[TRANSLATION]

Citation: *Canada Employment Insurance Commission v AG*, 2022 SST 670

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	Canada Employment Insurance Commission
Representative:	Jessica Grant
Respondent:	A. G.

Decision under appeal:	General Division decision dated December 3, 2021 (GE-21-1934)

Tribunal member:	Pierre Lafontaine
Type of hearing:	Teleconference
Hearing date:	June 30, 2022
Hearing participants:	Appellant's representative Respondent
Decision date:	July 25, 2022
File number:	AD-22-4

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 from October 5, 2020, to June 18, 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 had wanted to go back to work and had made efforts to find a job during her studies. It also found that the Claimant had not limited her chances of finding a job. The General Division decided that the Claimant was available for work from October 5, 2020, to June 18, 2021.

[4] The Appeal Division granted the Commission leave to appeal the General Division decision. The Commission says that the General Division made an error of law when it ignored the evidence on file and the case law of the Federal Court of Appeal (FCA).

[5] I have to decide whether the General Division made an error of law when it found that the Claimant was available for work within the meaning of the law.

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

Issue

[7] Did the General Division make an error of law when it found that the Claimant was available for work within the meaning of the law?

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 have to dismiss the appeal.

Preliminary remarks

[11] I did not take into account the documents the Commission submitted to the Appeal Division to make this decision. 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 when it found that the Claimant was available for work within the meaning of the law?

[12] The General Division found that the Claimant had rebutted the presumption that she was not available for work while studying full-time because she worked part-time for several years while studying full-time.

[13] The General Division found that the Claimant showed a desire to go back to work, made enough efforts to find a job, and did not set personal conditions that would have limited her chances of going back to work. The General Division found that the

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

Claimant was available within the meaning of the law from October 5, 2020, to June 18, 2021.

[14] The Commission says that the General Division ignored the evidence on file that the Claimant did not search for a job for several weeks during the period in question. It also says that she was waiting to go back to work for her usual employer despite not knowing when she would be able to go back. It says that the General Division made an error when it found that the Claimant had expressed the desire to go back to work through consistent efforts to find a suitable job.

[15] The Commission also says that the General Division made an error in finding that the Claimant had not unduly limited her chances of going back to work despite the demands of her training. It argues that the Claimant restricted her availability because of her studies during the day from Monday to Friday. Also, the Claimant limited her availability to her usual employer, which further limited her chances of finding a suitable job.

[16] The Commission argues that the General Division also ignored the case law of the FCA, which confirmed that a claimant who restricts their availability for work to non-school hours or days has not proven their availability within the meaning of the law.

[17] The Claimant says that she was entitled to benefits because she always worked part-time while going to school full-time before being laid off because of the pandemic. She argues that she had to remain available as a dance teacher for her usual employer but that she also applied to other jobs offered by her employer. The Claimant says that the General Division did not make an error when it found that she was available for work within the meaning of the law.

Verification of entitlement

[18] The Claimant established a claim for EI benefits effective October 4, 2020.

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

claimant is entitled to benefits by requiring proof that they were capable of and available for work any working day of their benefit period.[2]

[20] 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.

[21] I note that the provision was in force when the Claimant applied for benefits.[3]

[22] This means that the Commission could, at any time, verify whether the Claimant was entitled to EI benefits even after she had received them.

Availability

[23] The General Division found that the Claimant had rebutted the presumption that she was unavailable for work while she was taking training full-time. It accepted that the Claimant had shown an ongoing history of working part-time while also taking full-time training.

[24] 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.

[25] 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.[4]

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

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

b) the expression of that desire through efforts to find a suitable job

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

c) not setting personal conditions that might unduly limit the chances of going back to work[5]

[27] 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.[6]

[28] For the purposes of section 18 of the *Employment Insurance Ac*t (Act), a working day is any day of the week except Saturday and Sunday.[7]

[29] The General Division found that the Claimant had made efforts to find a suitable job by applying for other jobs offered by her employer while waiting to be called back to work as a dance teacher.

