Social Security Tribunal of Canada | Tribunal de la sécurité sociale du Canada

Citation: *GO v Canada Employment Insurance Commission*, 2020 SST 969

Tribunal File Number: AD-20-711

BETWEEN:

G. O.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Stephen Bergen

DATE OF DECISION: November 9, 2020

Canada

DECISION AND REASONS

DECISION

[1] The appeal is dismissed. The General Division made an error of law. I have corrected this error, but I have still reached the same conclusion as the General Division.

OVERVIEW

[2] The Appellant, G. O. (Claimant), tried to apply for Employment Insurance benefits in April 2019. However, she experienced technical difficulties with the online application and could not get through to the Commission. The Respondent, the Canada Employment Insurance Commission (Commission), had still not approved the Claimant's benefits by August 2019, so the Claimant enrolled in an apprenticeship training program.

[3] After speaking with the Claimant about her application on February 14, 2020, the Commission decided that the Claimant could not be paid benefits for any period before December 29, 2019. There were two reasons for this. First, the Commission did not accept that the Claimant had made an application for benefits in April. It found that she did not have good cause for the delay and only established her claim as of December 29, 2019. Second, the Commission did not accept that the Claimant was looking for work while she was taking her training program. It found that she was not available for work after August 25, 2019.

[4] After further discussions with the Claimant, the Commission wrote her another letter on February 21, 2020. In this letter, the Commission repeated that the Claimant was not entitled to benefits from April 28, 2019, to December 29, 2019. This time it said that she was not entitled to benefits because she had not completed her claim reports as required. The Commission repeated that it also disentitled the Claimant because she was not available for work, but it clarified that this additional disentitlement began on August 25, 2019.

[5] The Claimant asked the Commission to reconsider its decision. As a result, the Commission overturned its decision on "claim procedure." However, it did not change its decision that the Claimant was disentitled to benefits from August 25, 2019.

[6] The Claimant appealed the reconsideration decision to the General Division of the Social Security Tribunal, but the General Division dismissed her appeal. The Claimant is now appealing to the Appeal Division.

[7] The appeal is dismissed. The General Division made an error of law, but I have corrected that error and it does not change the decision. The Claimant was not available for work after August 25, 2019.

PRELIMINARY MATTERS

[8] The Claimant attached a number of documents to the submissions she sent to the Appeal Division. The documents included schedules from the *Employment Insurance Act* (EI Act), Employment Insurance information from a Government of Canada public facing webpage, and a summary of some of the Commission's "Benefit Entitlement Principles." All of this is general background information, which I could consider if it turned out to be relevant to my decision.

[9] However, she also attached a Record of Employment (ROE), which was new evidence that had not been before the General Division. The Appeal Division is not authorized to consider new evidence.[1] I will not be taking her ROE into account.

[10] The Appeal Division received additional submissions from the Claimant on October 19, 2020, after the Appeal Division hearing. These submissions were sent to the Commission, but the Commission chose not to respond. I will consider the Claimant's additional submissions.

WHAT GROUNDS CAN I CONSIDER FOR THE APPEAL?

[11] "Grounds of appeal" are the reasons for the appeal. To allow the appeal, I must find that the General Division made one of these types of errors:[2]

1. The General Division hearing process was not fair in some way.
2. The General Division did not decide an issue that it should have decided. Or, it decided something it did not have the power to decide.

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[1] *Parchment v Canada (Attorney General)*, 2017 FC 354.
[2] This is a plain-language version of the three grounds. The full text is in section 58(1) of the *Department of Employment and Social Development Act* (DESD Act).

3. The General Division based its decision on an important error of fact.
4. The General Division made an error of law when making its decision.

ISSUES

[12] Did the General Division make an error of law by misapplying the presumption of unavailability for full-time students, or by failing to support its decision with adequate reasons?

[13] Did the General Division make an error of jurisdiction because it failed to decide whether the Claimant was

a) still unavailable for work after she was no longer a full-time student?
b) entitled to an extension of her benefit period?

[14] Did the General division make an important error of fact when it found that

a) the Claimant was not available during the time that she was not in training and had not placed restrictive conditions on herself?
b) the Claimant was entitled to 31 weeks of benefits in total?
c) the Claimant's job search efforts were inadequate?

