Citation: *Canada Employment Insurance Commission v KJ*, 2022 SST 339

# Social Security Tribunal of Canada
## Appeal Division

# Decision

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| **Appellant:** | Canada Employment Insurance Commission |
| **Representative:** | Tiffany Glover |
| **Respondent:** | K. J. |
| **Representative:** | Kevin Love |

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| **Decision under appeal:** | General Division decision dated June 24, 2021 (GE-21-874) |

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| **Tribunal member:** | Jude Samson |
| **Type of hearing:** | Teleconference |
| **Hearing date:** | July 6, 2022 |
| **Hearing participants:** | Appellant's representative<br>Respondent's representative |
| **Decision date:** | August 12, 2022 |
| **File number:** | AD-22-142 |

## Decision

[1] The appeal is dismissed. Although the General Division made an error in this case, I agree with the conclusion it reached. The Claimant has shown that he was available for work, meaning that he is entitled to Employment Insurance (EI) benefits.

## Overview

[2] K. J. is the Claimant in this case. He came to Canada to train as a pilot. His study permit allows him to work on or off campus. During academic terms; however, he cannot work off campus for more than 20 hours/week.

[3] After arriving in Canada, the Claimant quickly started working in the airline industry. But he was laid off when the COVID-19 pandemic hit. He received EI regular benefits, from October to December 2020.

[4] The Claimant stopped claiming EI benefits for the next few months. When he tried to reactivate his claim in March 2021, the Canada Employment Insurance Commission (Commission) told him that he wasn't entitled to EI benefits after December 21, 2020.[1] According to the Commission, the Claimant's study permit and course schedule meant that he wasn't available for work. And a person has to be available to work to get EI benefits.[2]

[5] The Claimant appealed the Commission's decision to the Tribunal's General Division and won. It found that the Claimant hadn't set personal restrictions that unduly limited his chances of going back to work.

[6] Then, the Commission successfully appealed the General Division decision to the Tribunal's Appeal Division (First Appeal Division Decision).[3] At that time, the Appeal

[1] Service Canada delivers the EI program for the Commission.
[2] The Commission's decisions changed somewhat over time. They start on pages GD3-27, GD3-50, GD3-54, and GD3-55 of the appeal record.
[3] The First Appeal Division Decision is dated August 20, 2021, in file AD-21-236.

Division concluded that the Claimant's study permit prevented him from meeting the availability requirements under the law.

[7] The Claimant asked the Federal Court of Appeal to review the First Appeal Division Decision. Based on an agreement between the parties, the Court found that the Appeal Division made an error by failing to consider the Claimant's work history and flexible training schedule as part of its analysis. The Court set aside the First Appeal Division Decision and returned the matter to the Appeal Division for redetermination.

[8] The Commission maintains that the General Division decision contains errors of law. I agree that the General Division made an error of law. However, its error does not change the outcome of the appeal. As a result, I am dismissing the Commission's appeal.

## Issues

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

a) Did the General Division make an error of law when it concluded that the Claimant met the availability requirements under the law, even though he was not looking for full-time work?

b) Did the General Division make an error of law or an important error of fact in the way that it considered the Claimant's study permit?

c) Did the General Division make an error of law by misinterpreting the availability requirement for students?

## Analysis

[10] I can intervene in this case only if the General Division made a relevant error.[4] In this appeal, I considered whether the General Division made an error of law or made an important error about the facts of the case.

[11] Any error of law can justify my intervention in the case.

[12] However, not all errors of fact will allow me to intervene in the case. I cannot intervene just because the General Division made a mistake about some minor detail that is irrelevant to the outcome of the case. Instead, I can only intervene if the General Division based its decision on a fact that the evidence seriously contradicts or cannot support.[5]

### The General Division correctly decided that the Claimant could meet the availability requirements even if he wasn't looking for full-time work

[13] 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.[6] The *Employment Insurance Act* (EI Act) doesn't define "available," meaning that courts and tribunals have had to grapple with its meaning.

