Citation: *Canada Employment Insurance Commission v RJ*, 2022 SST 212

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	Canada Employment Insurance Commission
Representative:	Tiffany Glover
Respondent:	R. J.

Decision under appeal:	General Division decision dated December 14, 2021 (GE-21-2217)

Tribunal member:	Janet Lew
Type of hearing:	Teleconference
Hearing date:	March 7, 2022
Hearing participants:	Appellant's representative Respondent
Decision date:	April 5, 2022
File number:	AD-21-455

Decision

[1] The appeal is allowed. The Claimant was not available for work. She is not entitled to Employment Insurance benefits.

Overview

[2] The Appellant, Canada Employment Insurance Commission (Commission) is appealing the General Division decision.

[3] The General Division found that the Respondent, R. J. (Claimant), was available for work while in school. The General Division concluded that the Claimant was therefore not disentitled from receiving Employment Insurance benefits. This meant that she might be entitled to receive benefits.

[4] The Commission argues that the General Division failed to consider section 153.161 of the *Employment Insurance Act*. The Commission also argues that the General Division misinterpreted section 18(1)(a) of the *Employment Insurance Act*. In particular, the Commission argues that the General Division misinterpreted what "availability" means.

[5] The Claimant denies that the General Division made any errors. She asks the Appeal Division to dismiss the appeal. The Commission argues that the General Division made legal and factual errors. The Commission asks the Appeal Division to allow the appeal and make a finding that the Claimant was not available for work.

Preliminary matters

[6] Generally, new evidence is inadmissible in proceedings at the Appeal Division. Some exceptions may be available.

[7] The Commission proposes to file an affidavit, sworn on February 4, 2022, by George Rae.[1] Mr. Rae is a Director with the Employment Insurance Policy Directorate

[1] See sworn affidavit of George Rae, at AD4-20.

within the Skills and Employment Branch of Employment and Social Development Canada.

[8] The Commission acknowledges that, generally, the Appeal Division does not consider new evidence. However, the Commission argues that I should accept the affidavit evidence. The Commission says that the affidavit contains only general background information. The Commission notes that the affidavit does not contain any information about the Claimant's personal circumstances.

[9] The Commission explains that the evidence is vital to understanding its arguments regarding some of the legislative objectives that Parliament enacted to address the pandemic.

[10] The Claimant does not object to the admissibility of the affidavit.

[11] The affidavit attaches a copy of Interim Order No. 10, which amends the *Employment Insurance Act*. The amendments include adding sections 153.161(1) and (2). An explanatory note follows the Order, although it is not part of the Order itself.

[12] The Commission relies on the affidavit in large part to draw attention to the temporary measures under the *Employment Insurance Act*, implemented in response to the COVID-19 pandemic.

[13] Filing an affidavit to show sections 153.161(1) and (2) of the *Employment Insurance Act* is unnecessary, but the affidavit also includes some general background information about the Employment Insurance scheme. Mr. Rae explains how the temporary measures have affected the usual determination of a claimant's availability.

[14] I am accepting Mr. Rae's affidavit. The affidavit information is not determinative of the outcome of the appeal. The affidavit provides general background information that touches on some of the issues before me. Issues

[15] The issues in this appeal are:

(a) Did the General Division fail to consider section 153.161 of the *Employment Insurance Act*?

(b) Did the General Division misinterpret what it means to be available for work for the purposes of the *Employment Insurance Act*?

(c) Did the General Division overlook some of the evidence when it examined whether the Claimant was available for work?

Analysis

[16] The Appeal Division may intervene in General Division decisions if there are jurisdictional, procedural, legal, or certain types of factual errors.[2]

Did the General Division fail to consider section 153.161 of the *Employment Insurance Act*?

[17] The Commission argues that the General Division failed to consider section 153.161 of the *Employment Insurance Act* in the Claimant's case. The Commission argues that, if it had done so, the General Division would have concluded that the Claimant could not use the pandemic as an exceptional circumstance.

[18] Further, the Commission argues that, if the Claimant did not have any exceptional circumstances, she would be presumed to be unavailable for work. That would have ended the question about her availability. It would also preclude any investigation into whether, for instance, the Claimant's job search efforts were reasonable and customary, or whether she set personal conditions that might have unduly limited her chances of returning to work.

[2] See section 58(1) of the *Department of Employment and Social Development Act*.

