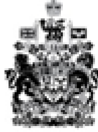

Citation: *SS v Canada Employment Insurance Commission*, 2022 SST 749

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	S. S.
Respondent:	Canada Employment Insurance Commission
Representative:	Tiffany Glover
Decision under appeal:	General Division decision dated February 10, 2022 (GE-21-2535)
Tribunal member:	Jude Samson
Type of hearing:	Teleconference
Hearing date:	May 19, 2022
Hearing participants:	Appellant Respondent's representative
Decision date:	August 12, 2022
File number:	AD-22-115

Decision

[1] The appeal is allowed. The Claimant was available for work and is entitled to Employment Insurance (EI) benefits.

Overview

[2] S. S. is the Claimant in this case. He came to Canada as a full-time student. His study permit allows him to work on or off campus. During academic terms, however, he can't work off campus for more than 20 hours/week.

[3] After arriving in Canada, the Claimant quickly found a job in the restaurant industry. But he was laid off when the COVID-19 pandemic hit. As a result, he received emergency benefits for some time, followed by EI regular benefits.

[4] Given his situation, the Claimant wasn't sure he could get EI benefits. So, he brought all his information to Service Canada, and agents repeatedly confirmed his entitlement.

[5] However, the Canada Employment Insurance Commission (Commission) later reviewed the Claimant's case and decided that he wasn't entitled to the EI benefits that it had paid him.[1] According to the Commission, the Claimant's class schedule and study permit meant that he wasn't available for work. And a person has to be available to work to get EI benefits.

[6] The Claimant appealed the Commission's decision to the Tribunal's General Division. It allowed the appeal in part, finding that the Claimant was available for work during his school breaks. Otherwise, the General Division found that the Claimant wasn't available for work and wasn't entitled to EI benefits.

[1] Service Canada delivers the EI program for the Commission.

[7] The Claimant is now appealing the General Division decision to the Tribunal's Appeal Division. He is arguing that the General Division didn't consider all the circumstances of his case, including his work history.

[8] I agree. The General Division made an error of law by misinterpreting the law on availability and by failing to consider whether the Claimant's circumstances allowed him to restrict his availability in some ways.[2] This allows me to give the decision the General Division should have given: The Claimant was available for work and was entitled to the EI benefits he had received.

Preliminary matter: the A. B. affidavit

[9] I will consider A. B.'s affidavit.[3] The Commission filed this affidavit to provide background information about another case that is mentioned in the leave to appeal decision.[4]

[10] The Appeal Division's limited role normally prevents me from considering new evidence.[5] New evidence is evidence that the General Division didn't have in front of it when it made its decision.

[11] There are exceptions to the general rule against considering new evidence. For example, I can consider new evidence that provides general background information only.[6]

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[2] This appeal is about the Claimant's availability under section 18(1)(a) of the *Employment Insurance Act* (EI Act). It isn't about whether the Claimant was making reasonable and customary efforts to find a suitable job under section 50(8) of the EI Act.
[3] The affidavit starts on page AD5-33.
[4] See paragraph 14 of the Appeal Division's March 9, 2022, decision in this case.
[5] The Appeal Division's role is mostly defined by sections 58 and 59 of the *Department of Employment and Social Development Act* (DESD Act).
[6] Although the context is somewhat different, the Appeal Division normally applies the exceptions to considering new evidence that the Federal Court of Appeal listed in *Sharma v Canada (Attorney General)*, 2018 FCA 48 at paragraph 8 and that the Federal Court listed in *Greeley v Canada (Attorney General)*, 2019 FC 1493 at paragraph 28.

[12] I decided to accept, A. B.'s affidavit because it provides general background information and, in fairness to the Commission, allows it to address a point raised in the leave to appeal decision.

Issues

[13] The issues in this appeal are as follows:

a) Did the General Division make an error of law by misinterpreting the law on availability and by failing to consider whether the Claimant's circumstances allowed him restrict his availability in some ways?

b) If so, how should I fix the General Division's error?

c) Was the Claimant available for work?

Analysis

[14] I can intervene in this case only if the General Division made a relevant error.[7] In this appeal, my focus is on whether the General Division made an error of law.

[15] Since any error of law can justify my intervention in the case, I can immediately consider the legal test for availability.