[15] Did the General Division make an error of law or fact by failing to consider that the Commission violated her human rights?

ANALYSIS

Issue 1: Use of the Presumption of Unavailability

[16] The General Division made an error of law because the reasons for its decision are not adequate. I cannot determine if the General Division applied the presumption of unavailability properly.

[17] The law says that a claimant is disentitled from receiving benefits on any working day in his or her benefit period in which the claimant cannot prove that he or she is capable of, and

available for work.[3] According to the Federal Court of Appeal, there is a presumption that a person enrolled in a course of full-time study is generally not available.[4] Part of the reason why the General Division found that the Claimant was unavailable for work was because it applied that presumption to the Claimant's case.

[18] The Claimant stopped going to her training program after she learned that it was preventing her from receiving Employment Insurance benefits. She argued that the General Division applied the presumption of unavailability to a period that was after she stopped attending the training. She argued that the presumption could not apply when she was no longer training.

Was the General Division required to determine if there were periods in which the presumption of unavailability should not apply?

[19] At the Appeal Division hearing, the Commission argued that the General Division did not make an error when it applied the presumption "after August 25, 2019." It stated that the date the Claimant stopped going to school was not clear from the evidence. If I understand the Commission's argument, the Commission believes that this means that there was no identifiable period in which the presumption should not apply. Therefore, the General Division would not have made an error even if it had applied the presumption for the Claimant's entire benefit period.

[20] I agree with the Commission that the evidence did not firmly establish the date the Claimant stopped going to school. Some of the evidence suggested that the Claimant's training program was supposed to end on February 7, 2020.[5] However, she also said that her training could possibly be extended. The Commission's notes of a February 14, 2020, conversation with the Claimant, recorded that the Claimant said she was still attending her training (at that time).[6]

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[3] Section 18(1)(a) of the EI Act.
[4] *Landry v Canada (Attorney General)*, A-719-91.
[5] GD3-18.
[6] *Ibid*.

[21] The Claimant could not tell the Commission when her training would end. She said the end date of her training was "undetermined"[7] The same notes also record that the Claimant said she would not leave the program if it conflicted with an offer of full-time work, but that she would consider changing her schedule.[8] She did not say that she would not return to training, and she did not give a future date when she planned to quit.

[22] The Claimant tried to explain to the Appeal Division what she meant by the different dates. The Claimant told the Appeal Division that the 2020 dates have nothing to do with when she stopped attending classes. The February 7, 2020 date was the program's completion date. The Claimant said only that the program itself could be extended.

[23] She stated that the school break began in December 2019 and she explained that she did not resume her classes. She said she did not continue her training because Service Canada told her in January 2020 that her training program interfered with her entitlement to benefits.

[24] In her post-hearing submissions to the Appeal Division, the Claimant argued that the February 14 notes are wrong and that I should disregard them. She said that the notes do not record what she actually said. However, I cannot decide whether the notes were wrong. It is not my role to evaluate and re-weigh the evidence that the General Division has already considered.[9]

[25] The Claimant had tried to explain the February 14 conversation to the General Division as well. The General Division asked her about the notes and gave her a chance to clarify when she actually stopped going to school. I have listened carefully to the hearing recording, but I am still uncertain what the Claimant was trying to tell the General Division about what she was trying to tell the Commission agent on February 14.

[26] She explained to the General Division that she was "technically" still in the course at that time (that is, February 14).[10] She seemed to be saying that school had not ended, but she was not attending classes. The General Division tried to confirm her testimony. It asked if she was saying that she was still in the program but not attending class, but she rejected this. She said that she

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[7] GD3-18, 19
[8] *Ibid.*
[9] *Griffin v Canada (Attorney General)*, 2016 FC 874.
[10] Audio recording of General Division hearing at timestamp 00:44:48.

was not still in the program (at that time) because the program technically ended on February 7.[11] She also said she did not finish the program[12] and that "anytime this year [she] did not attend the school or training, anything."[13] In post-hearing submissions to the General Division, the Claimant stated that she had stopped going to her training in December 2019.[14]

[27] Looking at all the evidence that was before the General Division, the earliest date that the Claimant could have stopped going to school is in December 2019. This date comes from her post-hearing submissions. The "latest date" that she could have stopped would have to come from the February 14, 2020, notes. Those notes suggest that the Claimant did not quit until sometime after February 14, but that the Claimant herself did not know when that would be.

