Citation: *SC v Canada Employment Insurance Commission*, 2024 SST 1046

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	S. C.
Representative:	S. S.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (584017) dated July 30, 2023 (issued by Service Canada)

Tribunal member:	Gary Conrad
Type of hearing:	Teleconference
Hearing date:	August 19, 2024
Hearing participant:	Appellant
Decision date:	August 29, 2024
File number:	GE-24-2335

Decision

[1] The appeal is allowed.

[2] The Canada Employment Insurance Commission (Commission) can go back and review the Appellant's claim. They also made their decision to review the Appellant's claim properly.

[3] The Appellant has shown that he is available for work for all the periods of disentitlement. This means that the Appellant should not be disentitled from benefits for that reason.

Overview

[4] The Appellant was laid off from his job at a restaurant in March 2021. He applied for, and was paid, EI benefits.

[5] During the period of time he was receiving EI benefits he was also attending high school.

[6] In February 2023 the Canada Employment Insurance Commission (Commission) finished a review of the Appellant's March 2021 claim. The Commission decided that they were not able to pay the Appellant benefits because he was not available for work. They say he was not making sufficient efforts to find work and his school was overly limiting his chances to return to the labour market.

[7] The Appellant says that he was available for work, as he was working while attending high school.

Matter I have to consider first

50(8) Disentitlement

[8] In their submissions the Commission states they disentitled the Appellant under subsection 50(8) of the *Employment Insurance Act* (Act). Subsection 50(8) of the Act

relates to a person failing to prove to the Commission that they were/are making reasonable and customary efforts to find suitable employment.

[9] In looking through the evidence, I do not see any requests from the Commission to the Appellant to prove his reasonable and customary efforts, or any explanations from the Commission to the Appellant about what kind of proof he would need to provide to prove his reasonable and customary efforts.

[10] While the Commission and Appellant did discuss his job search efforts, I find the reasoning in *TM v Canada Employment Insurance Commission*, 2021 SST 11 persuasive, in that it is not enough for the Commission to discuss job search efforts with the Appellant, instead they must specifically ask for proof from the Appellant and explain to him what kind of proof would meet a “reasonable and customary” standard.

[11] I also do not see any discussion about reasonable and customary efforts during the reconsideration process or explicit mention of disentitling the Appellant under section 50(8) of the Act, or anything about the Appellant’s lack of reasonable and customary efforts, in the reconsideration decision.

[12] Based on the lack of evidence the Commission asked the Appellant to prove his reasonable and customary efforts to find suitable employment under subsection 50(8) of the Act, the Commission did not disentitle the Appellant under subsection 50(8) of the Act. Therefore, it is not something I need to consider.

Issues

[13] Can the Commission go back and review the Appellant’s claim?

[14] If so, did they do it properly?

[15] Is the Appellant available for work?

Analysis

Reviewing the claim

[16] The Commission may review a claim for benefits, for any reason, within 36 months after benefits have been paid.[1]

[17] The period of benefits under review are from March 8, 2021, to June 24, 2021, and from September 8, 2021, onward.[2]

[18] The decision made by the Commission regarding their review of the Appellant's benefits is dated February 9, 2023.[3]

[19] I find the that the Commission is within the 36-month time limit to review a claim for any reason, so they are able to review the Appellant's claim.

Properness of the review

[20] Just because the Commission can go back and do a review, does not mean that is the end of the analysis. They must also make their decision to do a review properly. In the case of EI, properly means "judicially".

[21] For their decision to have been made "judicially" the decision maker (here, the Commission) cannot have acted in bad faith or for an improper purpose or motive, took into account an irrelevant factor or ignored a relevant factor, or acted in a discriminatory manner. Any discretionary decision that is not made "judicially" should be set aside.[4]

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[1] Section 52(1) of the *Employment Insurance Act*
[2] GD03-39 to 41
[3] GD03-39 to 41
[4] *Canada (Attorney General) v Purcell,* 1 FCR 644

Bad faith

[22] The Appellant says the Commission acted in bad faith as the first phone call he received from them was threatening, telling him he was going to owe the Commission a large amount of money.

[23] The Appellant says he was a minor at that time and the Commission should not have spoken to him without a guardian present.

[24] He says the Commission also failed to consider that he was told by the Commission's own employees to apply for Emergency Response Benefits (ERB), which he did, so they cannot say he did something wrong when he was just following their directions.

[25] Bad faith is a legal term which means an intentional dishonest act by not fulfilling some legal obligation or purposely misleading someone. I find the Commission did not do either of those things.

[26] I find that a phone call telling the Appellant he owes money would have happened after the investigation was already complete, since the Commission could not know if the Appellant owes money until after the investigation is done. That means this factor does not go towards the Commission's decision to go back and review the claim.

[27] The issue of the Appellant talking to the Commission without a guardian is also not relevant to the Commission's decision to go back and review the claim since, again, that call was part of the investigation process according to the Appellant, which would come after the decision to go back was already made.