The General Division misinterpreted the law on availability

[16] Among other requirements, a person who wants EI regular benefits has to show that they are "capable of and available for work" but aren't able to find a suitable job."[8] The *Employment Insurance Act* (EI Act) doesn't define "available," meaning that courts and tribunals have had to grapple with its meaning.

[17] To begin, I should summarize some of the key principles about availability that have emerged from previous decisions. Consistency with previous decisions is

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[7] The relevant errors, formally known as "grounds of appeal," are listed under section 58(1) of the DESD Act.
[8] This requirement is set out in section 18(1)(a) of the EI Act.

important. Even though I only have to follow previous court decisions, previous Tribunal decisions can be persuasive, and I try to follow them whenever possible.

– **A summary of the law on availability**

[18] Three factors guide the Tribunal's assessment of a person's availability. These are often called the *Faucher* factors.[9] It is an error to ignore any of the factors. Instead, the Tribunal needs to consider and weigh all three factors:[10]

- Does the person want to go back to work as soon as a suitable job is available?
- Has the person made reasonable efforts to find a suitable job?
- Has the person set personal conditions that might unduly (overly) limit their chances of going back to work?

[19] The Tribunal assesses a person's availability from Monday to Friday.[11] It also considers the person's attitude, conduct, and all the circumstances of their case.[12]

[20] A person's willingness to work sometimes needs to be measured against their ability to work. No matter how much a person wants to work, they won't be entitled to EI benefits if they are unable to work for any reason.[13]

[21] The availability analysis is objective, meaning that I don't need to consider a person's reasons for restricting their availability and whether they are justified.[14]

[22] However, some restrictions on a person's availability—like following a spouse to an area with fewer employment opportunities—aren't wilful (voluntary) and don't remove

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[9] This is a reference to the Federal Court of Appeal decision in which these factors were listed: *Faucher v Canada (Employment and Immigration Commission)*, 1997 CanLII 4856 (FCA).
[10] This is a plain language summary of the *Faucher* factors.
[11] See section 32 of the *Employment Insurance Regulations* (EI Regulations) and *Canada (Attorney General) v Lamonde*, 2006 FCA 44 at paragraph 10.
[12] See *Canada (Attorney General) v Whiffen*, 1994 CanLII 10954 (FCA) at paragraphs 12 and 17.
[13] See *Canada (Attorney General) v Leblanc*, 2010 FCA 60.
[14] See *Canada (Attorney General) v Bertrand*, 1982 CanLII 3003 (FCA) at paragraph 19, which was reaffirmed in *Vezina v Canada (Attorney General)*, 2003 FCA 198.

a person's entire ability to work. I don't need to consider these restrictions as part of the availability analysis.[15]

[23] The Tribunal can't assess a person's availability in the abstract. In other words, a person doesn't have to show that they are available for all jobs. Instead, the focus is on a suitable job.[16]

[24] The important of suitable work is reinforced by other parts of the EI Act too. A person who wants EI benefits has to be available for a suitable job **and** has to be making reasonable and customary efforts to find a suitable job.[17]

[25] The law provides some guidance about what a suitable job is.[18] It depends in part on a person's usual occupation, personal circumstances, past earnings, and working conditions.

[26] What a person has to show to prove their availability can also change over time.[19] The law allows a person to impose more restrictions at first, but says that they have to expand their job search after being unemployed for a reasonable time.

[27] A person who restricts their availability to part-time work or to irregular hours might still be available for work, especially if they can establish a link between their usual occupation (past work) and current restrictions.[20] In addition, a person who restricts their availability in one way might be able to compensate by showing flexibility in other ways.[21]

[28] There is also an important connection between a person's availability and their efforts to find work. A person's job search efforts provide important information about labour market conditions, and the effect of any self-imposed restrictions. In fact,

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[15] See *Canada (Attorney General) v Whiffen*, 1994 CanLII 10954 (FCA).
[16] See the first two *Faucher* factors along with *Canada (Attorney General) v Whiffen*, 1994 CanLII 10954 (FCA) at paragraphs 13 and 14.
[17] See section 50(8) of the EI Act.
[18] See section 6(4) of the EI Act and section 9.002 of the EI Regulations.
[19] See section 6(5) of the EI Act and *Canada (Attorney General) v Whiffen*, 1994 CanLII 10954 (FCA).
[20] See *JD v Canada Employment Insurance Commission*, 2019 SST 438; CUB 17298; and CUB 17308.
[21] See *Canada (Attorney General) v Whiffen*, 1994 CanLII 10954 (FCA) at paragraph 4.

evidence of a serious and intensive job search weighs strongly in favour of a person's availability.[22]

[29] I understand from these principles that there are no hard and fast rules that apply to the availability requirement under the EI Act.[23]

[30] For example, a teacher who restricts their availability to evenings and weekends is unlikely to meet the requirements of the EI Act. However, the result might be different if the person usually worked at a nightclub. A suitable job looks different for people with different work histories.