[19] Section 153.161 of the *Employment Insurance Act* states:

> **Availability**
>
> **Course, program of instruction or non-referred training**
>
> **153.161(1)** For the purposes of applying paragraph 18(1)(a), a claimant who attends a course, program of instruction or training to which the claimant is not referred under paragraphs 25(1)(a) or (b) is not entitled to be paid benefits for any working day in a benefit period for which the claimant is unable to prove that on that day they were capable of and available for work.
>
> **Verification**
>
> **(2)** the Commission may, at any point after benefits are paid to a claimant, verify that the claimant referred to in subsection (1) is entitled to those benefits by requiring proof that they were capable of and available for work on any working day of their benefit period.

[20] The section describes the Claimant's situation. She was a student who was attending a course, program of instruction or training to which she had not been referred. The section was relevant to the Claimant.

[21] The General Division did not refer to nor discuss any particular aspects of the section. It is clear that it did not consider the section nor consider whether it applied in the Claimant's case.

[22] Although the Commission did not raise section 153.161 of the *Employment Insurance Act*, the General Division should have considered the section and determined how it applied in the Claimant's case.

Did the General Division misinterpret what it means to be available under the *Employment Insurance Act*?

[23] Having determined that the General Division's error warrants intervention by the Appeal Division, I do not have to address whether the General Division made any other errors. However, I will examine whether the General Division misinterpreted what it means to be available under the *Employment Insurance Act* because this issue will have a significant impact on the outcome of these proceedings.

[24] The Commission argues that the General Division misinterpreted what it means to be available under the *Employment Insurance Act*. If the Claimant was unavailable for work, she would be disentitled to receiving benefits.

– The General Division decision

[25] The General Division found that the Claimant was capable and available for work. It concluded that she was therefore not disentitled to receiving benefits.

[26] In determining whether the Claimant was capable of and available for work, the General Division examined whether the Claimant met three requirements to prove her availability:

a) she wanted to return to work as soon as a suitable job was available,

b) she made efforts to find a suitable job, and

c) she did not set personal conditions that might have unduly limited her chances of returning to work.

[27] The General Division found that the Claimant met each of these three requirements. In regards to the third requirement, the General Division wrote:

> The Claimant lost her job because of the pandemic, and may have had more difficulty getting a replacement job for the same reason. I have already found that being able to work when she would otherwise have had to attend classes is an exceptional circumstance that rebuts the presumption of non-availability. I find in these unique circumstances, the Claimant saying that she would work around her school schedule did not unduly limit her chances of going back to work.[3]

– The Commission's arguments

[28] The Commission argues that if a claimant imposes **any** restrictions on their availability, then they are not available for work and therefore not entitled to benefits. In this case, the Commission argues that the Claimant was unwilling to look for and accept

[3] See General Division decision, at para 55.

work that conflicted with her school schedule. The Commission argues that this was an undue restriction that made her unavailable for work.

[29] The Commission notes that the Claimant stated that she would only accept full-time employment if the schedule was right.[4] I note that the Claimant reportedly told the Commission that she was unwilling to modify her school schedule to accept suitable employment, but was prepared to work long hours outside of her school schedule.[5]

[30] The Commission argues that a claimant has to demonstrate availability during regular hours for every working day and cannot limit their availability to irregular hours because of their course schedule.[6]

– **Decisions of the Federal Court of Appeal on the issue of availability**

[31] The Commission relies on several Federal Court of Appeal decisions. These decisions are binding. The Commission also relies on decisions of the former Umpire. These decisions are not binding. I will focus on the decisions of the Court of Appeal.

[32] The claimant in the case of *Gagnon*[7] had reduced his availability to Fridays and weekends. The Court of Appeal found that, under section 18 of the *Employment Insurance Act*, Gagnon was not available on the working days of a benefit period.

[33] The Court came to this conclusion because of section 32 of the *Employment Insurance Regulations*. The section defines every day of the week, except Saturday and Sunday, as a working day:

> **32.** For the purposes of section 18, of the Act, a working day is any day of the week except Saturday and Sunday.

[34] The Court also found that Gagnon was unwilling to adjust his course schedule in order to accept employment. For these and other reasons, the Court concluded that he was not eligible for benefits because he was not available within the meaning of

---

[4] See Supplementary Record of Claim, at GD 3-37.
[5] See Supplementary Record of Claim, at GD 3-37.
[6] See Commissions submissions at para 20, at AD4-10.
[7] See *Canada (Attorney General) v Gagnon,* 2005 FCA 321.

section 18 of the *Employment Insurance Act* and section 32 of the *Employment Insurance Regulations*.

