Citation: *Canada Employment Insurance Commission v DP*, 2022 SST 820

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	Canada Employment Insurance Commission
Representative:	Tiffany Glover (counsel)
Respondent:	D. P.

Decision under appeal:	General Division decision dated January 6, 2022 (GE-21-2394)

Tribunal member:	Janet Lew
Type of hearing:	Teleconference
Hearing date:	May 31, 2022
Hearing participants:	Appellant's representative Respondent
Decision date:	August 26, 2022
File number:	AD-22-45

Decision

[1] The appeal is allowed.

[2] The Claimant was not available for work between January 6, 2021 and March 25, 2021 because of his school schedule. Therefore, he was disentitled from receiving Employment Insurance benefits for this period.

[3] The Claimant's availability between March 25, 2021 and April 24, 2021 is indeterminate at this point. I am returning this matter to the General Division so that it may address this outstanding issue.

Overview

[4] The Appellant, the Canada Employment Insurance Commission (Commission) is appealing the General Division decision.

[5] The General Division found that the Respondent, D. P., (Claimant) was capable of and available for work between January 6, 2021 and April 23, 2021, while he was in school full-time. The General Division concluded that the Claimant was not disentitled from receiving Employment Insurance regular benefits.

[6] The Commission argues that the General Division made legal and factual errors. In particular, the Commission argues that the General Division misinterpreted what it means to be available for work. The Commission says that it failed to recognize that the Claimant's student visa restricted him from being available for work. The Commission also argues that the General Division overlooked some of the evidence when it examined whether the Claimant was available for work.

[7] The Commission asks the Appeal Division to allow the appeal and to find that the Claimant was unavailable for work. The Commission says the Claimant should be disentitled from receiving benefits. If the Claimant is disentitled to benefits, this would effectively result in an overpayment of benefits that the Commission already paid to the Claimant.

[8] The Claimant asks the Appeal Division to dismiss the appeal. Alternatively, he asks the Appeal Division to find that he was fully available after his course ended on March 25, 2021.

Issues

[9] The issues in this appeal are:

a) Did the General Division misinterpret what it means to be available for work?

b) Did the General Division overlook some of the evidence when it examined whether the Claimant was available for work?

Analysis

[10] The Appeal Division may intervene in General Division decisions if there are jurisdictional, procedural, legal, or certain types of factual errors.[1] Here, the Commission argues that the General Division made both legal and factual errors.

Did the General Division misinterpret what it means to be available under the *Employment Insurance Act*?

[11] The Commission argues that the General Division misinterpreted what it means to be available for work, for the purposes of the *Employment Insurance Act*. The Commission argues that if a claimant imposes **any restrictions** on their availability, then they are not available for work and therefore not entitled to any benefits.

[12] The Commission argues that the Claimant was unavailable for two reasons:

i. because of his school schedule – he was unable to work mornings and afternoons on weekdays because it conflicted with his school schedule, and

ii. because of his student visa – his student visa restricted him to working no more than 20 hours a week.

[1] Section 58(1) of the *Department of Employment and Social Development Act*.

[13] The Commission argues that the General Division made a legal error when it found that the Claimant did not have any personal conditions that unduly restricted the Claimant's chances to find work.

– The General Division decision

[14] The General Division wrote:

> [35] The Claimant says having to attend class was not a personal condition that limited his work hours. His course was meant to be in person but due to COVID-19, all classes were online. So, if he was working and missed class, he could catch up later.[2]
>
> [36] The Claimant reports that during his exam from March 26, 2021, to April 23, 2021, he would have been even more available for work. However, his international student visa only allowed him to work up to 20 hours a week during term time.
>
> [37] So, it was the terms of the Claimant student visa—not class attendance requirements—that stopped him working more than 20 hours a week.

[15] The General Division found that neither the Claimant's school schedule nor his student visa interfered with the Claimant's availability. The General Division found that the Claimant was available for work for the purposes of the *Employment Insurance Act*.