– **Assessing availability requires a contextual approach**

[31] Using a contextual approach when assessing a person's availability is consistent with the overall structure and purpose of the EI Act, including its social objectives.[24] Among its purposes, the EI Act is designed to compensate contributors who find themselves without work through no fault of their own.[25] The EI Act doesn't exclude particular groups, like students or part-time workers.

[32] However, interpreting the availability requirement too restrictively could have that effect. For example, if people who want EI benefits have to always be available during regular hours from Monday to Friday, then many people—like part-time workers, students, and those working irregular hours—would be required to pay into the EI scheme, with little or no hope of receiving its benefits.

[33] This contextual approach is also better adapted to the changing nature of work. It means that banker's hours should not be the barometer used for assessing availability

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[22] See, for example, *Ricard v Canada (Attorney General)*, A-298-74; CUB 19058; CUB 18691; and CUB 18243. Also, see CUB 18707 about the failure to consider job search efforts.
[23] The Commission's *Digest of Benefit Entitlement Principles* doesn't seem to adopt hard and fast rules either. For example, it doesn't say that foreign students on a study visa are always disentitled from EI benefits: See Chapter 10.12.2.9.
[24] See *Hills v Canada (Attorney General)*, 1988 CanLII 67 (SCC) at paragraphs 36 to 40.
[25] For example, see *Canada (Canada Employment and Immigration Commission) v Gagnon*, 1988 CanLII 48 (SCC) at paragraph 13.

in ever case. Instead, the types of work a person did in the past will help define suitable work for the future.

[34] The Commission argues that a contextual approach is inconsistent with the Federal Court of Appeal's decision in *Bertrand*.[26] According to the Commission, that case says that, to meet the availability requirement under the EI Act, a person has to be available for full-time work during regular hours for every working day of the week.[27] I disagree.

[35] Respectfully, this argument stretches the significance of the *Bertrand* decision too far beyond the facts of the case. And we should not rely on this 40-year-old decision to say that everyone who wants EI benefits has to be available for work during regular hours from Monday to Friday.

[36] Again, context is important. Ms. Bertrand was unable to make childcare arrangements for her young child, which meant that she had to leave her job as a bookkeeper and manager at a car rental agency. Critically, therefore, her availability changed from regular to irregular hours. Plus, she admitted that there were no opportunities for suitable work that matched her new availability schedule.[28]

[37] The Tribunal has to consider all the circumstances of each case. If a person established their claim for EI benefits based on part-time work, or by working irregular hours, then the law allows the Tribunal to consider that information when assessing the person's availability.

[38] However, this contextual approach may come at the cost of predictability.[29] In fact, it may have contributed to the Claimant's frustration over receiving conflicting information from the Commission's agents.[30] Although several of the Commission's

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[26] See *Canada (Attorney General) v Bertrand*, 1982 CanLII 3003 (FCA).
[27] Other Appeal Division decisions interpret the *Bertrand* decision the same way: See, for example, *Canada Employment Insurance Commission v RJ*, 2022 SST 212.
[28] See *Canada (Attorney General) v Bertrand*, 1982 CanLII 3003 (FCA) at paragraph 4.
[29] The Federal Court of Appeal recognized this in *Canada (Attorney General) v Whiffen*, 1994 CanLII 10954 (FCA) at paragraph 18.
[30] See, for example, the Claimant's description on page GD2-5.

agents considered the Claimant's situation and confirmed that he was available for work and entitled to benefits, the Commission later came to the opposite conclusion.

– **The General Division's errors**

[39] In this case, the General Division focused on the Claimant's class schedule and study permit. Respectfully, it made an error of law by failing to assess the Claimant's availability in all the circumstances of his case. In other words, did the Claimant's circumstances allow him to have some restrictions on his availability for work and still meet the availability requirement to get EI benefits?