[35] In another case called *Primard,*[8] the evidence showed that the claimant Primard's availability for work was limited to evenings and weekends because of her course schedule. The Court of Appeal found that this showed that Primard was placing personal conditions that might unduly limit the chances of returning to the labour market.

[36] New facts later emerged that there was the possibility that Primard could take her courses part-time, in the evening, three evenings a week, if she found a job. But, the Court found that this was, at best, a possible availability, which was also conditional upon her finding a job. It found that she was otherwise unavailable.

[37] In *Duquet*,[9] the Umpire had concluded that the claimant had not shown that he was available for work. The Court of Appeal found that, because of his university courses, the claimant Duquet was only available at certain times on certain days, which restricted his availability and therefore limited his chances of finding employment.

[38] The Commission also relies on *Bertrand.*[10] The decision does not involve a student. However, the claimant Bertrand was only available evenings from four to 10 pm, or midnight, five days a week. She had been unable to find a reliable babysitter during the day.

[39] The Court of Appeal found that, although Bertrand was available to work 30 to 40 hours per week during evening hours, she was not available for work for the purposes of the *Employment Insurance Act*.

[40] It is clear from this series of decisions from the Court of Appeal that restricting availability to only certain times on certain days—including evenings and weekends—

---

[8] See *Canada (Attorney General) v Primard,* 2003 FCA 349.
[9] See *Duquet v Canada Employment Insurance Commission and Attorney General of Canada*, 2008 FCA 313.
[10] See *Canada (Attorney General) v Bertrand*, 1982 CanLII 3003 (FCA).

represents setting personal conditions that might unduly limit the chances of returning to the labour market.

[41] It is particularly clear from *Bertrand* that a claimant has to be available during regular hours for every working day. In other words, a claimant cannot restrict availability to irregular hours, whether it is because of being unable to find a reliable babysitter as in the *Bertrand* case, or, because of a restrictive school or course schedule.

– ***J.D. v Canada Employment Insurance Commission***

[42] A relatively recent Appeal Division case called *J.D.*[11] involved a claimant who sought only part-time work that did not interfere with her full-time school schedule. The Appeal Division accepted that seeking only part-time work likely meant excluding jobs that could otherwise be available.

[43] But, the Appeal Division accepted that a claimant could still be available for work for the purposes of the *Employment Insurance Act*, even if they had restrictions on their availability. The Appeal Division decided that they could be available for work, as long as any restrictions were not "unduly limiting."

[44] The Appeal Division found that J.D. had not unduly limited her chances of returning to the labour market. This was because she remained available for work to the same degree that had previously existed. The member found that J.D.'s schooling did not limit her work prospects any more than they did before her job loss. Given this, the Appeal Division concluded that J.D. was available for work.

[45] The Appeal Division noted that the General Division referred to *Rideout*.[12] The case involved a full-time student who was available for work two days per week plus weekends. The Court of Appeal found that this was a limitation on his availability for full-

[11] See *J.D. v Canada Employment Insurance Commission*, 2019 SST 438.
[12] See *Canada (Attorney General) v Rideout,* 2004 FCA 304.

time work. It concluded that he was not available for work within the meaning of section 18(1)(a) of the *Employment Insurance Act*.

[46] The Appeal Division did not address this particular finding in *Rideout*. It limited its analysis of *Rideout* to the issue of whether it meant full-time employment was the only relevant consideration when considering whether there were exceptional circumstances that could rebut the presumption of non-availability.

[47] The Commission argues that *J.D.* is of limited use. The Commission accepts that the Appeal Division's statements are not wrong "in a general sense."[13] However, the Commission says that the Appeal Division did not include important details about J.D.'s availability. J.D. was available for 16 to 20 hours a week, but the Appeal Division did not state on which day(s) of the week these hours fell.

[48] As the Appeal Division in *J.D.* did not address *Bertrand*, or any of the other decisions of the Court of Appeal that discussed whether a claimant is available, it is of limited utility when a case is highly fact-specific.