[16] In terms of the Claimant's school schedule, the General Division accepted that the Claimant's classes were online. So, it found that his school schedule was flexible and that he could work at any time on any day. There were no class attendance requirements that could have limited the Claimant from working. From this perspective alone, the General Division did not misinterpret what it means to be available. This of course is setting aside the student visa issue and the issue over whether the General Division made any factual errors.

[17] As for the Claimant's student visa, he was restricted from working more than 20 hours a week.

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[2] General Division decision, at para 35.

[18] The General Division found that the Claimant had not imposed the 20-hour restriction on himself. He did not have any control or say over how many hours he could work under his student visa. So, the restriction was not a "personal condition."[3]

[19] The General Division found that the 20-hour restriction was unlike the conditions tied to class attendance rules, type of work, job location, or pay. There would have been some measure of control over these types of restrictions. For instance, the Claimant could have limited his job search to jobs that paid a certain hourly wage. That would have qualified as a "personal condition" because it was something that he could chose and control.

[20] Under his student visa, the Claimant could not work more than 20 hours of work per week, even if he could or wanted to work more hours. So, the General Division did not see this as a personal condition.

[21] The General Division also found that the restriction on the Claimant's hours was not a condition that unduly limited the Claimant's chances of returning to the labour market. The General Division explained that the restriction was not unduly limiting because the Claimant was just as available as he had been when he previously worked.

[22] My analysis on whether the General Division misinterpreted what it means to be available will focus on the Claimant's student visa.

– The Claimant's arguments

[23] The Claimant argues that the Appeal Division did not make any errors. He notes that he remained available to the same extent he had been before COVID-19 lockdowns. He had worked 20 hours weekly. He claims the evidence showed that he was flexible with his work hours and could have worked at any time. His availability was subject only to the limitations under his student visa that limited him to 20 hours weekly.

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[3] General Division decision, paras 40 to 42.

– The Commission's arguments

[24] The Commission argues that the General Division misinterpreted availability by failing to follow binding case law from the Federal Court of Appeal. The Commission relies on two cases in particular: *Lavita*[4] and *Leblanc*.[5]

[25] In *Leblanc*, the Court found the claimant Leblanc unavailable for work. A house fire had destroyed all his possessions, including his work clothes and boots. He wanted to go to work, but was unable to because he did not have the proper clothes and was unable to get to work. The Court determined that willingness to work is not synonymous with availability.

[26] The Court adopted the comments from another decision, in holding that, when considering whether a person is available:

> … one must determine whether that individual is struggling with obstacles that are undermining his or her will to work. By obstacle, we mean any constraint of a nature to deprive someone of his or her free choice … It goes without saying that a person may not be regarded as available when that person admits to not being available or is in a situation that prevents him or her from being available. Payment of benefit is subject to the availability of a person, not to the justification of his or her unavailability.[6]

[27] The Commission notes that the General Division did not refer to *Leblanc* or the principles set out in that case.

[28] The Commission also relies on *R.J.*, a decision that I issued in April 2022.[7]

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[4] *Canada (Attorney General) v Lavita*, 2017 FCA 82, at para 8. Ms. Lavita worked for the Toronto-Dominion Bank. She went on an unpaid leave of absence. When she was ready to return to work, she began applying for jobs within the bank, but was unable to secure a position. She limited her job search to one employer. Typically, a claimant who imposes unreasonable restrictions on the type of work they seek is not available for work. The Appeal Division concluded that Ms. Lavita did not unduly limit her chance of returning to the labour market so as to be unavailable. This was because she sought work with a large corporate employer. The Federal Court of Appeal found that the Appeal Division could have come to a different conclusion, but based on the facts before it, found that its decision was not unreasonable.
[5] *Canada (Attorney General) v Leblanc*, 2010 FCA 60.
[6] *Leblanc,* at para 5, citing *Sarkis*, CUB 25057.
[7] *Canada Employment Insurance Commission v R.J.*, 2022 SST 212, also reproduced at AD6-4 to AD6-16.