[28] The General Division did not identify a specific date that the Claimant stopped going to school. However, the General Division was still able to find that the Claimant stopped going to her training program. It also accepted that this happened sometime between December 2019 and early 2020.[15]

[29] Even though the General Division did not define what it meant by "early 2020", there was at least some period of time after "early 2020" in which the Claimant was not in school. For that period, the General Division would have to determine whether the Claimant was available for work without regard to the presumption of unavailability.

[30] If the General Division applied the presumption for any period after the Claimant stopped going to school, then it would have made an error. It does not matter that the General Division did not determine the exact date that the Claimant stopped going to school.

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[11] Audio recording of General Division hearing at timestamp 00:48:00.
[12] Audio recording of General Division hearing at timestamp 00:51:12.
[13] Audio recording of General Division hearing at timestamp 00:48:30.
[14] GD13-5.
[15] General Division decision, para 34.

Where did the General Division apply the presumption?

[31] In the following paragraphs, I will consider whether the General Division may have used the presumption of unavailability where it does not apply.

[32] The General Division stated, " … although [the Claimant] she stopped going to her training course […] she had not shown that she applied for any new jobs."[16] It then concluded, "because of this, I find [the Claimant] is subject to the presumption that she was not available for work while she was in her full-time training program."[17]

[33] If the General Division believed that the Claimant was still in her full-time training for the balance of her benefit period, then it would make sense that the Claimant would remain subject to the presumption. However, this would be inconsistent with its finding of fact that she had stopped her training in early 2020.

[34] On the other hand, I see that the General Division relied on the Claimant's conduct **after she stopped training**, to conclude that the presumption applied. The presumption can only be applied based on evidence that a claimant is in school, and it only applies for the period that the claimant is in school. The presumption can be rebutted by evidence that the claimant could go to school and work at the same time. Evidence of the Claimant's job search efforts after she was no longer going to school could not support the General Division's finding that the Claimant should be subject to the presumption when she was in school.

[35] I recognize that the General Division stated that the Claimant was "subject to the presumption that she was not available for work "while she was in her full-time training program."[18] Even so, the General Division referred to the Claimant's job search during a period that the General Division knew she was not in school, to support a conclusion that the presumption should apply. This implies that the General Division relied on the presumption to find that the Claimant was not available for the same period; that is, after the Claimant left school.

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[16] *Ibid.*
[17] *Ibid.*
[18] *Ibid.*

[36] There are other places in the decision where the wording suggests that the General Division could have applied the presumption throughout the Claimant's benefit period. At one point, the General Division stated that it would continue to decide on the Claimant's availability, "even though [it had] already found that the Claimant [was] presumed to be unavailable."[19] This implies that the General Division would have reached the same decision **because of the presumption**, even though there may have been periods in which it might have found the Claimant to be available for work if the presumption did not apply.

[37] The General Division later concluded that the Claimant was not entitled to benefits because it had found her to be "presumed unavailable for work" and not "making reasonable and customary efforts to find a suitable job."[20] It did not qualify that conclusion by stating that the presumption could only be relevant to the period in which the Claimant was still a full-time student.

[38] Because of these passages, I am not certain if the General Division applied the presumption to periods when the Claimant was not attending school. If it did, I do not know to what extent the decision depended on how or where the General Division applied the presumption. I cannot determine from the decision reasons whether the General Division correctly applied the presumption of unavailability.

[39] It is an error of law for the General Division to give inadequate reasons for its decision. The Federal Court has stated that a reviewing court must be able to "understand why the tribunal made its decision and [reasons must permit it to] determine whether the conclusion is within the range of acceptable outcomes."[21]

[40] I find that the General Division made an error of law by not supporting its decisions with adequate reasons.