[49] Here, the Claimant described her availability, as follows:[14]

Fall session:

Mondays	available all day
Tuesdays	available noon onwards
Wednesdays	available after 1 pm
Thursdays	available after 2 pm
Fridays	2 online classes, but available all day. The Commission's records indicate that the Claimant was not available on Fridays, from 11 to 12 pm and from 5 pm to 6 pm[15]

[13] See Commission's letter dated March 14, 2022, at AD5-1.
[14] See Supplementary Record of Claim, dated October 4, 2021, at GD3-37. Also at approximately 14:13 of the audio recording of the General Division hearing on December 2, 2021.
[15] See Supplementary Record of Claim, dated October 4, 2021, at GD3-37.

Winter session:

Mondays	available after 3 pm
Tuesdays	available after 1 pm
Wednesdays	The Commission's records indicate that the Claimant was not available from 1 pm to 2 pm and from 4 pm to 7 pm.[16] At the General Division hearing the Claimant was unavailable on Wednesdays, "unless she worked 8 to noon somewhere."[17]
Thursdays	available until 2:30 pm
Fridays	available after 4 pm

[50] The Claimant was available for work on weekends during both school sessions.

[51] The General Division accepted that the Claimant had synchronous and asynchronous classes. The General Division noted the times and days on which the Claimant was available for work.

[52] However, the General Division failed to consider how the principles set out in *Gagnon*, *Primard*, *Duquet*, *Rideout* and *Bertrand* applied in the Claimant's case on the issue of availability. By failing to follow this line of decisions, the General Division misinterpreted what it means to be available.

Remedy

[53] The General Division failed to consider section 153.161 of the *Employment Insurance Act*.

[54] The General Division also failed to consider the principles set out in *Gagnon*, *Primard*, *Duquet*, and *Bertrand* when it decided whether the Claimant was available for work. This in turn led the General Division to misinterpret what it means to be available in the context of the Claimant's case.

---

[16] See Supplementary Record of Claim, dated October 4, 2021, at GD3-37.
[17] At approximately 15:08 of the audio recording of the General Division hearing on December 2, 2021

[55] How can I fix the General Division's errors? I have two basic choices.[18] I can substitute my own decision or I can refer the matter back to the General Division for reconsideration. If I substitute my own decision, this means I may make findings of fact.[19]

[56] Neither party has asked to return this matter to the General Division. The parties had a fair hearing at the General Division. The parties were aware of the case that they had to meet. They had the chance to produce any witnesses and any records. There is no suggestion that there are any significant gaps n the evidence, or that there is any need to clarify any of the evidence. The parties have produced all of the relevant records.

[57] Given these considerations, I find it appropriate to review this matter and come to my own decision.

– **Section 153.161 of the *Employment Insurance Act***

[58] The Commission argues that the existence of section 153.161 of the *Employment Insurance Act* means that Parliament accounted for the consequences of the pandemic. The Commission argues that, as a result, a claimant cannot rely on the pandemic as an exceptional circumstance for the purposes of rebutting the general presumption of non-availability.

[59] If, as the Commission argues, the Claimant did not have any exceptional circumstances (or did not have a history of full-time employment while schooling), then she will not have rebutted the general presumption. In that case, she is presumed not to have been available for work.

[60] The Commission says that Parliament enacted the section in response to the COVID-19 pandemic. The Commission claims that, for that reason, students cannot use the pandemic as an exceptional circumstance to overcome the general presumption

---

[18] See section 59 of the *Department of Employment and Social Development Act*.
[19] See *Weatherley v Canada (Attorney General)*, 2021 FCA 58, at paras 49 and 53, and *Nelson v Canada (Attorney General)*, 2019 FCA 222, at para 17.

that full-time students are not available for work. (The general presumption can be rebutted by evidence of a history of full-time employment while schooling, or if there are exceptional circumstances.)

[61] The General Division found that the presumption applied to the Claimant, but that she rebutted it. The General Division found that the Claimant rebutted it because of exceptional circumstances.

[62] The Claimant had asynchronous classes in her school schedule. She could attend these classes at her convenience. It made her more available for work. The General Division wrote that it found that "being able to work when she would otherwise have had to attend classes is an exceptional circumstance."[20]

[63] The explanatory note that accompanies Interim Order No. 10 Amending the *Employment Insurance Act* (Employment Insurance Emergency Response Benefit): SOR/2020-208 states that the interim order enables a "modified operational approach to the assessment of availability to work for claimants who are in training."[21] The explanatory note pertains only to section 153.161(2) of the *Employment Insurance Act*.

[64] The explanatory note does not say anything more about section 153.161. It does not address the purpose of section 153.161(1) of the *Employment Insurance Act*. It does not specify that a claimant cannot use the pandemic as an exceptional circumstance to rebut the general assumption.