– ***R.J.* – a review of decisions of the Federal Court of Appeal and of the Appeal Division**

[29] In *R.J.*, I reviewed a series of decisions of the Federal Court of Appeal on the issue of availability. These included *Gagnon*,[8] *Primard*,[9] *Duquet,*[10] and *Bertrand*.[11]

[30] Other than *Bertrand*, all of these decisions dealt with the issue of a student's availability for work. In *Gagnon*, the claimant there had reduced his availability to Fridays and weekends. The Court found that, under section 18 of the *Employment Insurance Act*, Gagnon was not available on the working days of a benefit period.

[31] As I noted in *R.J.*, the Court came to this conclusion because of section 32 of the *Employment Insurance Regulations*. The section defines every day of the week, except Saturday and Sunday, as a working day:

> **32.** For the purposes of section 18, of the Act, a working day is any day of the week except Saturday and Sunday.

[32] Similarly, in *Primard*, the claimant there was available evenings and weekends because of her course schedule. The Court found that this showed that she was placing personal conditions that might unduly limit the chances of returning to the labour market. And, in *Duquet*, the claimant there was only available at certain times on certain days, which restricted his availability.

[33] *Bertrand* did not involve a student. The claimant Bertrand was only available evenings from 4 p.m. to 10 p.m., or midnight, five days a week. She had been unable to find a reliable babysitter during the day. The Court found that, although Bertrand was available to work 30 to 40 hours per week during evening hours, she was not available for work for the purposes of the *Employment Insurance Act*.

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[8] *Canada (Attorney General) v Gagnon*, 2005 FCA 321.
[9] *Canada (Attorney General) v Primard*, 2003 FCA 349.
[10] *Duquet v Canada Employment Insurance Commission and Attorney General of Canada*, 2008 FCA 313.
[11] *Canada (Attorney General) v Bertrand*, 1982 CanLII 3003 (FCA).

[34] *Bertrand* establishes that a claimant has to be available during regular hours for every working day of the week. It is irrelevant that a claimant is able to work only evenings because of an inability to find a babysitter.

[35] I also reviewed *J.D.*,[12] a 2019 decision from the Appeal Division. The claimant J.D. looked for only part-time work that did not interfere with her full-time school schedule. The Appeal Division found that JD had not unduly limited her chances of returning to the labour market. This was because she remained available for work to the same degree as before. Her schooling did not limit her work prospects any more than they did before her job loss. The Appeal Division concluded that J.D. was available for work.

[36] The Commission distinguished J.D., on the basis that the decision does not include important details about J.D.'s availability. She was available for 16 to 20 hours a week, but it was unclear which day(s) of the week these hours fell.

[37] Following my review of these decisions, I concluded that restricting availability to only certain times on certain days—including evenings and weekends— represented setting personal conditions that might unduly limit the chances of returning to the labour market. Ultimately, a claimant has to be available during regular hours for every working day of the week.

– **Review of recent Appeal Division decisions on availability**

[38] Since April 2022, the Appeal Division has released other decisions dealing with the issue of the availability of students.

- ***R.V.*[13]**

[39] The claimant attended full-time training. He committed 35 hours per week, around five hours per day, to his studies. He was unavailable for work two to three days

[12] *J.D. v Canada Employment Insurance Commission*, 2019 SST 438.
[13] *Canada Employment Insurance Commission v R.V.*, 2022 SST 658.

per week. He did not have to attend classes, but he usually went for training between 9 a.m. and 5 p.m. during the week.

[40] The Appeal Division reviewed decisions of the Federal Court of Appeal. In addition to *Bertrand*, *Primard*, and *Duquet*, the Appeal Division also relied on *Vézina*,[14] *Rideout*[15] and *Gauthier*,[16]summarizing them as follows:

- In *Vézina* - the Court followed *Bertrand* and found that the claimant's intentions of work and weekends and evenings demonstrated a lack of availability for work under the *Employment Insurance Act*.

- In *Rideout* - the Court found that being only available for work two days per week plus weekends was a limitation on the claimant's availability for full-time work.

