Citation: *AS v Canada Employment Insurance Commission*, 2024 SST 1369

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

# Decision

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| **Appellant:** | A. S. |
| **Respondent:** | Canada Employment Insurance Commission |

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| **Decision under appeal:** | Canada Employment Insurance Commission reconsideration decision (661174) dated June 7, 2024 (issued by Service Canada) |

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| **Tribunal member:** | Katherine Parker |
| **Type of hearing:** | In person |
| **Hearing date:** | July 23, 2024 |
| **Hearing participants:** | Appellant<br>Appellant's witness |
| **Decision date:** | August 1, 2024 |
| **File number:** | GE-24-2311 |

# Decision

[1] The appeal is allowed. The General Division agrees with the Appellant. The debt is cancelled.

[2] The Commission didn't have the authority to review this claim because it didn't do so within the timeframe required by law.

[3] The Commission didn't act judicially when it reviewed this claim.

[4] The Appellant has shown that she didn't quit her job. This means she isn't disqualified from receiving Employment Insurance (EI) benefits.

[5] The Appellant has shown that she was available for work while in school. This means that she isn't disentitled from receiving Employment Insurance (EI) benefits. So, the Appellant may be entitled to benefits.

[6] The Commission may have made mistakes in reporting the actual earnings for the weeks May 2, 2021, to August 22, 2021. There is a discrepancy in the reports it provided. This will have to be corrected by the Commission.

# Overview

### – The Commission's decisions

[7] DISQUALIFICATION #1: The Commission reviewed the Appellant's claim and imposed an indefinite disqualification effective November 22, 2020, because it said she voluntarily left her employment without just cause on August 17, 2020. So it wasn't able to pay her benefits.

[8] DISENTITLEMENT: The Commission imposed a disentitlement from November 21, 2020, to April 30, 2021, for failing to prove her availability for work while attending school.

[9] DISQUALIFICATION #2: It imposed another indefinite disqualification effective August 22, 2021, also for having voluntarily left her employment without just cause on August 27, 2021.

[10] ALLEGED FALSE STATEMENTS AND CLAIMS: The Commission said it reviewed this claim because it believed the Appellant made false statements about quitting on August 17, 2020, and that she knowingly misrepresented her earnings for the period of May 2, 2021, to August 22, 2021.[1]

[11] EARNINGS: The Commission provided corrected earnings for the weeks from May 2, 2021, to August 22, 2021. But it may have made mistakes.

[12] DEBT OWING: All EI benefits that were paid between November 22, 2020, and August 29, 2021, were clawed back, and the result is a debt owing of $14,726.[2]

# Matter I have to consider first

## The Commission was invited to provide additional submissions

[13] The Commission didn't attend the hearing. At the hearing, an issue was added about the Commission's authority to go back and review this claim. The Commission was given an opportunity to respond and provided additional submissions in GD8.

[14] The Commission issued a Notice of Debt in the amount of $14,726. However, it didn't provide a breakdown of how it calculated this overpayment. I requested this information, and it was provided in GD8.

# Issues

– **Did the Commission act judicially**

[15] Did the Commission have the authority to review its decision?

[1] See GD8.
[2] See GD8-12.

[16] Did the Commission act judicially when it decided to reconsider the Appellant's claim and assess an overpayment?

– **Voluntary leaving**

[17] Is the Appellant disqualified from receiving EI benefits because she voluntarily left her job without just cause?

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

– **Availability while in school**

[19] Was the Appellant available for work while in school?

– **Earnings**

[20] Did the Commission allocate the earnings reported correctly?

# Analysis

## Did the Commission have the authority to review its decision

– **Did the Commission act judicially**

[21] The Commission has the authority to review a decision after it was made. It has this discretion, but it must act judicially.[3] This means it has to make the decision in good faith and not ignore any relevant facts.

[22] The Commission has to exercise its discretion within 36 months of a claim, or 72 months if it suspects the claimant made false statements.

[23] In this claim, there is a discrepancy in reported earnings, but the earnings were reported[4]. The Commission argues that it had 72 months to review this claim because it

[3] See section 52 of the Act.
[4] See GD3-76 to GD3-148 for the Commission's evidence that the Appellant reported her earnings.

said the Appellant knowingly made false statements about her earnings beginning the week of May 2, 2021.[5]

[24] However, the Commission it reversed its decision about false claims, so the Appellant didn't knowingly make false statements.[6] I agree with the Commission on this point for the reasons below.