[65] However, the section requires students to prove that they are capable of and available for work. By requiring students to prove their availability, the section entrenches the general presumption that a full-time student is not available for work. More importantly, the section has the practical effect of rendering the ability to rebut the general presumption meaningless. Rebutting the general presumption, such as by

---

[20] See General Division decision, at para 27.
[21] See *Canada Gazette*, Part II, Volume 154, Number 21, SOR/220-208 September 26, 2020, reproduced in Commission's submissions, at AD4-25 to AD4-36.

showing a history of full-time work, becomes irrelevant if full-time students must prove they are capable of and available for work.

– **Availability under the *Employment Insurance Act***

[66] Because the Claimant had a mixture of synchronous and asynchronous classes, she had more hours available for work. For both the fall and winter sessions, the Claimant had several days during the week when she was available. She was also available on weekends.

[67] Indeed, the evidence was that she was "willing to work numerous hours around [her] synchronous school schedule, not limiting [herself] to only 20 hours per week."[22] The Claimant testified that her classes were "almost all exclusively online."[23]

[68] The Claimant testified that she thought she could work the equivalent of full-time hours, outside 9 am to 5 pm work hours.[24] In the past, the Claimant worked an average of anywhere between 25 and 30 hours a week, when it was not midterm or exam periods.[25]

[69] But, as I have noted above, the Court of Appeal has held that restricting availability to only certain times on certain days—including evenings and weekends—represents setting personal conditions that might unduly limit the chances of returning to the labour market.

[70] The Court of Appeal has also determined that a claimant has to be available during regular hours for every working day.[26] In other words, a claimant cannot restrict availability to irregular hours, for whatever reason.

[71] The Claimant's availability (summarized at paragraph 49 above) shows that she was not available during regular hours for every working day. Her circumstances were

---

[22] See Claimant's request for reconsideration, filed September 20, 2021, at GD3-33 to GD3-35; General Division decision, at para 6, and at approximately 11:42 and 12:30 of the audio recording of the General Division hearing.
[23] At approximately 7:12 of the audio recording of the General Division hearing.
[24] At approximately 11:15 of the audio recording of the General Division hearing.
[25] At approximately 13:05 of the audio recording of the General Division hearing.
[26] See *Bertrand*.

somewhat similar to those described by the Court, particularly in *Duquet* and *Rideout*. But, unlike those claimants, the Claimant was available most afternoons, rather than just evenings. Even so, she was only available at certain times on certain days, which restricted her availability.

[72] The principles set out in *Bertrand*, along with other decisions of the Court of Appeal, are directly applicable to the Claimant's case. Despite the fact that the Claimant could work several afternoons, most evenings, and weekends, the Claimant was not available for work for the purposes of the *Employment Insurance Act*.

The Claimant's options

[73] The Claimant argues that she should not bear any responsibility for any overpayment that resulted when the Commission paid her Employment Insurance benefits before verifying her entitlement. She exercised due diligence by contacting the Commission (via Service Canada) before applying for benefits. She relied on the Commission's advice to her that she was entitled to receive benefits. She is experiencing financial strain and hardship.

[74] Service Canada should have made it clear to the Claimant that the Commission would provisionally accept her claim for Employment Insurance benefits. In other words, the Commission would pay her for the time being before verifying whether she was entitled to those benefits.

[75] Even if the Claimant received erroneous advice from the Commission and received benefits to which she was not entitled, the *Employment Insurance Act* still requires her to repay those benefits.

[76] The Appeal Division does not have any authority to provide any relief to the Claimant. In terms of any potential relief, the Claimant has two options:

i. she can ask the Commission to consider writing off the debt because of undue hardship. If the Claimant does not like the Commission's response, her option then is to appeal to the Federal Court, or

ii. she can contact Canada Revenue Agency's Debt Management Call Centre at 1-866-864-5823 about writing off the debt or about a repayment schedule.

[77] Often, the Commission refers claimants to the Debt Management Centre to help determine whether they are facing financial hardship.

Conclusion

[78] I am allowing the Commission's appeal. The General Division made a legal error when it determined that the Claimant was available for work and was not disentitled to Employment Insurance benefits. The evidence shows that the Claimant was not available for work for the purposes of the *Employment Insurance Act*. She is not entitled to Employment Insurance benefits during the relevant period.

Janet Lew
Member, Appeal Division