[28] The fact the Appellant may have been told to apply for ERB at some point is also not relevant since this appeal is not about ERB.

Improper purpose or motive

[29] The Appellant says the Commission did act for an improper purpose or motive because they decided he was not available due to their belief he could not work a full-time job when going to school, yet he as working nearly full-time hours.

[30] I find the Commission did not act for an improper purpose or motive. The evidence supports the Commission decided to review the Appellant's claim because he had informed them in was in school while collecting EI benefits.

[31] The Appellant's schooling could impact his entitlement to benefits. The Commission choosing to review the Appellant's claim to determine his availability because he was in school while getting EI, is not the Commission acting for an improper purpose or motive. It is the Commission acting in their capacity of administrating the EI program to try and ensure that only the people who meet the requirements to get paid benefits receive EI.

Ignore a relevant factor

[32] The Appellant says the Commission ignored a relevant factor when they made their decision to review his claim.

[33] The Appellant says the Commission ignored the fact that as a family they had decided the Appellant would leave his school if necessary for a full-time job.

[34] I find the Commission did not ignore a relevant factor. The above factor is not relevant to their decision to review the Appellant's claim; it is relevant to the decision of whether the Appellant is actually available.

[35] What I am looking at here is not the decision on whether the Appellant was available, but whether the Commission acted judicially when they decided to **review** his claim.

Consider irrelevant factor

[36] The Appellant says the Commission considered an irrelevant factor. He says they kept going on about how many hours he had to spend in school, which was irrelevant, as with COVID going on, even some teachers were not showing up for work; school was not like it was before or after COVID.

[37] I find that this factor goes towards the decision of whether the Appellant was actually available, not the Commission's decision to review the Appellant's claim.

[38] I find that the evidence supports the Commission decided to review the Appellant's claim because he had informed them in was in school while collecting EI benefits. This is not an irrelevant factor to consider when making their decision to go back and review the Appellant's claim since the Appellant's schooling could impact his entitlement to benefits.

Discriminate against

[39] The Appellant says he does feel the Commission discriminated against him as there are a lot of people who get EI for doing nothing, yet he worked very hard to earn all his EI hours and paid into the system.

[40] I find the Commission did not discriminate against the Appellant. There is no evidence they chose to review his claim because of any specific characteristic, such as his age, or race.

Did the Commission act judicially?

[41] I find the Commission did act judicially when they made their decision to go back and review the Appellant's claim as they did not act in bad faith, or for an improper purpose or motive; did not take into account an irrelevant factor or ignore a relevant factor; and did not act in a discriminatory manner.

[42] This means I cannot interfere in their decision to go back and review the Appellant's claim.

[43] In other words, I cannot change their decision to review the claim, but I can, and will, make a decision on whether the Appellant was available.

Presumption that students are not available

[44] The Appellant was a student. The Federal Court of Appeal has said that claimants who are taking training full-time are presumed to be unavailable for work.[5] This is called "presumption of non-availability." It means I can suppose that students aren't available for work when the evidence shows that they are taking training full-time.

[45] So, the first thing I need to determine is if the Appellant was in full-time training.

Full-time student

[46] The Appellant says that due to COVID, in grade 11, he was doing his schooling all online. In grade 12 he started off at half weeks in-person and then went back to full weeks in-person.

[47] He says that the online schooling required him to do nothing other than log in, so he could even be logged in to school while at work and just leave the computer on the table.

[48] The Commission argues that the Appellant said on the training questionnaire he completed that he was in class from 9:00 AM to 3:00 PM. They say this means he was a full-time student.

[49] The Appellant's principle told the Commission that students did switch to online learning, but attendance was still taken like any regular class and in grade 12 the Appellant would have been going to school Monday to Friday 9:00 AM to 3:00 PM.

[50] I find the Appellant was a full-time student. I find the Appellant's classes running from Monday to Friday from 9:00 AM to 3:00 PM represents 30 hours of class time a week, which is full-time hours.

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[5] See *Canada (Attorney General) v Cyrenne*, 2010 FCA 349.

[51] However, it is possible to rebut the presumption that a full-time student is unavailable.

[52] Rebutting the presumption of unavailability is a factual determination that requires a contextual analysis.[6] Fact patterns where the presumption has been successfully rebutted include circumstances where an appellant indicated a willingness to give up their studies to accept employment or where an appellant has a history of being regularly employed while attending school and is searching for employment at hours similar to those formerly worked. Other considerations might be relevant, such as the ability of an appellant to follow classes online at a time of their choice.[7]

[53] I find the Appellant has rebutted the presumption of unavailability due to the fact he was working while attending school for almost the entire period of the disentitlements, so he has a history of being regularly employed while attending school. I would note the Federal Court of Appeal (FCA) has said there is no need for the employment to have been full-time.[8]

[54] So, while the Appellant is not presumed to be unavailable, I still must determine whether he is actually available.