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[19] General Division decision, para 35.
[20] General Division decision, para 43.
[21] *Canada (Attorney General) v Thériault*, 2017 FC 405; this was actually reasons for the purpose of judicial review, but the same principle applies here.

Issue 2: Refusal to Exercise Jurisdiction

[41] The Claimant argues that the General Division made an error of law when it found that she had no more weeks of payable benefits left in her benefit period. She also argues that the General Division refused to exercise its jurisdiction because it did not determine whether the Claimant was entitled to additional weeks of benefits beyond the date that she was no longer in training.

[42] The General Division did not make any errors of jurisdiction or law related to the availability of additional weeks of benefits.

[43] Section 18(1) of the EI Act says that a claimant is not entitled to benefits for any working day in a benefit period for which the claimant cannot prove his or her availability for work. The General Division considered the Claimant's availability for work by reviewing three factors. It considered whether she had a desire to return to work; whether she expressed that desire through efforts to find a job; and whether she set personal conditions that unduly limited her chances of returning to the labour market. The Federal Court of Appeal has said that all three factors (the *Faucher* factors) must be considered to assess availability.[22]

[44] The General Division did not make an error of law by finding that the Claimant had no more weeks of benefits available. The General Division did not say that the Claimant had **exhausted** her weeks of benefit. It held that she was **not entitled** to those remaining weeks of benefits because she was not available for work. It found that she was not available after considering the three *Faucher* factors. Beyond the General Division's uncertain application of the presumption that I described earlier, the General Division did not make a legal error in how it analyzed the Claimant's availability.

[45] The General Division did not refuse to exercise its jurisdiction by not determining whether the Claimant was entitled to additional weeks of benefits after she abandoned her training.

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[22] *Faucher v Canada (Employment and Immigration Commission)*, A-56-96 and A-57-96.

[46] When the General Division analyzed the Claimant's availability, it did so generally. It did not restrict its analysis to the period in which the Claimant was still in training. Therefore, when the General Division found that the Claimant was not available for work, it found that she was not available even during the period that followed her training. This meant that the Claimant was not entitled to further benefits within her benefit period.

[47] The General Division did not decide, or need to decide, the total number of weeks available under the claim based on her hours of insurable employment and the unemployment rate in her economic region. It did not need to decide how many of those weeks would still have been available to the Claimant if she had been disentitled. These issues were not before the General Division.

[48] Furthermore, it does not matter how many weeks of benefits might still have been available to the Claimant. According to the General Division, the Claimant was not available for work. Because of this, she was not entitled to any additional benefits, regardless of how many additional weeks of benefits she might otherwise have received.

[49] The Claimant also argues that the General Division should have determined whether she was entitled to an extension of her benefit period. According to the Claimant, the Commission established a benefit period in a decision of April 26, 2019, which was to end on April 25, 2020.[23] However, the Claimant believes that the Commission should have allocated what her employer paid her in severance. If the Commission had allocated her severance payment, it could have extended her benefit period.

[50] The General Division did not make an error of jurisdiction by not considering the Claimant's entitlement to an extension of her benefit period. The General Division has jurisdiction to consider only the issues arising from the reconsideration decision that a party has appealed.[24]

[51] The Claimant appealed an April 22, 2020, reconsideration decision. The Commission's reconsideration decision was a response to the Claimant's challenge of the February 21, 2020,

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[23] GD2-10.
[24] EI Act, section 113.

decision letter. There were two issues at the time. The first was whether the Claimant had good cause for delaying her application for benefits. The second issue was whether the Claimant was available for work during the benefit period established on the claim. These were the issues reviewed in the April 22, 2020, reconsideration decision. The April 22, 2020, decision did not reconsider her benefit period or any extension to her benefit period.

[52] The Claimant did not appeal a reconsideration decision about her benefit period or any extension to her benefit period. The General Division did not make an error of jurisdiction by not considering whether the Claimant should be entitled to an extension of her benefit period.