[14] In this case, the Commission argues that, to meet the availability requirements, the Claimant had to be available for full-time work, from Monday to Friday, during regular working hours. By finding otherwise, the Commission argues that the General Division misinterpreted the EI Act's availability requirements.[7]

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[4] The relevant errors, formally known as "grounds of appeal," are listed under section 58(1) of the *Department of Employment and Social Development Act*.
[5] This is a summary from paragraph 41 of the Federal Court of Appeal's decision in *Walls v Canada (Attorney General)*, 2022 FCA 47.
[6] This requirement is set out in section 18(1)(a) of the *Employment Insurance Act* (EI Act).
[7] There are several inconsistencies in the Commission's position, including how it paid benefits to the Claimant before December 2020 but not after, even though his availability seems to be the same.

## – The law does not prohibit people available irregular hours from receiving EI benefits

[15] Assessing a person's availability requires a highly contextual and fact-specific analysis.

[16] Three factors guide the Tribunal's assessment of a person's availability. These are often called the *Faucher* factors.[8] It is an error to ignore any of the factors. Instead, the Tribunal needs to consider and weigh all three factors:[9]

- 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?

[17] The Tribunal assesses a person's availability from Monday to Friday.[10] It also considers the person's attitude, conduct, and all the circumstances of their case.[11]

[18] 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.[12]

[19] The importance of a suitable job is reinforced in 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.[13]

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[8] This is a reference to a Federal Court of Appeal decision in which these factors appear: *Faucher v Canada (Employment and Immigration Commission)*, 1997 CanLII 4856.
[9] This is a plain-language summary of the *Faucher* factors.
[10] See section 32 of the *Employment Insurance Regulations* (EI Regulations) and *Canada (Attorney General) v Lamonde*, 2006 FCA 44 at paragraph 10.
[11] See *Canada (Attorney General) v Whiffen*, 1994 CanLII 10954 (FCA) at paragraphs 12 and 17.
[12] See the first two *Faucher* factors along with *Canada (Attorney General) v Whiffen*, 1994 CanLII 10954 (FCA) at paragraphs 13 and 14.
[13] See section 50(8) of the EI Act.

[20] The law provides some guidance about what a suitable job is.[14] It depends on factors like a person's usual occupation, personal circumstances, past earnings, and working conditions.

[21] What a person has to show to prove their availability can also change over time.[15] 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.

[22] Using this contextual approach, a person who restricts their availability to part-time work or to irregular hours might still be available for work, especially if there's a link between their usual occupation (past work) and current restrictions.[16] In addition, a person who restricts their availability in one way might be able to compensate by showing flexibility in other ways.[17]

[23] There's 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, evidence of a serious and intensive job search weighs strongly in favour of a person's availability.[18]

[24] I understand from these principles that there are no hard and fast rules that apply to the availability requirements under the EI Act. Instead, the Tribunal must decide each case based on all the circumstances of that case.

[25] 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

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[14] See section 6(4) of the EI Act and section 9.002 of the EI Regulations.
[15] See section 6(5) of the EI Act and *Canada (Attorney General) v Whiffen*, 1994 CanLII 10954 (FCA).
[16] See *JD v Canada Employment Insurance Commission*, 2019 SST 438, CUB 17298 and CUB 17308. I also note how some of the Commission's forms ask an applicant how their availability has changed: see, for example, page GD3-37.
[17] See *Canada (Attorney General) v Whiffen*, 1994 CanLII 10954 (FCA) at paragraph 4.
[18] 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.

if the person usually worked at a nightclub. Suitable work looks different for people with different work histories.

### – The contextual approach to assessing availability

[26] 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.[19] Among its purposes, the EI Act is designed to compensate contributors who find themselves without work through no fault of their own.[20] The EI Act doesn't exclude particular groups, like students or part-time workers.

