 2020. The Appellant was on a medical leave of absence from her employer due to severe anxiety from this date until she was removed from her position in September 2021, and she provided a medical note that she continued to be incapable of work from September 8, 2021, until she was medically cleared to return. There is no evidence that the Appellant was medically cleared to return to work, and the Appellant told the Commission that she was still not well enough to work on October 31, 2023.

Was the Appellant available for work?

[56] No. The Appellant was not available for work within the meaning of the law. From February 21, 2021, I find that she would **not** have been **otherwise available** for work if not for her illness.[39]

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[38] See GD03-113.

[39] Being otherwise available for work if not for illness, injury or quarantine, is the requirement set out under section 18(1)(b) of the EI Act. Although the Commission didn't specifically reference this section when deciding if the Appellant was available for work, I take guidance from the Federal Court of Appeal in *Canada (Attorney General) v Caughlin,* A-1168-84. The Court said that Appellants who are proven capable of working after applying for sickness benefits should have their availability viewed from the lens of someone who applied for regular benefits. In other words, they must meet the conditions under section 18(1)(a) rather than 18(1)(b) and the decision maker should not be blind to that. As the Supreme Court of Canada said in *Abrahams v Attorney General of Canada*, [1983] 1 SCR 2 "the overall intent of the Act is to make benefits available to the unemployed." The Court said this meant Appellants must not be denied

[57] 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:[40]

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.

[58] When I consider each of these factors, I have to look at the Appellant's attitude and conduct.[41]

– **Wanting to go back to work**

[59] The Appellant hasn't shown that she wanted to go back to work as soon as a suitable job was available.

[60] The Appellant stopped working for health reasons, but hasn't provided any evidence of a treatment plan or efforts to work towards returning to the workforce.

[61] The Appellant has testified that her job search for suitable jobs (due to her lifting limitation) is severely limited by her language skills and typing skills, but she has not made any effort to improve either of these issues to improve her employability.

[62] The Appellant was not dismissed by the Calgary Board of Education, only removed from her position, and she has not tried to contact her employer to see if she could return to work in some capacity or in a more clerical role.

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their rights because they "check the wrong box in a form." Even though this case describes the opposite situation as the Appellant's, I find the principle remains the same. The Appellant applied for regular EI benefits, but if he was not capable of working, then I must view his availability from the lens of someone who applied for sickness benefits.

[40] 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.

[41] 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.

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

[63] The Appellant hasn't made enough effort to find a suitable job.

[64] 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.[42]

[65] The Appellant's efforts to find a new job included asking several neighbours and people she knew if there were available jobs for her, and updating her resume. She also registered for Indeed job alerts. I explained these reasons above when looking at whether the Appellant has made reasonable and customary efforts to find a job.

[66] Those efforts weren't enough to meet the requirements of this second factor because they didn't demonstrate an ongoing and directed effort at finding work. At best the Appellant has demonstrated an occasional effort to actively seek work, underscored by the passive effort of reading Indeed job alerts in her email.

[67] Availability is an ongoing requirement. The EI Act makes clear that the Appellant needs to continue to make customary and reasonable efforts to find employment, even when a search seems futile. The Courts have repeatedly confirmed the requirement to actively look for employment, even if it seems like a useless endeavour.

[68] "The Act is quite clear that to be eligible for benefits a claimant must establish his availability for work, and that requires a job search...No matter how little chance of success a claimant may feel a job search would have, the Act is designed so that only those who are genuinely unemployed and actively seeking work will receive benefits."[43] It has also been held that even when a claimant has significant hurdles to finding suitable employment, they need to vigorously look for work.[44]

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[42] 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.
[43] See *Canada (Attorney General) v Cornelissen-O'Neil, A-652-93*.
[44] See CUB 12350A: "While it can be admitted that suitable employment for the claimant would be difficult to find in view of the economic conditions in his area and his age, it has also, unfortunately for him, been frequently held that the mere fact that employment is difficult to find is not a justification for failure to seek it vigorously, and in fact the more difficult it is to find, the greater must be the effort to seek it."

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

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

[70] The Appellant's limitations are either related to medical conditions and injury, or to a lack of training. Those are not personal conditions because they are more or less beyond her control.

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

[71] 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 if not for her illness and/or injury.

Conclusion

[72] The Appellant hasn't shown that she was available for work within the meaning of the law. Because of this, I find that the Appellant can't receive EI benefits.

[73] The Appellant requested a write off of her overpayment at the hearing. As I explained to her, I do not have the authority to write off an overpayment, but the Appellant can request that the Commission consider writing off her debt.[45] I understand that the Commission has already refused her request and the Appellant has lodged an appeal at the Federal Court. The Federal Court is the proper place to address the matter of a write-off at this stage.

[74] The Appellant also requested that her overpayment be deferred until she was in receipt of the Guaranteed Income Supplement and Canadian Pension Plan because she currently has no income. As with the write off request, I do not have the authority to make this decision. The Appellant will need to discuss a payment plan or potential write off of a debt to the crown for financial hardship through the Canada Revenue Agency.

[45] See sections 112.1 of the EI Act.

[75] I understand that this is not the decision the Appellant was seeking, and that she has significant financial hardships as a result. However, the legislation cannot be interpreted "in a manner contrary to its plain meaning,"[46] and, the law "does not allow any discrepancy and provides no discretion" regardless of individual circumstances.[47]

[76] I encourage the Appellant to inquire as to her entitlement to Canada Pension Plan Disability and the new Canada Disability Benefit since she appears to be unable to work due to illness.

[77] This means that the appeal is dismissed.

Ambrosia Varaschin
Member, General Division – Employment Insurance Section

[46] See *Attorney General of Canada v Knee*, 2011 FCA 301.
[47] See *Attorney General of Canada v Lévesque*, 2001 FCA 304.