Issue 3: Challenges to Findings of Fact

Restrictive conditions

[53] According to the Claimant, the General Division acknowledged that the Claimant was no longer in training and that she had not placed restrictive conditions on herself. Because of this, she argues that the General Division should not have found her to be presumptively unavailable.[25]

[54] I have already found that it was an error of law to apply the presumption of unavailability to periods in which the Claimant was not training. However, I will consider the Claimant's argument that the General Division should not have found her to be unavailable at the same time that it found she had not placed restrictive conditions on herself.

[55] The Claimant is mistaken about the General Division's findings. The General Division did not find that she did **not** place restrictive conditions on herself. To the contrary, it found that the Claimant **did** set personal conditions that might have unduly limited her chances of returning to the labour market. This is one of the three factors that the General Division must consider when it considers a claimant's availability for work, even where the presumption does not apply.

[25] AD1B-16, at para 35(a).

[56] There is no inconsistency, and no error, in finding that the Claimant was unavailable at the same time that she set personal conditions that unduly limited her chances of finding employment.

Weeks of benefit entitlement

[57] The Claimant also argues that the General Division made an error of fact when it stated that she was entitled to only 31 weeks of benefits.

[58] The Claimant is correct that the General Division did not verify whether the Claimant was entitled to 31 weeks of benefit. The appeal file does not include any evidence or decision that describes the number of weeks of benefits to which the Claimant should be entitled. Her ROE would have shown her hours of insurable employment, which it might have considered together with the regional rate of unemployment for her area to determine her weeks of benefits. However, the ROE was not in the evidence before the General Division.

[59] In the Overview section of its decision, the General Division said, "The Commission advised [the Claimant] that she was allowed 31 weeks of EI benefits". In saying this, the General Division can only have relied on the Claimant's own statement in her Notice of Appeal. She wrote, "On April 26, 2019, original decision had been made and granted 31 weeks of EI benefit…" [*sic*]. The Claimant is essentially arguing that the General Division should not have taken her word for it.

[60] But it does not matter that the General Division apparently accepted the Claimant's assertion without "verification." The General Division is entitled to weigh the evidence as it sees fit, and there was no evidence to suggest that the Claimant was mistaken.

[61] Furthermore, I could only accept a factual error as a ground of appeal if the General Division based its decision on it.[26] The General Division's decision that the Claimant was not available does not depend on the number of weeks of benefits she might have received or on the number of weeks of benefits that remained.

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[26] Section 58(1)(c) of the DESD Act states that "the General Division **based its decision** on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it." (my emphasis)

[62] The General Division did not make an error of fact that would establish a ground of appeal under the DESD Act.

Job search efforts

[63] Finally, the Claimant argues that the General Division made an important error of fact when it assessed the sufficiency of her job search. The Claimant states that the General Division considered only that she could not identify particular jobs to which she applied. She says that it did not consider evidence of her other job search efforts.

[64] The General Division decided that the Claimant's job search efforts were not enough to express her desire to return to work. In particular, the General Division said that the Claimant had not provided any "information" about jobs she may have considered and did not confirm that she actually applied for any jobs, during or after her training program.[27] This suggests that the General Division considered this missing information to be important.

[65] However, I do not accept that the General Division failed to assess any other evidence of the Claimant's job search activities. The General Division stated that it considered whether the Claimant had engaged in the following job-search activities:

- assessing employment opportunities;
- preparing a resume or cover letter;
- registering for job search tools or with online job banks or employment agencies;
- attending job search workshops or job fairs;
- networking;
- contacting employers who may be hiring;
- submitting job applications;
- attending interviews; and
- undergoing evaluations of competencies."[28]

[66] The General Division referred to the Claimant's evidence that she had updated her resume and that she had looked for jobs on *jobs.gc.ca*, which is a Government of Canada

[27] General Division decision, para 50.
[28] General Division decision, paras 37 and 49.

website.[29] It noted that she also had an account with "Indeed," another job search website.[30] At the hearing, the General Division member asked the Claimant whether she had spoken to friends or family to help her find a job. The General Division decision noted her response; that she had no family in Canada and her only friends were previous co-workers.

[67] There was no other evidence before the General Division of the Claimant's job search efforts. The General Division told the Claimant that she still could send in additional proof of the types of jobs she had applied for or considered. The Claimant did not send in additional proof.[31]

[68] I am satisfied that the General Division looked at all the evidence of the Claimant's job search activities and that it did not misunderstand the evidence.

