[TRANSLATION]

Citation: *Canada Employment Insurance Commission v ET*, 2022 SST 662

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	Canada Employment Insurance Commission
Representative:	Jessica Grant
Respondent:	E. T.

Decision under appeal:	General Division decision dated November 17, 2021 (GE-21-1792)

Tribunal member:	Pierre Lafontaine
Type of hearing:	Teleconference
Hearing date:	June 30, 2022
Hearing participants:	Appellant's representative Respondent
Decision date:	July 22, 2022
File number:	AD-21-434

Decision

[1] The appeal is allowed.

Overview

[2] The Appellant, the Canada Employment Insurance Commission (Commission), decided that the Respondent (Claimant) was not entitled to Employment Insurance (EI) regular benefits as of January 10, 2021, because she was taking unauthorized training and was not available for work within the meaning of the law.

[3] The General Division found that the Claimant wanted to go back to work and that she had made significant efforts to find a job during her studies. It also found that the Claimant was not limiting her chances of finding a job. The General Division decided that the Claimant was available for work from January 10, 2021.

[4] The Appeal Division granted the Commission leave to appeal the General Division decision. The Commission argues that the General Division made an error of law by ignoring the case law of the Federal Court of Appeal (FCA) which confirmed that a claimant who is restricting their availability for work to non-school hours or days has not proven their availability within the meaning of the law.

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

[6] I am allowing the Commission's appeal.

Issue

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

Analysis

Appeal Division's mandate

[8] The FCA 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*.[1]

[9] 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.

[10] 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.

Preliminary remarks

[11] In making this decision, I did not consider the documents that the Commission filed before the Appeal Division. So, I did not consider whether exceptions to the general rule against considering new evidence applied in this case.

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

[12] The General Division found that the Claimant had rebutted the presumption that she was not available for work while in school full-time, since she had a history of working part-time while studying full-time.

[13] The General Division also found that the Claimant was showing a desire to go back to work, was making enough effort to find a job, and had not set personal

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

conditions that limited her chances of going back to work. The General Division found that the Claimant was available within the meaning of the law.

[14] In support of its appeal, the Commission argues that the General Division made an error of law in finding that the Claimant was available for work within the meaning of the law despite her full-time training.

[15] Specifically, the Commission argues that the General Division made an error of law in its interpretation of the third factor of the legal test confirmed in *Faucher*, and when it found that the Claimant had not set personal conditions that unduly limited her chances of going back to work.[2]

[16] According to the Commission, the evidence shows that the Claimant's classes were between the hours of 10 a.m. and 5 p.m., Monday to Friday, and that she was available for work only outside her school hours, that is, on weekday evenings and weekends.

[17] The Commission says that the General Division made an error in finding that the Claimant had discharged her burden of proof by simply being available for part-time work while enrolled in full-time training.

[18] The Claimant says that she was a full-time student working part-time before she was laid off because of the pandemic. She argues that, despite the pandemic, she still applied for jobs. She says that the General Division did not make an error when it found that she was as available for work as before her layoff, since she had to help provide for her family with her brother to help her mother.

Verification of entitlement

[19] The Claimant established a claim for EI benefits effective January 10, 2021.

[20] The law says that the Commission may, **at any point** after benefits are paid to a claimant who attends a course, program of instruction or training, verify that the

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

claimant 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.[3]

[21] This provision—which is part of the *Temporary Measures to Facilitate Access to Benefits*—implicitly acknowledges that, during the pandemic, it may not have been possible to verify entitlement when benefits were initially paid. And it allows for a later verification, even after the benefits have ended.

[22] I note that the provision was in force when the Claimant applied for benefits.[4]

[23] This means that the Commission could, at any point, verify whether the Claimant, who was attending a program of instruction, was entitled to EI benefits even after she had received them.

Availability

[24] The General Division found that the Claimant had rebutted the presumption that she was not available for work while taking training full-time. It accepted that the Claimant had shown an ongoing history of working part-time while also taking training full-time.