Capable of and available for work

[55] Case law sets out three factors for me to consider when deciding whether the Appellant is capable of and available for work but unable to find a suitable job. The Appellant has to prove the following three things:[9]

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

b) He was making efforts to find a suitable job.

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[6] *Page v Canada (Attorney General)*, 2023 FCA 169 at paras 68 and 69
[7] *Page v Canada (Attorney General)*, 2023 FCA 169 at para 69
[8] *Page v Canada (Attorney General)*, 2023 FCA 169 at para 62
[9] 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.

c) He did not set personal conditions that might have unduly (in other words, overly) limited his chances of going back to work.

[56] When I consider each of these factors, I have to look at the Appellant's attitude and conduct[10] for all the periods of disentitlement (March 8, 2021, to June 24, 2021, and from September 8, 2021, onward).[11]

– **Wanting to go back to work**

[57] The Appellant has shown that he wants to work for all the periods of disentitlement.

[58] I find as such because the Appellant was working through the periods of the disentitlement at a local restaurant. I imagine if someone had no interest in working, they would not accept work.

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

[59] The Commission says the Appellant was not making enough efforts to find work since he only had three applications for work over the entire period of his claim.

[60] They say there was a myriad of jobs available that he did not apply for.[12]

[61] The Appellant says that he was laid off in March 2021, and then started working again in May 2021.[13] He says he kept working for his employer all the way to September 2022.[14]

[62] He says the Commission saying that there were hundreds of jobs back at the time he was on claim proves nothing. He says they are looking back in time but during the time of the disentitlements almost no one was hiring due to COVID lockdowns and the associated slowdown in the economy.

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[10] 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.
[11] GD03-39 to 41
[12] GD03-35
[13] GD03-23
[14] GD03-24

[63] I find the Appellant efforts to find work were sufficient, as he did find a job, since he was rehired in May 2021.

[64] The Appellant was laid off in March 2021, and was recalled in May 2021.[15] I find he did make some efforts to find work, as even the Commission accepts he submitted three applications, but he was also waiting to see if he would be recalled.

[65] The FCA has said that it is reasonable to allow a claimant a reasonable opportunity to wait to be recalled,[16] so even though the Appellant was not just waiting, as he did look for other work, even if he had not, that would not have been a problem since it was just a two-month waiting period.

[66] The Appellant made efforts to find a job, and after two months, he regained his old job back. This shows his efforts were sufficient.

[67] Further, I find there was no need for the Appellant to try and find another job.

[68] The Appellant had a job, and his hours were limited by the business of his employer which was negatively impacted by COVID, not anything the Appellant did.

[69] Finally, there is nothing in the law that says the Appellant must work-full time hours or continuously try and obtain enough part-time jobs to add up to full time hours to be considered available.

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

[70] I find the Appellant did not have a personal condition that would have overly limited his chances of returning to the labour market.

[71] It is true the Appellant had schooling in the morning and afternoon so could not have worked a job during those hours, but I find that is not an overly limiting condition for three reasons.

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[15] GD03-23
[16] *Page v Canada (Attorney General)*, 2023 FCA 169 at para 82.

[72] One, the FCA has said there is no bright line rule that full-time students are disentitled from EI benefits if they are required to attend classes full time during weekday hours, Monday to Friday.[17]

[73] Two, the Appellant was working all throughout the period of the disentitlements while attending school.[18] His job started in the late afternoon and ran late into the evening. The fact he was able to secure and hold onto a job for the almost the entire period of the disentitlements (barring a brief interruption due to COVID) shows that his school was not overly limiting his chances of returning to the job market.

[74] Three, it was not the Appellant's school that resulted in him being laid off in March 2021, or his lower number of work hours for a period of time. All of that came about due to the COVID pandemic and the associated lockdowns and the resulting impact on the economy.[19]

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

[75] Based on my findings on the three factors, I find that the Appellant has shown that he was capable of and available for work and unable to find a suitable job.

Conclusion

[76] The appeal is allowed.

[77] The Commission can go back and review the Appellant's claim and they made their decision to review the Appellant's claim properly.

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[17] *Page v Canada (Attorney General)*, 2023 FCA 169 at para 49 and 56.
[18] The Appellant was laid off in March 2021, returned in May 2021 and worked continuously until September 2022. See GD03-23 and 24
[19] I can take judicial notice of facts only where they fall into one of two categories. They must be either (1) "so notorious or generally accepted as not to be the subject of debate among reasonable persons" or (2) "capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy". *R v Spence*, 2005 SCC 71 at para 53, quoting *R v Find*, 2001 SCC 32 at para 48. The fact that the COVID pandemic and lockdowns had a negative effect on the economy is not only capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy but is something no reasonable person would debate.

[78] The Appellant has shown that he is available for work for all the periods of disentitlement.

[79] This means that the Appellant should not be disentitled from benefits for that reason.

Gary Conrad
Member, General Division – Employment Insurance Section