Issue 4: Human Rights

[69] In her post-hearing submissions, the Claimant argued that the Commission had harassed her and discriminated against her because a Commission agent had yelled at her and she felt she was being interrogated. She also said that Service Canada's poor service violated her human rights.[32]

[70] This is the first time the Claimant has raised this argument. In one of the Claimant's submissions to the General Division, she said that the Commission agent "interrogated" her, and she described this as harassment.[33] However, the Claimant did not suggest that this treatment violated her human rights.

[71] Nothing on the face of the file suggests that the General Division should have known that the Claimant meant to raise a human rights issue. There is no evidence that the Commission interfered with the Claimant's fundamental or other rights under the *Canadian Charter of Rights and Freedoms*.[34] The record does not suggest that the Commission discriminated against the Claimant, or harassed the Claimant, for any of the grounds described in the *Canadian Human*

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[29] *Supra*, note (para 29).
[30] General Division decision, para 55.
[31] General Division decision, para 40.
[32] AD4-3.
[33] GD13-3.
[34] *Canadian Charter of Rights and Freedoms*, *Constitution Act*, 1982, Part 1.

Rights Act.[35] If the Commission gave poor service or its agent had bad telephone manners, there is no evidence suggesting this was based on a prohibited ground.[36] There is no evidence of any violation of the Claimant's human rights that affected the decision that was on appeal to the General Division.

[72] I cannot find that the General Division made either an error of law or an important error of fact by not considering whether the Commission's treatment of the Claimant violated her human rights.

Summary

[73] I have found that the General Division made an error of law in applying, or apparently applying, a presumption of unavailability to a period in which the Claimant was not a student.

[74] Because I have found an error, I must decide what to do about it.

REMEDY

Nature of Remedy

[75] I have the authority to change the General Division decision or make the decision that the General Division should have made.[37] I could also send the matter back to the General Division for it to reconsider its decision.

[76] The Commission suggests that the General Division record is complete and that I should make the decision that the General Division should have made. The Claimant did not take a position on how I should remedy the error.

[77] I will give the decision that the General Division should have given because I consider that the appeal record is complete. That means that I accept that the General Division has already

[35] *Canadian Human Rights Act*, section 3(1).
[36] Prohibited grounds are particular reasons for discrimination that are unlawful. Some of the prohibited grounds are race, place of origin, religion, disability, age, family status, sex, sexual orientation.
[37] My authority is set out in sections 59(1) and 64(1) of the DESD Act.

considered all the issues raised by this case and that I can make a decision based on the evidence that the General Division received.

Availability While Enrolled in Training

[78] The Claimant's representative did not argue that the Claimant was available for work during the time she was enrolled in the training. In fact, he acknowledged that she was not entitled to benefits at that time. At the Appeal Division hearing, the Claimant said that she was relying on her representative's submissions.

[79] However, the Claimant also said that that she believes that her enrollment in vocational training proved that she intended to return to work. In her post-hearing submissions to the Appeal Division, she argued again that she would not have even enrolled in the training program without a referral if the Commission had been able to process her claim quickly. It is plain from the Claimant's submissions, that she feels that she should not be prejudiced by the fact that she took the training.[38]

[80] I accept that the Claimant intended to return to work after she lost her job, as soon as a suitable job was offered. I also accept that one of her reasons for taking the training was that she wanted to learn new skills that would make it easier for her to find work. However, as her representative acknowledged, the Claimant had not been referred to her training program.[39] The courts have said that a claimant may be presumed to be unavailable for work, if he or she goes to school without a referral by an authority designated by the Commission.[40]

[81] To get around that presumption, the Claimant would have to have shown that she had a history of working full-time or that her circumstances were exceptional.[41] The Claimant did not claim to have ever worked full-time while going to school, and the General Division did not accept that her circumstances were exceptional.

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[38] AD4-2.
[39] Section 25(1) allows the Commission to deem a claimant to be available even though the claimant is attending training, if the claimant is referred by some organization or agency authorized by the Commission to make referrals.
[40] *Canada (Attorney General) v Cyrenne*, 2010 FCA 349.
[41] *Canada (Attorney General) v Rideout*, 2004 FCA 304.

