[TRANSLATION]

Citation: *Canada Employment Insurance Commission v CB*, 2022 SST 1017

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	Canada Employment Insurance Commission
Representative:	Josée Lachance
Respondent:	C. B.

Decision under appeal:	General Division decision dated April 29, 2022 (GE-22-735)

Tribunal member:	Pierre Lafontaine
Type of hearing:	Teleconference
Hearing date:	October 7, 2022
Hearing participants:	Appellant's representative Respondent
Decision date:	October 14, 2022
File number:	AD-22-335

Decision

[1] The appeal is allowed.

Overview

[2] The Appellant, the Canada Employment Insurance Commission (Commission), decided that the Respondent (Claimant) was not entitled to Employment Insurance (EI) regular benefits as of August 16, 2021, because she was taking unauthorized training and was not available for work. The Commission upheld its initial decision on reconsideration. The Claimant appealed the decision to the General Division.

[3] The General Division found that the Claimant wanted to go back to work and that she had made enough efforts to find a job while in school. It also found that the Claimant was not limiting her chances of finding a job. The General Division decided that the Claimant was available for work as of August 16, 2021.

[4] The Appeal Division granted the Commission leave to appeal the General Division decision. The Commission argues that the General Division made its decision without regard for the material before it and made an error of law.

[5] I have to decide whether the General Division ignored the evidence on file and made an error of law in finding that the Claimant was available for work within the meaning of the law.

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

Issue

[7] Did the General Division make its decision without regard for the material before it and make an error of law in finding that the Claimant was available for work within the meaning of the law, despite her full-time training?

Analysis

Appeal Division's mandate

[8] The Federal Court of Appeal (FCA) has established that the Appeal Division's mandate is conferred to it by sections 55 to 69 of the *Department of Employment and Social Development Act*.[1]

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

[10] So, unless the General Division failed to observe a principle of natural justice, made an error of law, or based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it, I must dismiss the appeal.

Did the General Division make its decision without regard for the material before it and make an error of law in finding that the Claimant was available for work within the meaning of the law, despite her full-time training?

[11] The General Division found that the Claimant had rebutted the presumption that she was not available for work while in school full-time because she had shown a history of working full-time while dedicating herself to her high school studies.

[12] The General Division also found that the Claimant was showing a desire to go back to work, making enough efforts 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 as of August 16, 2021.

[13] The Commission argues that the General Division made an error of law in its interpretation of the third factor of the legal test confirmed in *Faucher*, and when it found

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

that the Claimant had not set personal conditions that unduly limited her chances of going back to work.

[14] The Commission argues that the evidence shows that the Claimant's classes were between the hours of 8 a.m. and 4 p.m., Monday to Friday, and that she was available for work only outside her school hours—that is, on weekday evenings and weekends. The Commission says that, despite the change in course schedule on April 22, 2022, to start classes at 1 p.m., the Claimant has been limiting her availability to certain hours because of her full-time training course since August 16, 2021.

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

[16] The Claimant argues that she was entitled to benefits because she worked full-time while attending school full-time before she was let go because of the pandemic. The Claimant says that she wanted to work and was willing to leave school to work full-time. She says that the General Division did not make an error in finding that she was available for work within the meaning of the law.

[17] The General Division found that the Claimant had rebutted the presumption that she was not available for work while in school full-time because she had shown a history of working full-time while dedicating herself to her high school studies.

[18] 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.

[19] 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]

[2] See section 18(1)(a) of the *Employment Insurance Act*.

[20] Availability must 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]

[21] 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]

[22] 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]

[23] 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.

[24] The following principle emerges from prior Umpire case law:

> Availability must be demonstrated during regular hours for every working day and cannot be restricted to irregular hours resulting from a training program schedule that significantly limits availability.[6]

[25] 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.[7]

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

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[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] CUB 74252A; CUB 68818; CUB 52688; CUB 37951; CUB 38251; CUB 25041.
[7] CUB 68818.

[27] 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.[8]

[28] In *Vezina*, the Court followed *Bertrand*, finding that the claimant's intentions to work weekends and evenings showed a lack of availability for work under the EI Act.[9]

[29] 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.[10]

[30] 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.[11]

[31] 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 a job.[12]

[32] From the FCA case law, 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.

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[8] *Bertrand*, A-613-81: The Federal Court of Appeal 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.
[9] *Vezina v Canada (Attorney General)*, 2003 FCA 198.
[10] *Canada (Attorney General) v Rideout*, 2004 FCA 304.
[11] *Canada (Attorney General) v Primard*, 2003 FCA 349; *Canada (Attorney General) v Gauthier*, 2006 FCA 40.
[12] *Duquet v Canada (Attorney General)*, 2008 FCA 313.

[33] In an initial interview by the Commission, the Claimant said that she would not give up her training for a full-time job.[13] She then contacted the Commission to clarify her initial statement. The Claimant said that she could mostly work 20 to 25 hours on weekends, since she was studying full-time.[14]

[34] In a subsequent message left on the Commission's voicemail, the Claimant said that she was available about 16 hours per week on weekends.[15]

[35] The Commission refused to pay the Claimant benefits.

[36] In support of her reconsideration request, the Claimant said that she could be available to work from 8 a.m. to 5 p.m. and that she would give up her training to work full-time.[16] However, in the reconsideration interview, she said that she had looked for a job only on weekends because she was busy at school during the week.[17]

[37] In testimony before the General Division, the Claimant explained that she was available to work more than 25 hours per week because she had to earn a living. She said that she had changed her course schedule in April 2022 to work as many hours as possible.

[38] I am of the view that the General Division ignored the evidence showing that the Claimant had been available for work only outside her school hours, since the start of her training in August 2021. The change in schedule in April 2022 did not change the fact that the Claimant was available only outside her school hours.

[39] In addition, it is clear from the Claimant's initial statement, her further clarifications about her initial statement, and the message she left on the Commission's voicemail, that the Claimant was unwilling to give up her course for a full-time job during the regular hours of the week.

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[13] GD3-14.
[14] GD3-16.
[15] GD3-17.
[16] GD3-21.
[17] GD3-22.

[40] 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.

[41] 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.[18]

[42] I can only conclude that the General Division made its decision without regard for the material before it, made an error of law by ignoring the binding case law from the FCA, and misinterpreted the third factor of the availability test in *Faucher*: not setting personal conditions that might unduly limit a claimant's availability for work.

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

Remedy

[44] 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.

[45] The preponderant evidence shows that the Claimant was enrolled in full-time training to get a Diploma of Vocational Studies in culinary arts. She was available for work only outside her school hours—that is, on weekday evenings and weekends. In addition, the Claimant was clearly 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.

[46] In accordance with section 18(1)(a) of the EI Act, and in applying FCA case law, I find that the Claimant was not available and unable to find a suitable job each working day of her benefit period, since her availability was unduly restricted by the requirements of the program she was taking.

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[18] *SL v Canada Employment Insurance Commission*, 2021 SST 986: It is an error of law to consider the pandemic in this way when assessing a claimant's availability.

[47] As the FCA has stated, cases such as the Claimant's elicit sympathy, and the Tribunal is strongly tempted to do away with the rule of law and render a decision based on fairness, but it must be careful not to fall into such a trap.[19]

[48] For the above reasons, I am allowing the Commission's appeal.

Conclusion

[49] The appeal is allowed.

[50] The Claimant was not entitled to EI regular benefits as of August 16, 2021, because she was taking unauthorized training and was not available for work within the meaning of the law.

Pierre Lafontaine
Member, Appeal Division

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