- In *Gauthier* – the Court noted that a working day excluded weekends under the *Employment Insurance Regulations* and found that work availability restricted to evenings and weekends alone to be a personal condition that might unduly limit the chances of returning to the labour market

[41] The Appeal Division in *R.V.* drew the same conclusions as I did in *R.J.* The member there concluded that, while a claimant can establish a claim for benefits based on part-time work, they cannot set any personal conditions that could unduly limit their chances of returning to the labour market. Looking for work around a school schedule is a personal condition that might unduly limit the claimant's chances of returning to the labour market.

- ***K.J.* and *S.S.***

[42] The Appeal Division issued *K.J.*[17] and *S.S.*[18] weeks after *R.V.* In both cases, the Appeal Division found the definition of availability outdated. The Appeal Division found

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[14] *Vézina v Canada (Attorney General)*, 2003 FCA 198.
[15] *Canada (Attorney General) v Rideout*, 2004 FCA 304.
[16] *Canada (Attorney General) v Gauthier*, 2006 FCA 40.
[17] *Canada Employment Insurance Commission v K.J.*, 2022 SST 339.
[18] *S.S. v Canada Employment Insurance Commission*, 2022 SST 743.

that the working landscape had evolved since *Bertrand* and that it was no longer reasonable to necessarily require a claimant to be available during regular hours for every working day of the week.

[43] The Appeal Division found that a claimant who restricted their availability to part-time work or to irregular hours could still be available for work, especially if they could establish a link between their usual occupation (past work) and current restrictions.[19] The Appeal Division found that a person who restricted their availability in one way might be able to compensate by showing flexibility in other ways.[20]

[44] The Appeal Division said that it remained important to look at whether a claimant placed personal restrictions that unduly limited their chances of returning to work. But, the Appeal Division said that it was equally important to consider whether that claimant showed that they wanted to return to work as soon as possible. And equally important to consider too was whether that claimant made serious and intensive efforts to find a new job that was suitable.

[45] The Appeal Division found that this approach was consistent with *Faucher*. In that case, the Federal Court of Appeal set out three factors, all of which it said have to be considered and weighed when assessing availability.[21] These factors are:

- Whether the person wants to go back to work as soon as a suitable job is available
- Whether the person has made reasonable efforts to find a suitable job
- Whether the person has set personal conditions that might unduly limit their chances of going back to work.

[19] *S.S.*, at para 27, relying on *J.D. v Canada Employment Insurance Commission*, 2019 SST 438.
[20] *S.S.*, citing *Canada (Attorney General) v Whiffen*, 1994 CanLII 10954 (FCA) at para 4.
[21] *Faucher v Canada (Employment and Immigration Commission)*, 1997 CanLII 4856.

[46] The Appeal Division found that it was an error to ignore any of the factors.[22] With this approach, the Appeal Division determined that it was possible for a claimant to set conditions or barriers to working, and yet remain available for work.

- ***S.S.***

[47] In S.S.'s case, he had significant restrictions, including an inflexible class schedule and a study permit that limited him to no more than 20 hours of work per week.[23] But, the Appeal Division said the restrictions were not determinative of the Claimant's availability, once weighed against other considerations.

[48] These considerations included S.S.'s history of balancing school with regular work and of finding work in industries that accommodated his class schedule. Also, S.S. had an extensive job search, outside his usual occupation, across a broad geographic area. There were many opportunities for work in his field. And, his availability did not change after he lost his job.

[49] The Appeal Division acknowledged the series of decisions from the Federal Court of Appeal.[24] However, the Appeal Division found the facts and evidence in those cases vastly different, particularly around work history and job search efforts.

[50] The Appeal Division found the *Leblanc* case irrelevant to the issue of availability. The Appeal Division found that the case did not deal with the *Faucher* considerations. Rather, it found that the case was about the person's willingness to work, negated by their inability to work.[25]

[51] The Appeal Division determined that the availability analysis is highly fact-specific and involved a "contextual approach". So, when assessing availability, a claimant's work history and job search efforts could outweigh any restrictions. The

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[22] *S.S.*, at para 18.
[23] *S.S.*, at para 75.
[24] The Appeal Division factually distinguished *Primard*, *Gagnon*, *Rideout*, *Duquet*, and *Canada (Attorney General) v Loder*. 2004 FCA 18. This case involved a student who quite a full-time job to go back to school. She also placed restrictions on the wage that she would be willing to accept for full-time employment.
[25] *S.S.*, at para 50.