[25] I reviewed the claim reports made for the weeks May 2, 2021, and August 22, 2021, that the Commission provided on GD3-149 t0 GD3-150. The Appellant said she made rounding errors. She said that her payroll and her EI claims were on alternate weeks, so she guessed.

[26] This is a period of 17 weeks. In almost half of the reports, eight of 17 weeks, the Appellant overestimated her earnings. In nine of the weeks she underestimated her earnings. The total discrepancy based on what the Commission provided is $637.27 that wasn't reported out of $7,846.27. It is clear that this discrepancy was caused by rounding errors and estimates rather than by knowingly making false statements. The Appellant wasn't trying to falsify her claims, she even overestimated in some claims which means that she claimed more earnings than she actually got.

[27] So I conclude that the Commission had 36 months to complete its review.

[28] To determine if the Commission had the authority to review this claim, I have to look at how much time passed from the receipt of benefits. The Appellant received EI benefits from November 22, 2020, to September 4, 2021. The Commission can go back to any claim week as long as it falls within the 36 months of that week.

[29] Thirty-six months from the claim period is November 22, 2023, to September 4, 2024. The Commission made a decision on March 15, 2024, and issued a notice of debt on March 16, 2024. It decided to deny the Appellant EI benefits as of November 22, 2020.

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[5] See GD8 for the Commission's submissions about jurisdiction to review this claim.
[6] See GD3-180.

[30] In the review process, there are four things that have to be completed within the timeframe: the decision to exercise its discretion, the new decision, the debt, and the notification to the claimant.

[31] I find that the Commission didn't have the authority to reconsider this claim. It didn't do so within the timeframe of 36 months.

– **Did the Commission act judicially when it decided to reconsider the Appellant's claim and assess an overpayment**

[32] The Commission has a policy to ensure that it exercises its discretion in a way that is fair. It wants to avoid creating debt when the claimant was overpaid through no fault of their own.[7]

[33] The Commission says that a claim will only be reconsidered when:

- Benefits have been underpaid
- Benefits were paid contrary to the law (or the structure of the Act)
- Benefits were paid as a result of a false or misleading statement
- The claimant should have known they weren't entitled to the benefits

[34] The Commission sometimes decides retroactively that there is an overpayment. But usually there are future benefits yet to be paid.

[35] In this claim,

- The Appellant had already received all of her regular EI benefits before the decision was made
- She had reported her earnings and didn't try to mislead the Commission

[7] This policy is available online in Chapter 17.3.3 *Reconsideration Policy*, in the *Digest of Benefit Entitlement Principles*.

- There is nothing to show that the claim or the payment of benefits were contrary to the structure of the Act (unlawful)

- There is no evidence that the claimant was ever informed that she would not be eligible for EI benefits

- I see no new information was provided to the Commission before it started to review this claim. It initiated a review of voluntary leaving on August 30, 2023.[8]

[36] The Appellant estimated her earnings. It resulted in a total overpayment of $637.27 based on the table provided by the Commission.[9] This isn't false information, and it doesn't give the Commission the judicial authority to look back and reconsider the claim.

[37] I find that the Commission didn't act judicially when it reviewed this claim. The total debt owing of $14,726 as a result of this claim review is cancelled.

[38] The Appellant may owe the difference or discrepancy between her actual earnings and her declared earnings for the weeks between May 2, 2021, and August 22, 2021. But I found some mistakes in those reports from the Commission so I can't calculate the exact amount.

## Voluntary Leaving

### – The Appellant didn't quit her job

[39] The parties don't agree that the Appellant quit her job.

[40] The Commission said that the Appellant voluntarily quit her job without just cause on August 17, 2020, and again on August 27, 2021.

[8] See GD3-29.
[9] See GD3-31.

[41] The Appellant said that she didn't quit on August 17, 2020, or on August 27, 2021. She said she remained employed with the same employer. She was a permanent part-time Personal Support Worker (PSW).