[82] The Claimant argues that she should not be held responsible for taking un-referred training when her benefits were delayed, and she could not reach the Commission to get advice.[42]

[83] I can see why the Claimant is upset. However, the General Division had no choice but to apply the law. The law says that the Commission cannot pay benefits to a claimant who is not available for work.

[84] The Claimant might have avoided the legal presumption of unavailability that applies to full-time students by showing that "exceptional circumstances" existed. Even so, she would still have had to prove that she was available for work while she was going to school. The circumstances around the Claimant's enrollment in training are sympathetic, but sympathetic circumstances are not the same as "exceptional circumstances." A claimant's circumstances are "exceptional" where they support a finding that it is likely that a claimant could have held a full-time job despite his or her school commitments.

[85] The Claimant has not shown exceptional circumstances. Her difficulty in contacting the Commission does not show that she could have worked and gone to school at the same time. The Claimant's circumstances could not have affected the General Division's finding that the presumption applied and that the Claimant was not available for work while she was going to school.

[86] I have not found any error in how the General Division found the Claimant to be unavailable for work when she was still going to school. I confirm that she was not entitled to benefits during the time that she was in school.

Availability After the Claimant Quit her Training

[87] I must still determine whether the Claimant was entitled to benefits after she stopped going to the training. It is possible that the General Division's findings on the Claimant's availability during this period may have been influenced by an error in applying the presumption of unavailability.

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[42] *Supra*, note 31.

[88] The EI Act says that a claimant is not entitled to benefits for any working day in a benefit period that the claimant cannot prove that he or she was capable of and available for work. The courts have said that a claimant must have a desire to return to work, express that desire through job search efforts, and not set conditions that unduly limit the claimant's job prospects. These are called the "*Faucher*" factors.

Desire to return to work

[89] The General Division looked at the three *Faucher* factors. It found that the Claimant had a desire to return to work. I agree.

[90] In both her statements and her testimony, the Claimant insisted that she needed to find work to support herself. She said that her training was her "biggest effort to be back on the job market."[43] As the General Division noted, the Claimant had always argued she wanted to return to work, and she was still fighting her dismissal.

[91] The Claimant had a desire to return to work.

Job search efforts

[92] The second *Faucher* factor is whether the Claimant expressed her desire to return to work through job search efforts. Like the General Division, I find that these job search efforts were inadequate.

[93] The Claimant did not argue that the General Division overlooked or misunderstood any of her evidence of her job efforts after she left school. She said that she updated her resume and visited "Indeed" and the federal government's jobs site. She did not describe any jobs that she reviewed or to which she applied or offer evidence of any other job search efforts. The General Division gave her additional time to supply evidence of jobs to which she applied or even the kinds of jobs she considered. The Claimant did not provide any other evidence.

[94] I know that the Claimant stopped going to school because she believed she would be only be entitled to benefits if she was not going to school. However, the Claimant has not

[43] GD2-13.

demonstrated an adequate job search. I am not bound by decisions of the former Umpire (CUB decisions),[44] but there is a large number of CUB decisions that suggest that a job search must be something more than what the Claimant did in this case.

[95] In a number of different decisions, the Umpire has held that an adequate job search is one that is "reasonable",[45] "serious and active",[46] and active[47] In CUB 73486, for example, the appellant supplied evidence of some newspaper ads to prove that he looked for jobs. The Umpire said that his job search was inadequate and quoted another CUB decision[48] which said that "proof of an adequate job search requires more than simply reviewing classified ads."

[96] In my view, the Claimant's review of "Indeed" and a federal government job-listing site is similar to looking at classified job advertisements in the newspapers. I am persuaded by the reasoning in the CUB decisions that I mentioned. The Claimant's review of online job listings and her update of her resume was not a reasonable, or serious and active, job search and I find that the Claimant's job search efforts were inadequate. These efforts do not demonstrate that the Claimant had the intention to return to work as soon as possible

Personal conditions

[97] The third *Faucher* factor is whether the Claimant set person conditions that limited her job prospects. The General Division agreed that the Claimant should not have to look for carpentry jobs because she had not finished her training. However, it found that she set personal conditions by only looking for clerical or administrative jobs within the federal government.