Appeal Division acknowledged that, while the approach offered flexibility, it could come at the cost of predictability.[26]

- ***K.J.***

[52] The Appeal Division also took a contextual approach in *K.J.*. The Appeal Division wrote, “Assessing a person’s availability requires a highly contextual and fact specific analysis.”[27]

[53] K.J.’s study permit imposed a 20-hour limit. The Appeal Division found that K.J.’s flexible training schedule and work history were important factors to consider. The Appeal Division noted that the parties agreed that these factors should have been included in the availability analysis. The Appeal Division found that it would have been an error otherwise to confine the analysis to whether there were restrictions that unduly limited the claimant’s chances of returning to the labour market.[28]

[54] The Appeal Division found that it was also important to consider whether any restrictions were self-imposed. The Appeal Division recognized that sometimes a claimant has no control over factors that restrict their availability.

[55] The Appeal Division concluded that K.J.’s restrictions, including those imposed by his study permit, did not overly limit his chances of going back to work. This was because:

- K.J. had a history of studying and doing regular part-time work;
- K.J. had no trouble finding work shortly after arriving in Canada;
- his availability remained the same, before and after he lost his job;

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[26] *S.S.*, at para 38.
[27] *Canada Employment Insurance Commission v K.J.*, 2022 SST 339, at para 15.
[28] The parties’ agreement formed the basis for a judgment order at the Federal Court of Appeal, returning the matter to the Appeal Division for redetermination. The claimant K.J. had sought judicial review of the decision of the Appeal Division rendered on August 20, 2021.

- K.J. had a flexible training schedule that 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 others.

– **Interpreting availability under the *Employment Insurance Act***

[56] Where there are any differences in approach in these cases, I defer to the Court of Appeal. Their decisions are binding on me. Some guiding concepts or principles have emerged:

- The definition of the concept of availability involves a question of law: *Primard*, referring to *Vézina* and *Faucher,*[29] and *Rideout.*[30] Its application is a question of mixed law and fact.[31] In *Faucher*, the Court said that a claimant's availability is a question of fact, and requires an assessment of the evidence.[32]

- The question of availability is an objective one. It cannot depend on the reasons for the restrictions on availability, otherwise this would lead to "a completely varying requirement depending on the view taken of the particular reasons in each for the relative lack of it."[33]

- A claimant has to be available during regular hours for every working day of the week.[34]

- Generally all three *Faucher* factors have to be considered, else this could lead to a result that has no real connection to all of the circumstances.[35]

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[29] *Primard*, at para 13,
[30] *Rideout*, at para 2.
[31] *Rideout*, at para 2.
[32] *Faucher*.
[33] *Bertrand*, at para 19, and cited in *Vézina*, at para 1.
[34] At the Federal Court of Appeal, see *Bertrand*, *Vézina*. *Gagnon*, *Primard*, *Duquet*, and *Rideout*. See also *Canada (Attorney General) v* Boland, 2004 FCA 251 (CanLII). At the Appeal Division, see *R.J.* and *R.V.*
[35] *Faucher*.

- If the restrictions are significant, this may mean it becomes unnecessary to analyze the remaining two *Faucher* factors.[36] This was the effective result of some of the Federal Court of Appeal cases that were issued after *Faucher*.

[57] Although *Faucher* requires a consideration of all three factors, there have been several decisions from the Federal Court of Appeal since then that have not addressed all of the factors.

[58] For instance, in *Loder*, the Court noted the claimant placed restrictions on the wage that she would be willing to accept for full-time employment (though it did note the findings of the Board of Referees. The Board had found that the claimant had a history of working while in school and that she was actively seeking full-time work.). And, in *Gagnon*, *Gauthier*, and again in *Duquet*, the Court noted the claimant's restrictions, but said nothing about the other *Faucher* factors.

