Citation: *Canada Employment Insurance Commission v RV*, 2022 SST 658

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	Canada Employment Insurance Commission
Representative:	Angèle Fricker
Respondent:	R. V.

Decision under appeal:	General Division decision dated October 21, 2021 (GE-21-1730)

Tribunal member:	Pierre Lafontaine
Type of hearing:	Teleconference
Hearing date:	June 16, 2022
Hearing participants:	Appellant's representative Respondent
Decision date:	July 21, 2022
File number:	AD-21-382

Decision

[1] The appeal is allowed.

Overview

[2] The Appellant (Commission) determined that the Respondent (Claimant) did not meet the availability requirements under the law because he was enrolled in fulltime training with the X. The Commission imposed a retroactive stop payment (disentitlement) as of November 22, 2020. This disentitlement resulted in an overpayment of EI benefits. The Commission maintained its decision upon reconsideration. The Claimant appealed the reconsideration decision to the General Division.

[3] The General Division found that the Claimant rebutted the presumption that he was unavailable for work while attending full-time school because he had a long history of working part-time while studying full-time. The General Division found that the Claimant showed a desire to return to the labour market, made enough efforts to find work and did not set personal conditions limiting his chances of returning to the labour market. It concluded that he was available under the law.

[4] The Appeal Division granted the Commission leave to appeal. It submits that the General Division erred in law in its interpretation of section 18(1) (a) of the *Employment Insurance Act* (EI Act).

[5] I must decide whether the General Division made an error in law in its interpretation of section 18(1) (a) of the EI Act.

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

Issue

[7] Did the General Division make an error in law in its interpretation of section 18(1) (a) of the EI Act and when it concluded that the Claimant was available for work?

Analysis

Appeal Division's mandate

[8] The Federal Court of Appeal has determined that when the Appeal Division hears appeals pursuant to section 58(1) of the *Department of Employment and Social Development Act* (DESD Act), the mandate of the Appeal Division is conferred to it by sections 55 to 69 of that Act.[1]

[9] The Appeal Division acts as an administrative appeal tribunal for decisions rendered by the General Division and does not exercise a superintending power similar to that exercised by a higher court.[2]

[10] Therefore, unless the General Division failed to observe a principle of natural justice, erred in law, 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 in law in its interpretation of section 18(1) (a) of the EI Act and when it concluded that the Claimant was available for work?

[11] The General Division found that the Claimant rebutted the presumption that he was unavailable for work while attending full-time school because he had a long history of working part-time while studying full-time.

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

[12] The General Division further found that the Claimant showed a desire to return to the labour market, made enough efforts to find work and did not set personal conditions limiting his chances of returning to the labour market. It concluded that he was available under the law.

[13] The Commission submits that the General Division erred in law in deciding the third factor in the legal test confirmed in the *Faucher* decision, when it concluded that the Claimant did not set personal conditions that unduly limited his chances of returning to the labour market.[3]

[14] The Commission submits that the evidence shows that the Claimant was enrolled in fulltime training with the X and that he would not drop his training if an offer of full time employment were presented. It submits that the Claimant indicated in his weekly reports that he was not available two to three days each week and that he dedicated more than 35 hours per week to his training.

[15] The Commission submits that the General Division made an error in concluding that the Claimant had met his burden of proof by just being available for part-time work while enrolled in full time training.

[16] The Claimant submits that he qualified for benefits because he has a long history of working part-time while going to school full-time. He submits that he established a claim for benefits with part-time work and that the law does not require that he search for full-time work. He puts forward that he always looked for work around his school schedule but the labour market was non-existent because of the pandemic. The Claimant submits that he was 100% transparent with the Commission from the beginning of his claim and that he should not pay for their mistake.

Verification of entitlement

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

[17] The Claimant established a claim for employment insurance (EI) benefits effective November 22, 2020.

[18] The law says that the Commission may, **at any point** after benefits are paid to a claimant, verify that the 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.[4]

[19] This provision, which is part of the *Temporary Measures to Facilitate Access to Benefits*, acknowledges that during the pandemic, verification of entitlement may not have been possible at the time benefits are initially paid, and to allow for subsequent verification even after benefits have been paid.

[20] I notice that the provision was in force when the Claimant applied for benefits.[5] Therefore, the Commission could verify at any point that the Claimant was entitled to EI benefits even after he had received the EI benefits.

Availability to work

[21] The General Division had to decide whether the Claimant met the availability requirements while attending full-time training.

[22] The General Division found that the Claimant had rebutted the presumption that he was unavailable for work while attending full-time training. It found that he had shown a continuous pattern since 2015 of working part-time while attending full-time training.

[23] As stated by the General Division, rebutting the presumption only means that the Claimant is not presumed to be unavailable. The General Division still

[4] Section 153.161(2) of the *Employment Insurance Act*.
[5] In force between September 27, 2020 and September 25, 2021: See sections 153.15 and following of the *Employment Insurance Act.*

had to look at the requirements of the EI Act and decide whether the Claimant was in fact available.

[24] To be considered available for work, a claimant must show that he is capable of, and available for work and unable to obtain suitable employment.

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

(1) the desire to return to the labour market as soon as a suitable job is offered,

(2) the expression of that desire through efforts to find a suitable job, and

(3) not setting personal conditions that might unduly limit the chances of returning to the labour market.