[40] The General Division effectively considered how the Claimant's restrictions affected his ability to find work in the abstract. It seems to have asked how the Claimant's class schedule and study permit would affect his ability to do any job, without reference to the jobs he was looking for or had done in the past.

[41] The General Division's task wasn't simply to confirm that the Claimant had a history of working and studying at the same time. It also needed to consider what the Claimant's work history said about his usual occupation. And how did his restrictions affect his chances of working in a suitable job again?

[42] Viewed through a different lens, the General Division made an error of law by mentioning the Claimant's circumstances but not discussing how they affected his chances of going back to work.[31]

[43] Assessing a person's availability isn't a box-ticking exercise. Although the General Division acknowledged the Claimant's work history and job search efforts, it also needed to make findings based on the evidence and connect it to the legal test that it was applying.

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[31] In *Canada (Minister of Human Resources Development) v Quesnelle*, 2003 FCA 92 at paragraph 9, the Federal Court of Appeal said that it is necessary to engage in a meaningful analysis of the evidence. In *Lalonde v Canada (Minister of Human Resources Development)*, 2002 FCA 211 at paragraph 17, the Court also said it is necessary to draw inferences from the evidence. And in *Canada (Attorney General) v St-Louis*, 2011 FC 492 at paragraph 26, the Federal Court said that it isn't enough to just list factors without discussing how they affect the legal issues in the case.

[44] For example, the General Division found that the Claimant's class schedule and study permit seriously limited his chances of going back to work.[32] Yet the General Division never acknowledged how the Claimant's usual occupation in the restaurant industry involved doing part-time work at irregular hours. Similarly, the General Division didn't grapple with evidence that contradicted its conclusion. For example, the Claimant:

- found work shortly after arriving in Canada
- found and applied for a very large number of suitable jobs while unemployed
- has already found several jobs since he went back to work and COVID-19 restrictions eased.

[45] Critically, the Claimant's availability schedule didn't change after he lost his job.

[46] By overlooking these points, the General Division misunderstood the law on availability. It failed to take a contextual approach when assessing whether the Claimant's circumstances allowed him to restrict his availability in some ways.

[47] In addition, the General Division made an error of law by failing to consider the presumption of unavailability that normally applies to full-time students. The General Division also failed to consider whether there were "exceptional circumstances" that the Claimant could use to counter this presumption.[33]

[48] The presumption of unavailability and list of exceptional circumstances described below reinforce the importance of a contextual analysis when assessing a person's availability.

[49] The Commission argues that the General Division was right to focus on the Claimant's main restrictions: his class schedule and study permit. It says that the

[32] See the General Division decision at paragraphs 40 and 42.
[33] I will say more about this presumption of unavailability and the need for exceptional circumstances below.

reasons for these restrictions are legally irrelevant and that people who are available only at certain times on certain days don't meet the EI Act's availability requirement.[34]

[50] I disagree with the Commission's arguments for these reasons:

- The Commission's arguments focus on the third *Faucher* factor only. In the *Faucher* decision, however, the Court made clear that all three factors need to be considered. The Federal Court of Appeal warned in *Faucher* that allowing the third factor to overtake the other two can result in a conclusion that is disconnected from all the circumstances of the case.

- The Commission seems to be arguing that any constraint on a person's availability disentitles them from receiving EI benefits. However, that interpretation is incompatible with other court decisions. In some cases, the Court said that a person can't **unduly** restrict their chances of going back to work.[35] So, some restrictions are tolerated. And in the *Whiffen* decision, the Court said that a restriction that a person has "practically no choice but to [accept]" should not be considered as part of the availability analysis.[36]

- As discussed above, the availability analysis is more fact-specific. Depending on their circumstances, not all applicants need to be available during regular hours, from Monday to Friday.

- The *Leblanc* decision that the Commission relies on isn't about a restriction under the third *Faucher* factor. Instead, it is about a person's willingness to work, which was negated by their **inability** to work.

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[34] In support of its arguments, the Commission relies heavily on cases like *Canada (Attorney General) v Bertrand*, 1982 CanLII 3003 (FCA); *Canada (Attorney General) v Leblanc*, 2010 FCA 60; and *Canada Employment Insurance Commission v RJ*, 2022 SST 212.
[35] See, for example, *Canada (Attorney General) v Lavita*, 2017 FCA 82, which relies on the *Whiffen* and *Faucher* decisions.
[36] See paragraph 22 of the decision in *Canada (Attorney General) v Whiffen*, 1994 CanLII 10954 (FCA).