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

[28] 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 in every case. Instead, the types of work a person did in the past will help define suitable work for the future.

[29] The Commission argues that a contextual approach is inconsistent with Federal Court of Appeal decisions, especially *Bertrand* and *Rideout*.[21] According to the Commission, those cases say that, to meet the availability requirements under the EI Act, a person has to be available for full-time work during regular hours for every working day of the week.[22]

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[19] See *Hills v Canada (Attorney General)*, 1988 CanLII 67 (SCC) at paragraphs 36–40.
[20] For example, see *Canada (Canada Employment and Immigration Commission) v Gagnon*, 1988 CanLII 48 (SCC) at paragraph 13.
[21] See *Canada (Attorney General) v Bertrand*, 1982 CanLII 3003 (FCA) and *Canada (Attorney General) v Rideout*, 2004 FCA 304.
[22] Other Appeal Division decisions interpret the *Bertrand* decision the same way: see, for example, *Canada Employment Insurance Commission v RJ*, 2022 SST 212.

[30] The Commission's arguments are trying to stretch the importance of the *Bertrand* and *Rideout* decisions too far.

[31] For example, the *Bertrand* decision is about a person who **changed** her pattern of availability from regular to irregular hours and who admitted that no opportunities for suitable work matched her new schedule.

[32] And the *Rideout* decision is about a student who had no history of working and studying at the same time and had applied for just one job when the Commission contacted him about his availability.

[33] Those decisions are of limited value in this case, which is about a Claimant who has a history of working and studying at the same time, conducted a serious and extensive job search, and provided evidence showing that, in his area, there are numerous job opportunities within his restrictions.

[34] At the hearing before me, the Commission relied almost entirely on the 20-hour limit imposed by the Claimant's study permit. Although the Commission seemed to be arguing that the Claimant's study permit was fatal in his case, it wouldn't go so far as to say that all students with study permits are excluded from receiving EI benefits.[23]

[35] By focusing on the Claimant's study permit, the Commission is ignoring many of the other circumstances in this case.

[36] The parties agreed—and the Federal Court of Appeal decided—that that the First Appeal Division Decision, which also focused on the Claimant's study permit, was "unreasonable because [the Appeal Division] erred in fact by not considering the General Division's June 24, 2021, findings of the nature of the applicant's flexible training and work history."[24] In other words, context matters.

[37] Yet before me, the Commission argued that the Claimant's training schedule and work history are of little or no relevance in this case. I disagree. By ignoring these

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[23] Indeed, section 10.12.2.9 of the *Digest of Benefit Entitlement Principles* doesn't say this either.
[24] See pages AD3-1 to 2.

factors, I would be repeating past mistakes and ignoring the Federal Court of Appeal's decision.

[38] Another reminder about the importance of context comes from the *Faucher* decision. In that decision, the Federal Court of Appeal warns that relying on a person's self-imposed restrictions alone can result in a decision that is disconnected from all the circumstances of the case. The *Faucher* decision illustrates the highly contextual analysis that the law requires.

[39] In short, availability must be assessed in all the circumstances of each case. Nowhere does it say that a person must be available for full-time work during regular hours to meet the EI Act's availability requirements. Adopting that interpretation excludes large groups of people from having access to the EI scheme.

[40] The General Division interpreted the law correctly when it concluded that the Claimant could meet the availability requirements under the EI Act, even if he wasn't looking for full-time work during regular hours.

– **The Claimant was immediately available for work**

[41] The Commission also argues that the General Division made an error by failing to recognize that the Claimant's training schedule meant that he **could** be available for work, but wasn't **immediately** available for work. I disagree.

[42] In support of its argument, the Commission relies on the Federal Court of Appeal's decision in *Primard*.[25]

[43] Again, the facts in *Primard* are very different from the facts here.

