



[TRANSLATION]

Citation: *Canada Employment Insurance Commission v WP*, 2021 SST 802

Social Security Tribunal of Canada Appeal Division

Decision

Appellant:	Canada Employment Insurance Commission
Representative:	Josée Lachance
Respondent:	W. P.
Representative:	Frédéric-Alexandre Yao

Decision under appeal:	General Division decision dated September 3, 2021 (GE-21-1213)
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Tribunal member:	Pierre Lafontaine
Type of hearing:	Videoconference
Hearing date:	December 2, 2021
Hearing participants:	Appellant's representative Respondent Respondent's representative
Decision date:	December 30, 2021
File number:	AD-21-316

Decision

[1] The Commission's appeal on the issue of availability is allowed.

[2] The Claimant was not available and unable to find a suitable job while attending a training course as of October 5, 2020, with the exception of the period from March 1 to 5, 2021.

[3] The file returns to the General Division for it to decide the Claimant's other grounds of appeal.¹

Overview

[4] The Appellant, the Canada Employment Insurance Commission (Commission), decided that the Respondent (Claimant) was not entitled to Employment Insurance regular benefits as of October 5, 2020, because he was taking unauthorized training and was not available for work.

[5] The General Division found that the Claimant had wanted to go back to work and had made efforts to find a job during his studies. It also found that the Claimant had not limited his chances of finding a job. The General Division decided that the Claimant was available for work as of October 5, 2020.

[6] The Appeal Division granted the Commission leave to appeal the General Division decision. It argues that the General Division made an error of fact or law.

[7] I have to decide whether the General Division made an error of fact or law in finding that the Claimant was available for work within the meaning of the law despite his full-time training.

[8] I am allowing the Commission's appeal on the issue of availability. I am returning the file to the General Division for it to decide the Claimant's other grounds of appeal.

¹ Specifically, the Claimant's grounds of appeal concerning the Commission's authority to reconsider and promissory estoppel.

Issue

[9] Did the General Division make an error of fact or law in finding that the Claimant was available for work within the meaning of the law despite his full-time training?

Analysis

Appeal Division's mandate

[10] The Federal Court of Appeal has established that the Appeal Division's mandate is conferred to it by sections 55 to 69 of the *Department of Employment and Social Development Act*.²

[11] The Appeal Division acts as an administrative appeal tribunal for decisions made by the General Division and does not exercise a superintending power similar to that exercised by a higher court.

[12] So, unless the General Division failed to observe a principle of natural justice, made an error of law, or 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, I must dismiss the appeal.

Did the General Division make an error of fact or law in finding that the Claimant was available for work within the meaning of the law despite his full-time training?

[13] In support of its appeal, the Commission argues that the General Division made an error of fact or law.

[14] Specifically, the Commission says that the General Division ignored the evidence on file that the Claimant did not look for a job during the period in question. It says that, as a result, the division could not find that the Claimant had expressed the desire to go back to work through consistent efforts to find a suitable job.

² *Canada (Attorney General) v Jean*, 2015 FCA 242; *Maunder v Canada (Attorney General)*, 2015 FCA 274.

[15] The Commission also says that the General Division made an error in finding that the Claimant had not unduly limited his chances of going back to work despite the demands of his training. It argues that the Claimant was in class Monday to Friday from 7:30 a.m. to 3:30 p.m. and that he was available for work only outside his class hours, that is, on weekday evenings and weekends. This means that he was not available for work within the meaning of the law.

[16] The evidence shows that the Claimant worked for his employer while in school full-time until he was laid off in October 2020. In support of his application for benefits, he said that he would not have left his program to work full-time and that he was available for work on Friday evenings, Saturdays, and Sundays because he had to attend the classes as scheduled. He mentioned waiting for his employer to call him back to work and not applying for other jobs.³

[17] On a form he signed on March 10, 2021, the Claimant repeated that he was not actively looking for a job because he wanted to go back to his employer to continue working part-time.⁴ On March 30, 2021, the Claimant contacted the Commission to disclose that he was about to go back to work for his employer and that he had started looking for a second job.⁵

[18] The General Division found that the Claimant had wanted to go back to work and had made efforts to find a job during his studies. It found that the Claimant was entitled to a reasonable period to assess how he would be able to go back to his job before making efforts to work in another job.

[19] The General Division also found that the Claimant had not limited his chances of finding a job despite his training hours. The General Division decided that the Claimant was available for work as of October 5, 2020.

³ See GD3-2 to GD3-16.