[51] Overall, therefore, I find that the General Division made an error of law. It didn't consider whether the Claimant's circumstances allowed him to restrict his availability in some ways.

I will fix the General Division's error by giving the decision it should have given

[52] At the hearing before me, both parties argued that, if the General Division made an error, then I should give the decision the General Division should have given.[37] In particular, the Claimant confirmed that he had fully presented his case at the General Division level and that he would have nothing more to add at a new hearing.

[53] I agree. This means that I can decide whether the Claimant was available for work within the meaning of the EI Act.

[54] The General Division found that the Claimant was available for work during his school breaks:

- from December 23, 2020, to January 10, 2021
- after May 1, 2021

[55] The Commission didn't appeal these findings. This leaves the following relevant periods for me to consider:

- from October 3, 2020, to December 22, 2020
- from January 11, 2021, to April 30, 2021

[37] Sections 59(1) and 64(1) of the DESD Act give me the power to fix the General Division's errors in this way. Also, see *Nelson v Canada (Attorney General)*, 2019 FCA 222 at paragraphs 16 to 18.

The Claimant was available for work

– **I have to presume that the Claimant was unavailable for work**

[56] Students have to meet the same availability requirement as other people who want EI benefits.[38] However, the courts have said that full-time students face a presumption that they are unavailable for work within the meaning of the EI Act.[39]

[57] The presumption seems to be especially strong for students who leave full-time work to go to school.

– **The Claimant showed that he wanted to go back to work as soon as possible**

[58] The Claimant settled in the Waterloo Region to start his studies in September 2019.[40] Within a month or so, he started working in the restaurant industry. He continued working for over six months, until the COVID-19 pandemic hit.

[59] The Claimant said that he continued looking for work, even while receiving benefits. However, he wasn't able to find other work until March 2021, when pandemic restrictions started to ease.

[60] The Claimant's statements and actions show that he wanted to go back to work as soon as possible.

[38] See sections 18(1)(a) and 153.161 of the EI Act.
[39] See *Landry v Canada (Attorney General)* (1992), 152 NR 121 (FCA); *Canada (Attorney General) v Primard*, 2003 FCA 349; *Canada (Attorney General) v Rideout*, 2004 FCA 304 at paragraph 3; *Canada (Attorney General) v Gagnon*, 2005 FCA 321 at paragraph 6; *Duquet v Canada (Employment and Immigration Commission)*, 2008 FCA 313; and *Canada (Attorney General) v Cyrenne*, 2010 FCA 349.
[40] This summary is taken largely from the record of a phone call starting on page GD3-15, and the Claimant's evidence at the General Division hearing.

– **The Claimant made serious and intensive efforts to find a new job**

[61] The Claimant provided evidence of serious and intensive efforts to go back to work. Here is a summary of his efforts:[41]

- Although the Claimant's experience was in the restaurant industry, he applied for a variety of lower-skilled jobs, including as a labourer, security guard, and equipment operator (for which he was licensed).
- The Claimant's job search covered a large area, throughout the Waterloo Region.
- He used an employment website and applied for jobs online and in person. He provided a long list of jobs that he had applied for, and he said he had applied for even more but was unable to retrieve them from his online history.[42]

[62] The Claimant's serious and intensive efforts to go back to work strongly favour a finding that he was available for work.

– **The Claimant didn't unduly limit his chances of going back to work**

[63] Although the Claimant placed restrictions on his availability for work, they didn't seriously affect his chances of going back to work.

[64] The Claimant's classes ran Monday to Wednesday, from 8:00 am to 2:15 p.m. His classes were online, but attendance was mandatory. The Claimant invested significantly in his program. He honestly admitted that he was only looking for work that fit around his class schedule.

[65] In addition, the Claimant had to respect the terms of his study permit. Because of this, he could not work more than 20 hours/week during his academic terms.

[41] See pages GD3-15 and GD3-16 and document GD9, and listen to the audio recording of the General Division hearing.
[42] See page GD9-1.

[66] There is a question to be asked about whether this 20-hour restriction is a personal condition.[43] On the one hand, the Claimant argues that the government imposed this restriction on him as part of the terms of his study permit. And on the other, the Commission argues that the Claimant chose to study in Canada and knew (or should have known) that he would be subject to this restriction.[44]

[67] The General Division concluded that the Claimant's study permit was a personal restriction that it should consider as part of its availability analysis. I have to show deference to the General Division on findings of fact like this one. However, I don't need to decide the issue, since I find that the Claimant was available for work regardless of how this restriction is characterized. In my analysis, the Claimant's situation is similar to other people who restrict themselves to part-time work.