[42] I find that the Appellant didn't resign her job at X until May 10, 2022. Here are the facts and evidence that is very strong and compelling:

- She provided a witness at the hearing who testified that the Appellant was employed until she resigned on May 10, 2022.[10] This witness also provided a written statement.
- She provided her resignation letter dated May 5, 2022.[11]
- She provided a letter from the Executive Director of the employer testifying that the Appellant didn't abandon or quit her job and was employed until May 10, 2022.[12]

– **The Commission said it looked at this claim because of misleading information made on the application for EI benefits**

[43] The Commission said that the Appellant tried to mislead it and misrepresented the reason for leaving her job on August 17, 2020, when she applied for EI benefits.[13] I see no evidence of this.

[44] I reviewed the Appellant's application,[14] and it provides the following information. **Q-** is the question asked on the application, **A-**is the response provided by the Appellant:

- **Q—** *What is the name of your most recent employer*? **A**- X Long-Term Care

[10] See GD2-24 for a written statement from this witness.
[11] See GD3-60. Although she dated her resignation letter on May 5, 2022, she gave her letter to the manager on May 10, 2022.
[12] See GD6-2.
[13] See GD8-2 and GD8-4.
[14] See GD3-3 to GD3-21 for the pages of the application that were provided by the Commission.

- **Q—** *What is the last day worked*? **A-** August 17, 2020
- **Q—** *Will you be returning tot his employer*? **A-** yes
- **Q—** *Will you be taking, or will you be taking a course or training program*? **A**- yes
- **Q—** *Why have you not made efforts to look for work*? **A**- **I am currently employed**[15]; however I cannot attend work because my schooling requires me to attend an unpaid clinical placement in a health care facility. Current Ontario legislation states that I cannot work within two health care facilities at the same time; therefore, I cannot attend work due to this legislation because I work in long-term care.
- All information about the training program was answered and provided including availability.

[45] The Appellant provided the Commission with all the information it needed to decide her November 20, 2020, claim. She was truthful. There is no misleading information. She remained employed until May 10, 2022, and didn't quit.

## Availability while in school

[46] 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.

[47] First, the *Employment Insurance Act* (Act) says that a claimant has to prove that they are making "reasonable and customary efforts" to find a suitable job.[16] The. *Employment Insurance Regulations* (Regulations) give criteria that help explain what "reasonable and customary efforts" mean.[17] I will look at those criteria below.

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[15] Bold emphasis added for decision.
[16] See section 50(8) of the *Employment Insurance Act* (Act).
[17] See section 9.001 of the *Employment Insurance Regulations* (Regulations).

[48] 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.[18] Case law gives three things a claimant has to prove to show that they are "available" in this sense.[19] I will look at those factors below.

[49] The Commission decided that the Appellant was disentitled from receiving benefits from November 22, 2020, to April 30, 2021, because she wasn't available for work based on these two sections of the law.

[50] In addition, the Federal Court of Appeal has said that claimants who are in school full-time are presumed to be unavailable for work.[20] This is called the "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.

[51] 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

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

### – The Appellant is a full-time student

[53] The Appellant agrees that she was a full-time student from September 2020 to April 2021, and I see no evidence that shows otherwise. So, I accept that the Appellant is in school full-time.

[54] The presumption applies to the Appellant.

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[18] See section 18(1)(a) of the Act.
[19] See *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96.
[20] See *Canada (Attorney General) v Cyrenne*, 2010 FCA 349.

### – The Appellant is a full-time student

[55] The Appellant is 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). The Federal Court of Appeal says that I have to do a contextual analysis when deciding whether the Appellant has rebutted the presumption of non-availability.21

[56] The Commission says that the Appellant failed to rebut the presumption of non-availability while attending a full-time course. It said the Appellant failed to produce evidence showing that she sought suitable work. It said she failed to rebut the presumption because she didn't look for alternate work when she was prevented from working for her employer.22

[57] The Appellant says that she had availability to work at her job as a PSW from September 2020 to April 2021. She said that she was required to complete an internship from September 2020 to April 2021. The internship was 1–2 days a week for 18 weeks. She was expecting to complete three placements of six weeks each.

[58] The Appellant said that her courses for the 2020–2021 school years were all online with recordings available to watch anytime. Given the online coursework, she had 3–4 days a week available to work.