[25] However, rebutting the presumption means only that the Claimant is not presumed to be unavailable. The General Division still had to look at the requirements of the law and decide whether the Claimant was actually available.

[26] To be considered available for work, a claimant has to prove that they are capable of and available for work and unable to find a suitable job.[5]

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

a) wanting to go back to work as soon as a suitable job is available

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[3] See section 153.161 of *the Employment Insurance Act*.
[4] In force between September 27, 2020, and September 25, 2021: See sections 153.15 *et seq.* of the *Employment Insurance Act*.
[5] See section 18(1)(a) of the *Employment Insurance Act*.

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 work[6]

[28] 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.[7]

[29] 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.[8]

[30] The main issue in this case is the General Division's interpretation of the third factor of the availability test in *Faucher*: not setting personal conditions that might unduly limit the chances of going back to work.

[31] I note that the Appeal Division's recent decisions on this issue are not unanimous.

[32] In *JD*, it was decided that the claimant, who had expressed intention to seek only part-time work that did not interfere with her full-time studies with constraints similar to those that pre-existed her loss of employment, had not unduly limited her chances of going back to work.[9]

[33] However, in *RJ*, the Appeal Division found that restricting availability to only certain times on certain days represents setting personal conditions that might unduly limit the chances of going back to work.[10]

[34] The issue of the availability of a claimant who is taking full-time training courses has been the subject of many decisions over the years.

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[6] *Faucher*, above.
[7] *Canada (Attorney General) v Cloutier*, 2005 FCA 73.
[8] See section 32 of the *Employment Insurance Regulations*.
[9] *JD v Canada Employment Insurance Commission*, 2019 SST 438: The Appeal Division member found CUB 52365 to be persuasive.
[10] *Canada Employment Insurance Commission v RJ*, 2022 SST 212.

[35] The following principle emerges from prior Umpire case law:

> Availability must be demonstrated during regular hours for every working day and cannot be restricted to irregular hours resulting from a training program schedule that significantly limits availability.[11]

[36] In an Umpire decision, a claimant who had classes from 8:30 a.m. to 3:30 p.m. and who was available any time outside her course schedule was found to be unavailable for work under the EI Act.[12]

[37] The FCA has also made a number of decisions about the availability of a claimant who is taking full-time training courses.

[38] In *Bertrand*, the Court found that the claimant, whose availability was restricted to the hours of work between 4 p.m. and midnight, was not available for the purposes of the EI Act.[13]

[39] In *Vézina*, the Court followed *Bertrand*, finding that the claimant's intentions to work weekends and evenings showed a lack of availability for work under the EI Act.[14]

[40] In *Rideout*, the Court found that the fact that the claimant was available for work only two days per week plus weekends was a limitation on his availability for full-time work.[15]

[41] In *Primard* and *Gauthier*, the Court pointed out that a working day excludes weekends under the *Employment Insurance Regulations*. It also found that a work availability that is restricted to evenings and weekends alone is a personal condition that might unduly limit the chances of going back to work.[16]

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[11] CUB 74252A, CUB 68818, CUB 52688, CUB 37951, CUB 38251, CUB 25041.
[12] CUB 68818.
[13] *Bertrand*, A-613-81: The FCA followed this case in student files even though it involved a claimant who could not work regular weekday hours because of her difficulties finding a babysitter.
[14] *Vézina v Canada (Attorney General)*, 2003 FCA 198.
[15] *Canada (Attorney General) v Rideout*, 2004 FCA 304.
[16] *Canada (Attorney General) v Primard*, 2003 FCA 349; *Canada (Attorney General) v Gauthier*, 2006 FCA 40.