[30] It is settled law that a claimant cannot simply wait to be called back to work and has to **actively** look for a job to be entitled to benefits.[8] Maintaining the employment tie does not necessarily make a person available for work.[9]

[31] I find that the evidence before the General Division clearly shows that the Claimant was waiting to be called back to work by her usual employer during her studies. Even if I had to consider that she was looking for work, her search was done late and limited to the jobs offered by her usual employer, which undermines her availability.

[32] I am of the view that the General Division made an error in its interpretation of the second *Faucher* factor and by finding that the Claimant showed a desire to go back to work through efforts to find a suitable job.

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[5] *Faucher v Canada (Employment and Immigration Commission)*, A-56-96.
[6] *Canada (Attorney General) v Cloutier*, 2005 FCA 73.
[7] See section 32 of the *Employment Insurance Regulations*.
[8] *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.
[9] *Canada (Attorney General) v Gagnon*, 2005 FCA 321.

[33] The other question of law the Commission noted is the General Division's interpretation of the third *Faucher* factor—not setting personal conditions that might unduly limit the chances of going back to work.

[34] I note that recent Appeal Division decisions on this issue have not been unanimous.

[35] In *JD*, it was decided that the claimant, who had expressed the 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.[10]

[36] 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.[11]

[37] 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.

[38] 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.[12]

[39] 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 Act.[13]

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[10] *JD v Canada Employment Insurance Commission*, 2019 SST 438: The Appeal Division member found CUB 52365 to be persuasive.
[11] *Canada Employment Insurance Commission v RJ*, 2022 SST 212.
[12] CUB 74252A; CUB 68818; CUB 52688; CUB 37951; CUB 38251; CUB 25041.
[13] CUB 68818.

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

[41] 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 Act.[14]

[42] In *Vezina*, the Court followed *Bertrand*, finding that the claimant's intentions to work weekends and evenings showed a lack of availability for work under the Act.[15]

[43] In *Rideout*, the Court found that the fact that the claimant was available for work only two days per week and weekends was a limitation on his availability for full-time work.[16]

[44] 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.[17]

[45] 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.[18]

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[14] *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.
[15] *Vezina v Canada (Attorney General)*, 2003 FCA 198.
[16] *Canada (Attorney General) v Rideout*, 2004 FCA 304.
[17] *Canada (Attorney General) v Primard*, 2003 FCA 349; *Canada (Attorney General) v Gauthier*, 2006 FCA 40.
[18] *Duquet v Canada (Attorney General)*, 2008 FCA 313.

[46] 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.

[47] 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.

[48] 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 existed before she lost her job due to the pandemic. She argues that she had only two mandatory school days, meaning she was available to work five days a week. The Claimant argues that she has always shown her desire to work during her studies by submitting her part-time employment history.[19]

[49] I accept that claimants can establish claims for benefits based on part-time work. However, they cannot set personal conditions that might unduly limit their chances of going back to work to be considered available for work within the meaning of the Act. Looking for work outside school hours is a personal condition that could unduly limit the chances of going back to work.

[50] The evidence shows that the Claimant was taking full-time training and that she was available for work only outside of her class hours—a few days a week—weekday evenings and weekends. She said she was unwilling to drop her course to accept a full-time job.

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[19] See AD-10-2.

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

[52] 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.

[53] I am of the view that 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.[20]

[54] 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.

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

Remedy

[56] 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.[21]

[57] The evidence shows that the Claimant was enrolled full-time at the Université de Montréal. She was available for work only outside her class hours weekday evenings and weekends. Also, the Claimant 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.

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[20] *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.
[21] In accordance with the powers given to the General Division under section 59(1) of the *Department of Employment and Social Development Act*.

[58] In accordance with section 18(1)(a) of the 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 Université de Montréal.

[59] 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.[22]

[60] For the reasons set out above, I am allowing the Commission's appeal.

Conclusion

[61] The appeal is allowed.

[62] The Claimant was not entitled to EI regular benefits from October 5, 2020, to June 18, 2021, because she was taking unauthorized training and was not available for work within the meaning of the law.

Pierre Lafontaine
Member, Appeal Division

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