[59] The Appellant was a PSW and was regularly working any shift in a 24-hour period and weekends. She provided a letter from the Executive Director (ED) of X testifying that the employer was a health care facility that operated 24 hours a day, seven days a week. The ED said that the Appellant would normally work any shift within a 24-hour period.23 She had worked these shifts during the school year in past years, and over the summer.

[60] I find that the Appellant does rebut the presumption of non-availability. The Federal Court of Appeal says that the presumption has been rebutted where a claimant

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[21] See *Page* v *Canada (Attorney General)*, 2023 FCA 169.
[22] See GD4-12, third paragraph.
[23] See GD2-31.

has a history of being regularly employed while attending school and are looking for similar work hours.

[61] In *Page*[24], the FCA said it isn't an error of law to conclude that a claimant is available for work if they are available for employment in accordance with their previous work schedule.

- The Appellant had availability during the week, weekends and evenings while working. The ED of the health care facility confirmed that the Appellant was working any available shift in a 24-hour period.
- The Appellant's classes were online because of COVID, and she wasn't required to attend because recordings were available.
- The Appellant was a permanent part-time PSW and continued to be available to work as a PSW for her employer on her usual schedule.

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

[63] I am now going to continue on to decide the sections of the law dealing with availability.

## The Appellant wasn't able to find suitable employment

[64] Section 18(1)(a) of the EI Act says the Commission can't pay a person benefits for a working day unless they prove they are capable and available for work and **unable to obtain suitable employment**.

[65] In the KP decision, the General Division accepted that the inability to obtain suitable employment is a distinct element of the section 18(1)(a) test.[25] The KP case

[24] *Page v Canada (Attorney General),* 2023 FCA 169.
[25] See paragraphs 11 to 13 in *Canada Employment Insurance Commission v KP*, 2020 SST 592 (GD).

relied on the umpire's decision in CUB 16305.[26] I am persuaded by these decisions that say availability and inability to obtain suitable employment are different concepts.

[66] I am going to follow this approach and consider if the Appellant was unable to find suitable employment.

### – Ontario Regulation 146/20

[67] The Appellant was trained as a PSW. She had been part-time and worked any available shift in a 24-hour period, any day of the week. This continued while she was in school from September 2020 to April 2021. She was being paid about $25 an hour which included a pandemic bonus.

[68] The Appellant has shown that she rebutted the presumption of non-availability. She had several days a week, evenings, and weekends available to work.

[69] However, the Appellant argued that there were no suitable jobs available to her because of Ontario Regulation 146/20.[27] This regulation limited health care workers to one health care facility at a time.[28] The regulation came into effect on Wednesday, April 22, 2020, with no known end date. It ended on April 22, 2021.

[70] The Appellant was in school and required to complete a placement in a health care facility. So she was limited by the Regulation 146/20 and couldn't also work for her employer.

[71] The Appellant wasn't trained for retail, hospitality or other jobs that would normally be hiring. These jobs were paid much lower than the one she had.

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[26] See *CUB 16305*, where the Umpire writes: "In my opinion, the board of referees erred in law in that it confused two different concepts, namely, availability for work and inability to obtain suitable work. These two notions will be based on distinct facts and will require the claimant to take different actions."
[27] See GD2-19.
[28] See GD2-20 to GD2-21.

[72] Regulation 146/20 was temporary. The Appellant expected to be recalled as soon as the regulation was lifted. A normal grace period for a job search would be expected.

[73] I find that the Appellant wasn't able to find a suitable job because of the limits imposed by Ontario Regulation 146/20 that was in effect from April 20, 2020, to April 22, 2021.

## Reasonable and customary efforts to find a job

[74] The first section of the law that I am going to consider says that claimants have to prove that their efforts to find a job were reasonable and customary.[29]

[75] The law sets out criteria for me to consider when deciding whether the Appellant's efforts were reasonable and customary.[30] 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.

[76] 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:[31]

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

[77] The Commission says that the Appellant didn't do enough to try to find a job. It said that she didn't provide a job search so she couldn't prove her availability.

[29] See section 50(8) of the Act.
[30] See section 9.001 of the Regulations.
[31] See section 9.001 of the Regulations.

[78] The Appellant disagrees. She was keeping in touch with her employer regularly. She was networking and expecting to be recalled. The Appellant says that her efforts were enough to prove that she was available for work.

[79] I find that the Appellant has shown reasonable and customary efforts to find a job (a suitable job).