[44] It appears that Ms. Primard worked full-time. She then registered for an intensive yearlong course, which meant that her pattern of availability changed to evenings and weekends only. Initially, Ms. Primard said that she was committed to her studies and

[25] See *Canada (Attorney General) v Primard*, 2003 FCA 349.

wouldn't change or abandon her program. Later, however, she said that she had the option of studying part-time and in the evenings, which she would do if she found a job.

[45] The Court seemed convinced that Ms. Primard's limited availability explained her inability to find work. In the end, the Court found that Ms. Primard wasn't available for work and that, at best, she had shown possible or conditional availability.[26]

[46] In short, then, Ms. Primard had the option of pursuing her course in a way that would take longer, but would not interfere with her availability schedule. Instead, she took the faster option, which interfered significantly with her availability.

[47] At the beginning of her program, Ms. Primard may not have known about the two options. In early calls with the Commission, she said that she was committed to taking her course during the day, and it is not clear what efforts (if any) she later made to change her schedule or to start looking for work during the day. Indeed, it may have been difficult to do so in the middle of her program.

[48] Importantly, the Court also noted that Ms. Primard had no history of working and studying at the same time and that the terms of her student loan prohibited her from working.

[49] In contrast, the evidence in this case shows that the Claimant's training schedule involved flying 10 hours/week. The Claimant explained that he could schedule his flying times at his convenience: any day of the week, from sunrise to sunset.[27] The Claimant also had exams to complete, but the Claimant could choose when he took those exams and the pace at which he prepared for them.[28]

[50] In this case, therefore, the Claimant was able to quickly arrange his training schedule to fit around his work schedule. Plus, the Claimant had a history of working

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[26] See *Canada (Attorney General) v Primard*, 2003 FCA 349 at paragraph 9.
[27] See paragraphs 25, 30, and 41 of the General Division decision.
[28] Despite this flexibility, the Claimant described himself as a full-time student: see, for example, pages GD3-10 to 11 and GD3-35 to 36.

and studying at the same time. So, the Claimant was available for work from Monday to Friday, it was just a question of adjusting his training schedule, if needed.

[51] The facts here are more similar to the ones the Federal Court of Appeal considered in *Wang*.[29] Ms. Wang was also a student but she was found to be available for work based on convincing evidence that her first priority was to go back to work. Specifically, Ms. Wang said that she would change her courses, quit her program, or relocate, if needed. Despite this, the Court raised no concerns about her conditional availability.

[52] In the circumstances, the General Division did not have to follow the *Primard* decision. I do not accept the Commission's concerns about the Claimant's possible or conditional availability.

## The General Division correctly considered the Claimant's study permit

[53] The General Division did not make a relevant error of fact or of law in the way that it considered the Claimant's study permit. In any event, the result of this issue would not change the outcome of the appeal.

### – The General Division did not make an error of law by considering whether the Claimant's study permit was a self-imposed restriction on his availability

[54] The General Division did not consider how the Claimant's study permit affected his availability for work. The General Division concluded that the study permit was not a self-imposed restriction on the Claimant's availability. Instead, the Government restricted the Claimant to working off campus for a maximum of 20 hours/week.

[55] The Commission argues that the availability test is objective and that all restrictions on a person's availability have to be taken into account, regardless of the reason. I disagree.

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[29] *Canada (Attorney General) v Wang*, 2008 FCA 112.

[56] In some cases, it matters whether the restrictions on a person's availability are involuntary or beyond their control. The Federal Court of Appeal decided this issue in the *Whiffen* case, where it refused to consider a restriction that Ms. Whiffen had practically no choice but to accept.[30]

[57] The *Leblanc* decision that the Commission relies on is not about a personal condition under the third *Faucher* factor.[31] Instead, it's about a person's willingness to work, which can be undermined by an **inability** to work. The *Leblanc* decision does not say that **any constraint** on a person's availability for work disentitles them from receiving EI benefits. That interpretation conflicts with the *Whiffen* decision and is incompatible with other decisions saying that a person must not **unduly** restrict their chances of going back to work. In other words, reasonable restrictions will be tolerated.[32]

[58] So, the availability analysis is objective in the sense that the Tribunal doesn't need to consider whether a person's self-imposed restrictions are justified or not.[33] In the *Bertrand* case, for example, there was no need to consider whether Ms. Bertrand's child really needed a babysitter or whether she had made reasonable efforts to find a babysitter.