⁴ See GD3-20 and GD3-21.

⁵ See GD3-59 and GD3-60.

[20] To be considered available for work, a claimant has to show that they are capable of and available for work and unable to find a suitable job.⁶

[21] Availability must be determined by analyzing three factors:

- a) wanting to go back to work as soon as a suitable job is available
- b) expressing that desire through efforts to find a suitable job
- c) not setting personal conditions that might unduly limit the chances of going back to work⁷

[22] In addition, availability is determined for each working day in a benefit period for which the claimant can prove that, on that day, they were capable of and available for work and unable to find a suitable job.⁸

[23] For the purposes of section 18 of the *Employment Insurance Act* (EI Act), a working day is any day of the week except Saturday and Sunday.⁹

[24] The evidence shows that the Claimant was a full-time student in a full-time program. He was unwilling to drop his course to accept a full-time job. These two conditions kept him from having full-time jobs during regular hours, Monday to Friday.

[25] The Claimant also repeatedly admitted that he was not actively looking for a full-time job but was instead waiting to go back to his usual employer, who had flexible hours that allowed him to work around his training schedule.

[26] I note that the case law the General Division relied on supports the position that a claimant who is waiting for their employer to call them back is exempt, at least for a reasonable period, from having to show an active job search.

[27] But, there is more recent case law than what the General Division relied on that establishes that a claimant cannot just wait to be called back to work and has to look for

⁶ See section 18(1)(a) of the *Employment Insurance Act* (EI Act).

⁷ *Faucher*, A-56-96.

⁸ *Canada (Attorney General) v Cloutier*, 2005 FCA 73.

⁹ See section 32 of the *Employment Insurance Regulations*.

a job to be entitled to benefits. This means that the Employment Insurance program is designed so that only those who are genuinely unemployed and actively looking for work will get benefits.¹⁰

[28] The evidence before the General Division clearly shows that the Claimant intended to wait to go back to working part-time for his usual employer during his studies. Even if I had to consider that he was looking for work outside his usual employer, his search did not start until March 2021 and was very limited, which is inconsistent with his availability.

[29] The EI Act clearly says that, to be entitled to benefits, a claimant must establish their availability for work and, to do this, they must look for work. A claimant must establish their availability for work for each working day in a benefit period, and this availability **must not be unduly limited**.

[30] In addition, it is well-established case law that availability must be shown during regular hours for every working day and cannot be restricted to irregular hours resulting from a course schedule that significantly limits availability.¹¹

[31] As a result, the Claimant does not meet the relevant factors to establish his availability in accordance with recent case law. Although the Claimant's academic efforts are certainly commendable, this does not eliminate the requirement to show availability within the meaning of the EI Act.

[32] For these reasons, I find that the General Division made an error of law in its interpretation of section 18(1)(a) of the EI Act and ignored the case law of the Federal Court of Appeal concerning the issue of availability for work during an unauthorized training course.

¹⁰ *Faucher v Canada (Employment and Immigration Commission)*, A-56-96; *Canada (Attorney General) v Cloutier*, 2005 FCA 73; *De Lamirande v Canada (Attorney General)*, 2004 FCA 311; *Canada (Attorney General) v Cornelissen-O'Neill*, A-652-93; *Canada Employment Insurance Commission v GS*, 2020 SST 1076; *DB v Canada Employment Insurance Commission*, 2019 SST 1277; CUB 76450; CUB 69221; CUB 64656; CUB 52936; and CUB 35563.

¹¹ *Bertrand*, A-613-81; CUB 74252A; CUB 68818; CUB 37951; CUB 38251; and CUB 25041.

Remedy

[33] Considering that both parties had the opportunity to present their case before the General Division on the issue of availability, I will give the decision that the General Division should have given.

[34] In accordance with section 18(1)(a) of the EI Act, and in applying the *Faucher* test, I find that the Claimant was not available and unable to find a suitable job while attending a training course as of October 5, 2020, with the exception of the period from March 1 to 5, 2021.

[35] Given the General Division's findings on the issue of availability, it did not decide the Claimant's other grounds of appeal. So, the file should be returned to the General Division for it to decide the Claimant's other grounds of appeal.

Conclusion

[36] The Commission's appeal is allowed.

[37] The Claimant was not available and unable to find a suitable job while attending a training course as of October 5, 2020, with the exception of the period from March 1 to 5, 2021.

[38] The file returns to the General Division for it to decide the Claimant's other grounds of appeal.

Pierre Lafontaine
Member, Appeal Division