[68] Overall, therefore, I find that the Claimant was restricting himself to part-time work. In addition, he was available only from about 3:00 p.m. to midnight from Monday to Wednesday. He could work all day Thursday and Friday.[45]

[69] However, I have to balance these restrictions against other evidence the Claimant provided to determine whether he unduly limited his chances of going back to work. In my view, he didn't.

[70] Despite his restrictions, the Claimant found work soon after arriving in Canada. For more than six months, he successfully balanced school with regular employment. So, he had a history of working and studying at the same time.[46] I say this especially because:

- his work history was cut short by the COVID-19 pandemic

[43] The third *Faucher* factor refers to a person "setting personal conditions." Whereas the *Whiffen* decision refers to restrictions that are wilful or not.
[44] See sections 186(f) and 186(v) of the *Immigration and Refugee Protection Regulations*.
[45] The Claimant was also available for work on Saturdays and Sundays, but those aren't working days under section 32 of the EI Regulations.
[46] The courts haven't defined, precisely, how much time is required to establish a history of work and study. However, they have said that it has to be more than two months: *Canada (Attorney General) v Loder*, 2004 FCA 18.

- he accumulated enough insurable hours over these six months to qualify for EI benefits.

[71] The following factors are also relevant to the effect of the Claimant's restrictions on his availability for work:

- He found a large number of suitable jobs and applied for them.
- He compensated for his restrictions by applying for jobs in his usual occupation and in several other industries. He also applied for jobs across a broad geographic area.
- Between the time he went back to work in March 2021 and the General Division hearing in February 2022, he had already found three or four jobs.[47]

[72] All of this tells me that, in the area where the Claimant lives, he has many opportunities for suitable jobs. In addition, many employers are prepared to accept part-time workers and to accommodate the Claimant's class schedule.

[73] As a result, I find that the Claimant's restrictions didn't unduly limit his chances of going back to work.

– **The Claimant has rebutted the presumption of unavailability**

[74] The presumption of unavailability doesn't apply to students who can show exceptional circumstances.[48] The following factors have been considered when assessing whether a person has exceptional circumstances:[49]

- Does the student have a history of studying and working at the same time?[50]

[47] Listen to the audio recording of the General Division hearing from about 0:16:30 to 0:18:20.
[48] See, for example, *Canada (Attorney General) v Macdonald*, A-672-93; *Canada (Attorney General) v Cyrenne*, 2010 FCA 349; and *Canada (Attorney General) v Wang*, 2008 FCA 112.
[49] This list is drawn in part from T. Stephen Lavender, *The 2022 Annotated Employment Insurance Act* (Toronto, ON: Thomson Reuters, 2021) at pages 137 and 138.
[50] Some decisions seem to suggest that the student has to be doing both full-time: See, for example, *Canada (Attorney General) v Rideout*, 2004 FCA 304. However, other decisions only require a history of regular work: See, for example, *Canada (Attorney General) v Lamonde*, 2006 FCA 44 at paragraph 12.

- How flexible is the student's schedule?
- How much has the student invested in the course?
- Would the student change their schedule, or even abandon their course if offered a suitable job?
- What efforts has the student made to find a new job?
- What is the nature, purpose, length, timing, and duration of the course?
- How does the course prohibit or restrict employment opportunities?

[75] I recognize that the Claimant's class schedule is inflexible, that he has invested significant money into his course, and that he would not abandon it in favour of accepting full-time work. In fact, his study permit prohibits him from doing many of these things.

[76] However, I have to balance these factors against several others. For example, the Claimant has a history of balancing school with regular work and of finding work in industries that can accommodate his class schedule. While his class schedule may be inflexible, it is predictable and extends from Monday to Wednesday only. The Claimant's schedule easily allows him to work 20 hours between Monday and Friday.

[77] I give significant weight to the Claimant's job search efforts. He looked for work both within his usual occupation and in other occupations. He also looked for work across a broad geographic area. He looked for jobs with the same conditions as he had when he qualified for EI benefits, and maintained the same degree of availability throughout the relevant period.

[78] In short, he has shown that there are many opportunities for people with his restrictions.