[98] I accept that the Claimant was willing to accept clerical work outside of the federal government. The Claimant may have focused her job search on clerical/administrative work with the federal government. However, she testified that she did not look only in the federal government.[49] She mentioned that she had used the job site "Indeed"[50] and that she was

[44] The Umpire was the final level of appeal in the former administrative appeal system. Decisions of the Umpire were reported as Canadian Umpire Benefit decisions (CUB).
[45] CUB 12606.
[46] CUB 19058, and others.
[47] CUB 18243, CUB 17843.
[48] CUB 19012.
[49] Audio recording of General Division hearing at timestamp 00:25:35.
[50] Audio recording of General Division hearing at timestamp 00:27:55.

searching for what was "out there," outside of government.[51] When asked about whether she had looked for work in the private sector, she said again that she had looked there as well.[52].

[99] Furthermore, the third *Faucher* factor is distinct from the second factor. The second *Faucher* factor already considered the manner and adequacy of the Claimant's job search. In my view, the third factor is not about the kind of work a claimant is actively seeking, but the kind of work a claimant would be willing to accept. By "type of work," I am thinking of characteristics of the work itself, such as its location or the scheduling of shifts, the wages or salary, or the type of employer or position.

[100] Consistent with this interpretation, one decision of the Federal Court of Appeal spoke of limiting the chances of "holding employment" as opposed to "finding employment." The Court stated that, "[a claimant] must not impose such restrictions on his or her availability as to unduly limit his or her chances of holding employment."[53] The Court's language suggests that it did not understand "undue restrictions" to be restrictions in the manner of a job search.

[101] The Claimant focused on finding the kind of work with which she was most familiar, but this does not mean she unduly limited her chances. Nothing in the evidence suggests that she would have refused other suitable employment. In fact, the Claimant testified that clerical work within government was "the only thing she could think of."[54] This is not surprising. The Claimant had been working for (approximately) the previous seven and a half years for the federal public service. She testified that her work was clerical/administrative and that she was the lowest clerical classification, a "CR3."[55] At the same time, the Claimant's enrollment in a carpentry apprenticeship suggests that the Claimant would have been willing to consider work outside of her experience if it was suitable.

[102] I find that the Claimant did not set personal conditions that unduly limited her chances of entering the labour market.

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[51] Audio recording of General Division hearing at timestamp 00:27:30.
[52] Audio recording of General Division hearing at timestamp 00:29:00.
[53] *Canada (Attorney General) v Gagnon*, 2005 FCA 321.
[54] Audio recording of General Division hearing at timestamp 00:26:18.
[55] Audio recording of General Division hearing at timestamp 00:24:50.

Conclusion on availability after she quit school

[103] I find that the Claimant was not available for work after she quit school.

[104] The Claimant says that she quit school so that she could be available for work. However, there was little evidence that she demonstrated that availability through active job search efforts. I accept that the Claimant desired to work and that she did not unduly limit the kind of work she would accept. However, I give more weight to the inadequacy of her job search efforts.

[105] I understand that the Claimant has had difficulties contacting the Commission. I know that she feels strongly that the Commission had an obligation to tell her exactly what it expected her to do to show her availability. However, the form that she completed when she applied for benefits does describe the kind of job search efforts that the Commission requires of claimants. It also instructs them to keep records, as the General Division also noted.[56]

[106] The Claimant was not available for work within the meaning of the EI Act at any time after she stopped going to school.

CONCLUSION

[107] The appeal is dismissed. The General Division made an error of law in its decision. I have corrected the error, but I have come to the same conclusion as the General Division. The Claimant was not available for work and is not entitled to Employment Insurance benefits after August 25, 2019.

Stephen Bergen
Member, Appeal Division

HEARD ON:	October 8, 2020
METHOD OF PROCEEDING:	Videoconference

[56] General Division decision, para 41; see also GD3-9.

APPEARANCES:	G. O., Appellant Susan Prud'homme, Representative for the Respondent