[TRANSLATION]

Citation: *Canada Employment Insurance Commission v ER*, 2022 SST 761

Social Security Tribunal of Canada
Appeal Division

Decision

Applicant:	Canada Employment Insurance Commission
Representative:	Jessica Grant
Respondent:	E. R.

Decision under appeal:	General Division decision dated October 28, 2021 (GE-21-1768)

Tribunal member:	Pierre Lafontaine
Type of hearing:	Teleconference
Hearing date:	August 9, 2022
Hearing participants:	Appellant's representative Respondent
Decision date:	August 15, 2022
File number:	AD-21-393

Decision

[1] The Commission's appeal is allowed.

[2] The file returns to the General Division for it to decide only on whether the Commission had the power to disentitle the Claimant to benefits retroactively, and if so, whether the Commission should have acted and did act judicially when it decided to reconsider the Claimant's claim.

Overview

[3] 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 11, 2021, because she was taking unauthorized training and was not available for work within the meaning of the law.

[4] The General Division found that the Claimant wanted to go back to work and that she had made efforts to find a job while in school. 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 as of January 11, 2021.

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

[6] 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.

[7] I am allowing the Commission's appeal on the issue of availability.

Issue

[8] Did the General Division make an error of law in finding that the Claimant was available for work within the meaning of the law?

Analysis

Appeal Division's mandate

[9] 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]

[10] 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.

[11] 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

[12] 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?

[13] The General Division found that the Claimant had rebutted the presumption that she was not available for work while in school full-time.

[14] 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 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 as of January 11, 2021.

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

[15] The Commission says that the General Division ignored the evidence on file that the Claimant did not look for a job from mid-January 2021 to May 2021, since she preferred to focus on school. 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.

[16] The Commission 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 daytime studies from Monday to Friday.

[17] The Commission says that the General Division ignored the case law of the FCA which confirmed that a claimant who is restricting their availability for work outside their course schedule or days has not proven their availability within the meaning of the law.

[18] The Claimant argues that she continued receiving benefits after having told a Commission agent about her going back to school. It was only when her EI benefits ended that she received correspondence from the Commission telling her that she had to repay the benefits she had received. She argues that that is unfair, since she has a large debt to repay despite disclosing her situation from the beginning.

Availability

[19] The General Division found that the Claimant had rebutted the presumption that she was not available for work while taking training full-time. The General Division accepted that the Claimant was available for work at her usual job outside school hours.

[20] 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.

[21] 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.[2]

[22] Availability has to 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 work[3]

[23] 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.[4]

[24] 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.[5]

[25] The General Division found that the Claimant had made efforts to find a suitable job, since she had made some efforts to find a job while in school.

[26] The EI Act clearly says that, to be entitled to benefits, a claimant has to establish their availability for work and, to do this, they have to **actively** look for work.

[27] I am of the view that the evidence before the General Division clearly shows that the Claimant wanted to put all of her efforts towards completing her program successfully, above all else.[6] Even if I had to consider that the Claimant was looking for

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[2] See section 18(1)(a) of the *Employment Insurance Act*.
[3] *Faucher v Canada (Employment and Immigration Commission)*, A-56-96.
[4] *Canada (Attorney General) v Cloutier*, 2005 FCA 73.
[5] See section 32 of the *Employment Insurance Regulations*.
[6] See GD3-18 and GD3-22.

work, her search was very limited, which is inconsistent with her availability during her studies.[7]

[28] 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 had shown the desire to go back to work through efforts to find a suitable job.

[29] The other question of law the Commission raised 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.

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

[31] 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 existed before she lost her job, had not unduly limited her chances of going back to work.[8]

[32] However, in *R*J, 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.[9]

[33] 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.

[34] 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

[7] See GD3-32 and GD3-33: Evidence of job searches from January 15, 2021, May 27, 2021, June 1, 2021, and July 11, 2021.
[8] *JD v Canada Employment Insurance Commission*, 2019 SST 438: The Appeal Division member found CUB 52365 to be persuasive.
[9] *Canada Employment Insurance Commission v RJ*, 2022 SST 212.

> from a training program schedule that significantly limits availability.[10]

[35] 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.[11]

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

[37] 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.[12]

[38] In *Vezina*, the Court followed *Bertran*d, finding that the claimant's intentions to work weekends and evenings showed a lack of availability for work under the EI Act.[13]

[39] 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.[14]

[40] 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.[15]

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[10] CUB 74252A; CUB 68818; CUB 52688; CUB 37951; CUB 38251; CUB 25041.
[11] CUB 68818.
[12] *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.
[13] *Vezina 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.

[41] 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.[16]

[42] 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.

[43] 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.

[44] 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 the 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.

[45] The evidence shows that the Claimant was taking training full-time from Monday to Friday and that she was available for work only outside her school hours—weekday evenings and weekends.

[46] The Claimant also indicated several times that she was unwilling to drop her courses to accept a full-time job.

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[16] *Duquet v Canada (Attorney General)*, 2008 FCA 313.

[47] 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.

[48] 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.

[49] 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.

[50] The legal test for availability does not require the General Division to identify all the obstacles—or the main obstacle—to the Claimant's job search. Rather, the relevant question was how the Claimant's studies affected her availability for work.[17]

[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 *Faucher* factor—not setting 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.[18]

[54] The evidence shows that the Claimant was enrolled in a technical school. She was taking training full-time from Monday to Friday and was available for work only outside her school hours, that is, on weekday evenings and weekends. In addition, she

[17] *Canada Employment Insurance Commission v SL*, 2022 SST 556: It is an error of law to consider the pandemic in this way when assessing a claimant's availability.
[18] In accordance with the powers given to the Appeal Division under section 58(1) of the *Department of Employment and Social Development Act*.

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 a benefit period, since her availability was unduly restricted by the requirements of the program she was taking.

[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 has to be careful not to fall into such a trap.[19]

[57] Before the General Division, the Claimant raised the issue of whether the Commission had the power to reconsider her claim at the end of her benefit period, since she had sincerely told an agent from the beginning about her going back to school full-time, and the Commission continued to pay her benefits.

[58] Given the General Division's findings on the issue of availability, it naturally did not decide whether the Commission had the power to disentitle the Claimant retroactively, and if so, whether the Commission should have acted and did act judicially when it decided to reconsider the Claimant's claim.

[59] For the above reasons, I am allowing the Commission's appeal on the issue of availability. However, the file returns to the General Division for it to decide only on the Commission's power to reconsider.

Conclusion

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

[61] The Claimant was not available and unable to find a suitable job while she was taking a training course as of January 11, 2021.

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

[62] The file returns to the General Division for it to decide only on whether the Commission had the power to disentitle the Claimant retroactively, and if so, whether the Commission should have acted and did act judicially when it decided to reconsider the Claimant's claim.

Pierre Lafontaine
Member, Appeal Division