[59] It is clear from the authorities that have arisen since *Faucher* that, when a claimant's restrictions are so significant, that they can be decisive of the question of a claimant's availability. They can be decisive, even when a claimant wants to return to work as soon as a suitable job is available, and even when that claimant has made efforts to find a suitable job.

[60] In *Faucher*, the claimant had developed a small roofing business, which both the Board of Referees and Umpire found restricting. The Board of Referees found that developing a small roofing business was a restriction because it would limit the claimant's chances of being re-employed by competitors. The Umpire found the business would limit the claimant to the roof repair business.

[61] But, Faucher developed the business during mid-February, when most roofers were unemployed. And, the claimant Faucher had a continuing desire to find employment. There was no debate either that he had been looking for work.

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[36] See, for instance, *Gagnon*, *Gauthier*, and *Duquet*.

[62] The Court questioned how developing a small business necessarily limited Faucher's employment opportunities. It is clear that the Court doubted whether developing a small business even amounted to a restriction.

[63] The nature of the restriction was not that clear cut or significant in Faucher's case. For that reason, it was appropriate to examine the other two *Faucher* factors in that context. In other words, the personal restriction in that case was not that significant that it would have unduly limited the claimant's chances of going back to work. The Court found Faucher available for work.

- **The restriction does not have to be self-imposed for a claimant to be unavailable**

[64] The General Division found that the Claimant had no control or say over the conditions imposed by his student visa. So, as he did not set the condition, it found that he did not have any personal conditions that unduly limited his chances of finding work. Indeed, he remained available to the same extent that he had been available before.

[65] While there is a certain attractiveness to this logic, it fails to reflect what the Court said in *Leblanc* on the issue of availability. The Court adopted the comments of the Umpire in *Sarkis*. The comments are worth repeating:

> It goes without saying that a person may not be regarded as available when that person admits to not being available **or is in a situation that prevents him or her from being available.** (My emphasis)

[66] In other words, it does not matter how the restriction arises, whether it is self-imposed or not. What matters is that the claimant "is in a situation that prevents them from being available".

- **The Federal Court of Appeal has not addressed student visa cases**

[67] Neither of the parties has referred me to any decisions of the Federal Court of Appeal nor the Federal Court that deal with a student with limited hours of availability to work under a student visa or permit. The cases thus far have dealt with school schedules.

[68] In *Primard*, the Federal Court of Appeal found the claimant Primard unavailable because she restricted her availability to evenings and weekends.

[69] But, there was also the issue of Primard's student loan. The conditions of her loan did not authorize her to work. The Court indicated that the Board of Referees should have considered this fact in its analysis on availability. The Court implied that such a restriction meant the claimant was unavailable.

[70] The Court did not give any indication whether, hypothetically speaking, Primard would have been available if the conditions of her student loan had authorized her to work on a part-time basis.

[71] The Federal Courts do not appear to have addressed student visa cases. The Appeal Division has examined the issue in *K.J.* and *S.S*.

[72] Apart from *K.J.* and *S.S.*, there is at least one other decision that squarely addresses the Claimant's situation. This is the case of *Graveline*. There, the Umpire dismissed the appeal, writing:

> In our view the Board of Referees either ignored or overlooked very clear and uncontradicted evidence from the University at which the applicant was registered as a full-time doctoral student that the applicant while so registered could not take work for more than 16 hours per week.[37]

[73] *Graveline* was decided before *Faucher.* The Umpire did not indicate whether the claimant wanted to return to work as soon as a suitable job was available, nor indicate whether the claimant had made reasonable efforts to find a suitable job. Even so, the fact that the claimant was limited to 16 hours of work per week was alone decisive in rejecting any notion that the claimant was available.

[74] It is clear from *Graveline* that a claimant is unavailable for work for the purposes of the *Employment Insurance Act* if they face restrictions in the hours they are permitted to work.

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[37] *Graveline v Canada (Attorney General)*, A-177-94.

[75] However, there was little background information in *Graveline*, such as whether that claimant was available during regular hours for every working day of the week. This information would have been helpful. If that claimant had not been available during regular hours for every working day of the week, that would have ended the discussion. She clearly would not have been available.