- The Appellant wasn't able to find another suitable job because of Ontario Regulations 146/20.
- The Appellant maintained communication with her employer in hopes that Regulation 146/20 would be lifted.
- The Appellant's employer provided a written statement that the Appellant stayed in touch.[32]
- The Appellant expected a recall.

[80] The Appellant has proven that her efforts to find a job were reasonable and customary.

## Capable of and available for work

[81] I also have to consider whether the Appellant was capable of and available for work but unable to find a suitable job.[33] Case law sets out three factors for me to consider when deciding this. The Appellant has to prove the following three things:[34]

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.

[32] See GD2-22.
[33] See section 18(1)(a) of the Act.
[34] 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) She didn't set personal conditions that might have unduly (in other words, overly) limited her chances of going back to work.

[82] When I consider each of these factors, I have to look at the Appellant's attitude and conduct.[35]

– **Wanting to go back to work**

[83] The Appellant has shown that she wanted to go back to work as soon as a suitable job was available.

[84] The Appellant was in school to become a nurse. She was working in the health care field and wanted to continue. She got a full-time job as a nurse immediately upon graduation. She worked in the health care field for several years.

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

[85] The Appellant has made enough effort to find a suitable job.

[86] 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.[36]

[87] The Appellant's efforts to find a new job included being available, maintaining communication with her employer, and searching for suitable alternatives. I explained these reasons above when looking at whether the Appellant has made reasonable and customary efforts to find a **suitable** job.

[88] Those efforts were enough to meet the requirements of this second factor because Ontario Regulations 146/20 prohibited the Appellant from working in two health care facilities at the same time.

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[35] 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.
[36] 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.

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

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

[90] The Commission says the Appellant could have dropped her course and continued working for the health care facility. It said that attending school as a personal choice.

[91] The Appellant says that she was going into her third year of a four-year program. She had invested $30,000 to $40,000 in the program. She said it isn't reasonable to expect that she would forfeit a year of school and start over again because of regulation 146/20. The regulation was temporary, she could have been called back at any time.

[92] I find that the Appellant didn't limit her chances of going back to work by being in school. The Ontario Regulations 146/20 imposed the limitations and made it impossible for her to work while in school. It wasn't school that limited her availability to work.

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

[93] Based on my findings, I find that the Appellant has shown that she was capable of and available for work but unable to find a suitable job.

## Earnings

[94] The Appellant reported earnings for the weeks of May 2, 2021, to the week of August 22, 2021. She made some errors because her payroll and reporting weeks for EI were different, so she estimated the total.

[95] The Commission said that the actual earnings from the employer were $7,846.27. It said that the Appellant declared $7,209.[37] It said that she knowingly made false representations. Then it reversed this decision.

[37] See GD3-149 to GD3-150.

[96] In eight of the weeks that she reported, she overestimated her earnings. In nine of the weeks she underestimated her earnings. Given she overestimated her earnings in almost half of the weeks, she clearly wasn't trying to make false claims.

[97] The Commission provided a breakdown of the overpayments, which includes the reported weeks of earnings on GD8-12. There is a discrepancy in the amounts for the week number 2292, and 2296.[38] The Commission has made an error on one of the two reports it provided. It will have to review the file and determine if there are mistakes.

[98] Otherwise, the Appellant agrees that she reported her earnings for these weeks. She has no dispute with what the employer provided as actual earnings. She agrees that these earnings are allocated to the right weeks.

## Conclusion

[99] I find that the Appellant isn't disqualified from receiving EI benefits because the Commission didn't have the authority to review this claim, and it didn't act judicially.

[100] I find that the Appellant never quit her job and remained employed until May 10, 2022. So she didn't voluntarily leave and isn't disqualified from receiving EI benefits.

[101] I find that the Appellant was available while in school but couldn't find a suitable job. So she isn't disentitled from receiving benefits and may be entitled to benefits.

[102] The Appellant earned wages for weeks 2266 to 2305 but the Commission may have made mistakes and has to review their records to make corrections.

[103] This means the appeal is allowed and the debt caused by disqualification and disentitlement is cancelled.

Katherine Parker

Member, General Division—Employment Insurance Section

[38] I am using the Commission's codes for weeks to make it easier for them to identify the mistakes.