[42] In *Duquet*, the Court, applying the *Faucher* factors, found that being available only at certain times on certain days restricts availability and limits a claimant's chances of finding employment.[17]

[43] From the case law of the FCA, I can draw the following principles:

1. A claimant has to be available during regular hours for every working day of the week.
2. Restricting availability to only certain times on certain days of the week, including evenings and weekends, is a limitation on availability for work and a personal condition that might unduly limit the chances of going back to work.

[44] Based on these principles established by the FCA, I simply cannot follow the Appeal Division's decision in *JD*. And I see no explanation in the decision as to why the General Division chose not to follow the binding case law from the FCA concerning the availability of a claimant who is taking full-time training courses.

[45] The Claimant says that she looked for part-time work that did not interfere with her full-time studies with constraints similar to those that pre-existed her loss of employment. She argues that her schedule allowed her to work from 6 p.m. to 9 p.m. on Mondays and Tuesdays, from 5 p.m. to 9 p.m. on Wednesdays and Thursdays, and from 3 p.m. to 9 p.m. on Fridays, for a total of 20 hours per week, excluding weekends. The Claimant argues that she always showed her desire to work while in school by providing a history of part-time employment.[18]

[46] I admit that claimants can establish claims for benefits based on part-time work. However, to be considered available for work under the EI Act, they must not set personal conditions that might unduly limit their chances of going back to work. Looking for work outside school hours is a personal condition that might unduly limit the chances of going back to work.

[47] The evidence shows that the Claimant's classes were between the hours of 10 a.m. and 5 p.m., Monday to Friday, and that she was available for work only outside

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[17] *Duquet v Canada (Attorney General)*, 2008 FCA 313.
[18] See AD7-3.

her school hours, that is, on weekday evenings and weekends. She also went back to her regular part-time job in April 2022. She indicated that she was unwilling to drop her course to accept a full-time job.

[48] Based on this evidence, the General Division found that the Claimant had not set personal conditions that unduly limited her chances of going back to work.

[49] From my reading of the General Division decision, it seems that the General Division confused the presumption of non-availability with the analysis of the third *Faucher* factor.

[50] In my view, the General Division could not use the presumption of non-availability and the pandemic to establish the absence of personal conditions that might unduly limit the Claimant's chances of going back to work.[19]

[51] I am also of the view that the General Division made an error of law by ignoring the binding case law from the FCA and by misinterpreting the third factor of the availability test in *Faucher*: not setting personal conditions that might unduly limit a claimant's availability for work.

[52] This means that I am justified in intervening.

Remedy

[53] 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.

[54] The evidence shows that the Claimant was enrolled full-time at the Cégep de Maisonneuve. Her classes were between the hours of 10 a.m. and 5 p.m., Monday to Friday, and she was available for work only outside her school hours, that is, on weekday evenings and weekends. She also went back to her regular part-time job in

[19] *SL v Canada Employment Insurance Commission*, 2021 SST 986: It is an error of law to consider the pandemic in this way when assessing a claimant's availability.

April 2022. In addition, she was unwilling to drop her course to accept a full-time job. These two conditions kept her from having jobs during regular hours, Monday to Friday.

[55] In accordance with section 18(1)(a) of the EI Act, and in applying the case law of the FCA, I find that the Claimant was not available and unable to find a suitable job each working day of her benefit period, since her availability was unduly restricted by the requirements of the program she was taking at the Cégep de Maisonneuve.

[56] As the FCA has stated, cases such as the Claimant's elicit sympathy, and the Tribunal is strongly tempted to do away with the rule of law and render a decision based on fairness, but it must be careful not to fall into such a trap.[20]

[57] For the above reasons, I am allowing the Commission's appeal.

Conclusion

[58] The appeal is allowed.

[59] The Claimant was not entitled to EI regular benefits as of January 10, 2021, because she was taking unauthorized training and was not available for work within the meaning of the law.

Pierre Lafontaine
Member, Appeal Division

[20] *Canada (Attorney General) v Gauthier*, 2006 FCA 40 at para 5.