[59] And if a person is unable to work, like in *Leblanc*, then there's no need to consider the reasons why.

[60] However, some restrictions on a person's availability are caused by factors beyond their control. In those cases, so long as the person maintains an ability to work, the Tribunal needs to consider whether any limits on the person's availability were voluntary (self-imposed).

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[30] See *Canada (Attorney General) v Whiffen*, 1994 CanLII 10954 (FCA) at paragraphs 17 and 21 to 22.
[31] See *Canada (Attorney General) v Leblanc*, 2010 FCA 60.
[32] See, for example, *Canada (Attorney General) v Lavita*, 2017 FCA 82, which relies on the *Whiffen* and *Faucher* decisions. *Macdonald*, A-672-93 is another case in which a student was found to be available for work despite self-imposed restrictions on her availability.
[33] 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.

[61] As a result, the General Division was right to consider whether the Claimant's restriction on working hours was a self-imposed restriction.

### – The General Division did not make an important error about the facts of the case in the way that it characterized the Claimant's study permit

[62] The Commission also argues that the General Division should have found that the Claimant's study permit was a self-imposed restriction that it needed to consider as part of its availability assessment. Specifically, the Commission says that the Claimant chose to study in Canada and knew (or should have known) that he would be subject to this restriction.[34]

[63] I interpret the Commission's argument to be alleging that the General Division's characterization of the Claimant's study permit amounts to an important error about the facts of the case. As mentioned above; however, I need to show deference to the General Division's findings of fact.

[64] Here, there is evidence to support the General Division's characterization of the study permit. The General Division also acknowledged contradictory decisions, and explained why this case was different, or why it refused to follow the other decisions.[35]

[65] The Commission has not met the high standard that would allow me to intervene based on an error of fact. Similar to the Court's decision in *Whiffen*, the General Division was entitled to find that the Claimant had "practically no choice" but to accept the conditions imposed by his study permit.[36]

### – This issue doesn't change the outcome of the appeal

[66] If I'm wrong about the conclusions above, then the Claimant's situation is similar to any other person who lost their part-time job involuntarily and through no fault of their own, and is looking for another part-time job.

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[34] See sections 186(f) and 186(v) of the *Immigration and Refugee Protection Regulations*.
[35] See the General Division decision at paragraphs 36 to 38.
[36] See *Canada (Attorney General) v Whiffen*, 1994 CanLII 10954 (FCA) at paragraph 22.

[67] In the circumstances of this case, I would find that the Claimant's restrictions, including those imposed by his study permit, didn't overly limit his chances of going back to work. I say this because:

- the Claimant has a history of studying and doing regular part-time work;[37]
- he had no trouble finding work shortly after arriving in Canada;[38]
- his availability remained the same, before and after he lost his job;
- his flexible training schedule presented no obstacles to going back to work; and
- he made serious and intensive efforts to find a new job, both in his usual industry and in several other industries.[39]

[68] The Claimant showed that, in the area where he lives, there are many opportunities for part-time work and that his restrictions didn't unduly limit his chances of going back to work.

## The General Division made an error of law by misinterpreting the availability requirement for students

[69] I agree with the Commission's argument on this issue. The General Division made an error of law when it concluded that recent changes to the EI Act mean that full-time students no longer face the presumption of unavailability.

[70] Again, however, the result of this issue does not change the outcome of the appeal.