[79] For all these reasons, I find that the Claimant has rebutted the presumption of unavailability. It doesn't apply to him. He has also shown that he was available for work within the meaning of the EI Act.

[80] The Commission argued against this conclusion, saying that it runs contrary to binding decisions from the Federal Court of Appeal. However, the facts and evidence in those cases are very different, especially around work history and job search efforts. Here are examples of how they differ:

- In *Primard*, the applicant had a history of full-time work and then registered for an intensive study program, which meant she was available for work only on evenings and weekends. In addition, she had no experience of working and studying at the same time, and the terms of her student loan prohibited her from working.[51]

- In *Gagnon*, the applicant quit a full-time job to go back to school, reducing his availability to Fridays and weekends. Plus, he made no job search efforts and had no history of working and studying at the same time.[52]

- In *Loder*, the applicant quit a full-time job to go back to school and refused to accept work below a certain wage.[53]

- In *Rideout*, the applicant had no history of working and studying at the same time. He had also applied for just one job when the Commission contacted him about his availability.[54]

[81] The facts of each case are critical given the contextual approach that the law requires. As a result, I don't have to follow the Court's decision in the cases above. The facts in those cases are different from the facts here.

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[51] See *Canada (Attorney General) v Primard*, 2003 FCA 349.
[52] See *Canada (Attorney General) v Gagnon*, 2005 FCA 321.
[53] See *Canada (Attorney General) v Loder*, 2004 FCA 18.
[54] See *Canada (Attorney General) v Rideout*, 2004 FCA 304.

[82] It is also difficult to draw any broad principles from the Court's decision in *Duquet*. The decision is very short, and the Court didn't discuss all the *Faucher* factors, including work history and efforts to go back to work.[55]

[83] I also recognize that Appeal Division decisions aren't entirely consistent on this issue. My decision is more in line with *JD v Canada Employment Insurance Commission*.[56] The Commission argues that that decision is of little value, since it doesn't give details about JD's availability schedule.

[84] However, I find the Commission's argument somewhat perplexing because it agreed that JD was available for work and entitled to EI benefits, even though she wanted to work less than 20 hours/week and only wanted work that fit around her class schedule.

[85] Other Appeal Division decisions interpret availability more restrictively, saying that, to meet the legal requirements, a person has to be available during regular hours for every day of the week.[57] That may be true in some cases, depending on the circumstances. However, I don't think it applies in a case like this one, which includes the following key elements:

- The Claimant has a history of balancing full-time studies with regular part-time work.
- The Claimant's availability didn't change, before and after he lost his job.
- The Claimant made serious and intensive efforts to go back to work (in his usual occupation, in other industries, and across a broad geographic area).
- There are many opportunities for work in the Claimant's area, even with his restrictions.

[55] See *Duquet v Canada (Employment and Immigration Commission)*, 2008 FCA 313.
[56] See *JD v Canada Employment Insurance Commission*, 2019 SST 438.
[57] See, for example, *Canada Employment Insurance Commission v RJ*, 2022 SST 212.

[86] Ultimately, however, the assessment of a person's availability is very fact-specific, and no two cases are likely to be exactly the same.

– **The EI program is not a student assistance program**

[87] Before closing, I quickly want to address the Commission's concern that finding the Claimant available for work effectively turns the EI program into a student assistance program. I disagree.

[88] The contextual approach described above doesn't depart from Federal Court of Appeal decisions in which students were found to fall short of the EI Act's availability requirement.

[89] This decision is based on the particular facts of this case. In contrast, students who leave a full-time job to go to school and those without a history of balancing school and regular work will continue to struggle to meet the requirements of the EI Act.

[90] Parenthetically, it's also worth remembering that the amount of EI benefits a person receives is normally adjusted depending on their past earnings. In other words, a person who qualifies for EI benefits based on part-time work will have a lower benefit rate than a similar worker who qualified based on full-time work. For the reasons described above; however, the EI Act should not be interpreted in a way that excludes part-time workers altogether.

Conclusion

[91] I am allowing the Claimant's appeal.

[92] The General Division made an error of law by not considering whether the Claimant's circumstances allowed him to restrict his availability in some ways. This allows me to give the decision the General Division should have given. Based on the

law and the facts of this case, I find that the Claimant was available for work and was entitled to the EI benefits he had received.

Jude Samson
Member, Appeal Division