[26] Furthermore, availability is determined for **each working day** in a benefit period for which the claimant can prove that on that day he was capable of and available for work, and unable to obtain suitable employment.[6]

[27] For the purposes of sections 18 of the EI Act, a working day is any day of the week except Saturday and Sunday.[7]

[28] The main question in this case is the General Division's interpretation of the third factor of the *Faucher* availability test, namely, not setting personal conditions that might unduly limit the chances of returning to the labour market.

[29] I notice that recent Appeal Division decisions on this question are not unanimous.

[30] In the case of J.D., it was held that the claimant who expressed the intention to seek only part-time work that did not interfere with her full-time

[6] *Canada (Attorney General) v Cloutier*, 2005 FCA 73.
[7] Section 32 of the *Employment Insurance Regulations*.

studies with the similar constraints to those that pre-existed her lost of employment, did not unduly limit her chances of returning to the labour market.[8]

[31] In the case of R.J., the Appeal Division found that restricting availability to only certain times on certain days represented setting personal conditions that might unduly limit the chances of returning to the labour market.[9]

[32] The issue of a claimant's availability when taking full-time training courses has been the subject of numerous decisions over the years.

[33] The following principle emerged from the previous Umpire case law:

> -Availability has to 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.[10]

[34] In a decision rendered by an Umpire, a claimant who had classes from 8h30 a.m. to 3h30 p.m., and was available anytime outside her course schedule, was considered not available to work under the EI Act.[11]

[35] The Federal Court of Appeal (FCA) has rendered several decisions regarding the availability of a claimant when taking full-time training courses.

[36] In *Bertrand*, the Court indicated that availability restricted to the hours of work between 4 p.m. and midnight, is not availability for purposes of the EI Act.[12]

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[8] *J.D. v Canada employment Insurance Commission*, 2019 SST 438: the Appeal Division member found CUB 52365 to be persuasive.
[9] *Canada Employment Insurance Commission v R.J.*, 2022 SST 212.
[10] CUB 74252A; CUB 68818; CUB 52688; CUB 37951; CUB 38251; CUB 25041.
[11] CUB 68818.
[12] *Bertrand*; A-613-81: this case was followed by the FCA in student cases even tough it involved a claimant not being able to work during regular hours during the week because of her difficulties finding a babysitter.

[37] In *Vézina*, the Court followed *Bertrand* and found that the Claimant's intentions of working weekends and evenings demonstrated a lack of availability for work under the EI Act.[13]

[38] In *Rideout*, the Court found that the claimant being only available for work two days per week plus weekends was a limitation on his availability for full-time work.[14]

[39] In *Primard* and *Gauthier*, the Court noted that a working day excluded weekends under the *Employment Insurance Regulations* and found that a work availability restricted to evenings and weekends alone is a personal condition that might unduly limit the chances of returning to the labour market.[15]

[40] In *Duquet*, the Court applying the *Faucher* factors determined that being available only at certain times on certain days restricted availability and limited a claimant's chances of finding employment.[16]

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

> 1- A claimant must 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—represents a limitation on availability for work and sets a personal condition that might unduly limit the chances of returning to the labour market.

[42] Based on these established principles, I simply cannot follow the Appeal Division decision in J.D.. I find no explanation in the decision why it chose not to

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

follow the binding FCA case law regarding a claimant's availability when taking full-time training courses.

[43] The Claimant takes the position that because he qualified for benefits with part-time work, he can limit his search to work that does not interfere with his school schedule.

[44] I acknowledge that a claimant may establish a claim for benefits based on part-time work. However, they must not set a personal condition that might unduly limit their chances of returning to the labour market to be considered available to work under the EI Act. Looking for work around a school schedule is a personal condition that might unduly limit his chances of returning to the labour market.

[45] The evidence before the General Division shows that the Claimant attended a full-time training at the X to become a pilot. He stated on two occasions that he dedicated 35 hours per week, around 5 hours per day, to his studies. He indicated in his weekly reports that he was not available two to three days each week. The course did not have classes to attend, virtual or in person, but he would usually go for training between 9 and 5 during the week when the trainer was available. He indicated that he would only accept a full-time job as long as he could delay the start date to allow him to finish the program.[17]

[46] Based on this evidence, the General Division found that the Claimant could limit his search to part-time work that did not interfere with his school schedule and that he did not set personal conditions that unduly limited his chances of returning to the labour market.

[47] I find that the General Division erred in law by ignoring the above-binding FCA case law and by misinterpreting the third factor of the availability test in

[17] See GD3-8, GD3-216 and GD3-219.

Faucher, namely the absence of conditions that might unduly limit a claimant's availability for work.

[48] I am therefore justified to intervene.

Remedy

[49] Considering that both parties had the chance to present their case before the General Division, I will render the decision that should have been given by the General Division.[18]

[50] The evidence shows that the Claimant dedicated 35 hours per week, around 5 hours per day, to his studies. He indicated in his weekly reports that he was not available two to three days each week. The course did not have classes to attend, virtual or in person, but he would usually go for training between 9 and 5 during the week, when the trainer was available. The Claimant would only accept a full-time job as long as he could delay the start date to allow him to finish the program. Both of those restricted his availability and limited his chances of finding employment during regular hours for every working day of the week.

[51] Pursuant to section 18(1) (a) of the EI Act, and in applying the binding FCA case law, I find that the Claimant was not available and unable to obtain suitable employment on the working days of a benefit period because his availability was unduly restricted by the requirements of the program he was following at the X.

[52] For the above-mentioned reasons, I am allowing the Commission’s appeal.

[18] Pursuant to the powers given to the Appeal Division by section 59(1) of the DESD Act.

Conclusion

[53] The appeal is allowed.

Pierre Lafontaine
Member, Appeal Division