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[37] See paragraph 26 of the General Division decision. At the hearing before me, the Commission accepted that the Claimant had a history of working and studying at the same time.
[38] According to his application for benefits, the Claimant found two jobs within the time he was in Canada: see page GD3-19.
[39] See the General Division decision at paragraphs 18 to 20 and page GD6-3.

– **Recent changes to the EI Act have not displaced the presumption that full-time students are unavailable for work**

[71] The EI Act's main availability requirement is set out in paragraph 18(1)(a), which says this:

> **Availability for work, etc.**
>
> **18 (1)** A claimant is not entitled to be paid benefits for a working day in a benefit period for which the claimant fails to prove that on that day the claimant was
>
> > **(a)** capable of and available for work and unable to obtain suitable employment;

[72] Then, during the COVID-19 pandemic, the government added the following section into the EI Act, which refers to students more specifically:

> **Course, program of instruction or non-referred training**
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> **153.161 (1)** For the purposes of applying paragraph 18(1)(a), a claimant who attends a course, program of instruction or training to which the claimant is not referred under paragraphs 25(1)(a) or (b) is not entitled to be paid benefits for any working day in a benefit period for which the claimant is unable to prove that on that day they were capable of and available for work.
>
> **Verification**
>
> **(2)** The Commission may, at any point after benefits are paid to a claimant, verify that the claimant referred to in subsection (1) 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.

[73] Overall, the Commission says that section 153.161 allowed it to make operational changes to the way it assessed the availability of students.[40] However, it's hard to see what subsection 153.161(1) adds to the existing law on availability.

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[40] See *Canada Gazette*, Part II, volume 154, No. 21, Interim Order No. 10 and the Explanatory Note at pages 2423–2428.

[74] Regardless, I do not interpret this new provision as overriding the presumption of unavailability that the courts developed when applying paragraph 18(1)(a) of the EI Act. This is especially true given the opening words: “For the purposes of applying paragraph 18(1)(a).”

– **This issue doesn’t change the outcome of the appeal**

[75] As already mentioned, the Tribunal uses the *Faucher* factors to assess availability.

[76] However, the courts have said that full-time students face a presumption that they are unavailable for work.[41] The presumption is especially strong for students who leave full-time work to go to school.

[77] The presumption appears to be a short-handed way of signalling that full-time students will often struggle under the third *Faucher* factor.

[78] A person who overcomes the presumption of unavailability still has to prove that they meet the availability requirements under the law. However, a person who meets the availability requirements, based on a proper consideration of the *Faucher* factors, has necessarily overcome the presumption of unavailability.

[79] That’s the case here.

[80] In another case, the Federal Court of Appeal also considered the *Faucher* factors and the presumption of unavailability at the same time.[42]

[81] After considering the three *Faucher* factors and any challenges created by the Claimant’s study schedule, the General Division concluded that the Claimant was available for work.

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[41] 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.
[42] See *Canada (Attorney General) v Wang*, 2008 FCA 112.

[82] By finding that the Claimant's training did not unduly limit his chances of going back to work, the General Division effectively found that the Claimant had exceptional circumstances and that the presumption of unavailability should not apply to him.[43]

[83] As a result, even if the General Division had applied the presumption of unavailability, the Claimant would have overcome it. So, this error doesn't affect the outcome of the appeal.

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

[84] 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.

[85] 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 requirements.

[86] 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.

[87] 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.

[43] Factors that can be considered when assessing if a person has exceptional circumstances include the student's history of working and studying, the flexibility of their course schedule, their willingness to change or abandon their program, and their efforts to find a new job: T. Stephen Lavender, *The 2022 Annotated Employment Insurance Act* (Toronto, ON: Thomson Reuters, 2021) at pages 137–138.

## Conclusion

[88] I am dismissing the Commission's appeal.

[89] Although I found a small error of law in the General Division decision, the error doesn't change the outcome of the appeal. The Claimant has shown that he meets the availability requirements under the EI Act.

Jude Samson
Member, Appeal Division