[76] Most of the cases of the Federal Court of Appeal largely deal with a claimant`s availability in terms of hours and days of the week that they are prepared to or are able to work. But, the Claimant's student visa imposes a vastly different kind of restriction. This type of restriction is similar to limiting oneself to part-time work, in terms of the limited number of hours of work a claimant is available. For that reason, I will now turn my focus to claimants who limit themselves to part-time work.

- **Part-time work does not result in automatic disentitlement**

[77] I note the Commission's arguments on part-time work. The Commission states that being available for part-time work or searching exclusively for part-time work may enable a claimant to be entitled to Employment Insurance benefits.[38] The Appeal Division accepts that students seeking part-time work may be entitled to benefits.[39]

[78] But, the Commission says the analysis has to be fact-specific. So, not every student seeking part-time student will be entitled to benefits. Entitlement will be dependent upon the facts.

[79] I understand from these submissions then that looking for part-time work, say, around a school schedule would mean a claimant is unavailable. Conversely, looking for part-time work without any such restrictions arguably should mean that that claimant is available.

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[38] Commission's submissions, at AD3-13, at para 24.
[39] *J.D.*, *R.V.*, *S.S.* and *K.J.*.

- **Summary and conclusions on the Claimant's student visa**

[80] Claimants who have limited work hours under a student visa are similar to those looking for part-time work. Both obviously are not seeking nor available for full-time work.

[81] Much like a student seeking or being available for part-time work, a claimant with a student visa that limits them to 20-hours of work weekly should not automatically be disentitled to benefits.

[82] If a student seeking or being available for part-time work may be entitled to benefits, it is unclear why a claimant with a student visa is disentitled to benefits, when both are available for work to the same or similar extent.

[83] The Commission says that a student seeking part-time work may be entitled to benefits, depending upon the facts. If a claimant were available during regular hours for every working day of the week, it would seem that claimant might be entitled to benefits. By that same reasoning, it would seem that a claimant with a student visa could also be entitled to benefits, if they too are available during regular hours for every working day of the week and have no other restrictions to unduly limit their chances of returning to the labour market.

[84] In the case before me, beyond limiting the Claimant to 20 hours of work per week, the Claimant's student visa said nothing about when he could work. For instance, it did not limit him to working just evenings or weekends. As far as the student visa was concerned, the Claimant could have worked during regular hours for every working day of the week. He claims that he could have worked at any "given time… [He] didn't have a fixed time on [his] lectures. It was completely flexible."[40]

[85] In short, a claimant's student visa alone may not disentitle them from receiving Employment Insurance benefits, if there are no other restrictions. Much like it is for

[40] At approximately 22:55 of the audio recording of the General Division hearing.

claimants seeking or being available for only part-time work, the analysis for claimants with student visas must be fact-specific.

[86] The General Division did not see the Claimant's student visa as an obstacle to the Claimant's availability. I have arrived at a similar conclusion, although for different reasons. Being available for upwards of 20 hours of work per week may enable a claimant to be entitled to benefits, but that will depend on the facts.

[87] Some restrictions are so significant that it is unnecessary to examine each of the *Faucher* factors. While a student visa represents a significant restriction, it does not automatically disentitle a claimant from receiving benefits. But, it will be necessary to examine the facts and determine the scope of any other restrictions that claimant might have.

Did the General Division overlook some of the evidence when it examined whether the Claimant was available for work?

[88] The Commission also argues that the General Division ignored some of the evidence. The Commission says this evidence shows that the Claimant set personal conditions that unduly limited his chances of finding work.

[89] The Commission says that this evidence was important. It was important because it could show that the Claimant was unavailable for work. A claimant has to be available for work. If they are not available for work, then they are not entitled to get Employment Insurance benefits.

[90] So, if the General Division overlooked any evidence that showed the Claimant set personal conditions that could limit his chances of returning to work, the General Division could have decided that the Claimant was not available for work. In that case then, it would have had to conclude that he was not entitled to receive Employment Insurance benefits.

– The General Division decision

[91] The General Division found that the Claimant did not have any unduly restrictive personal conditions such as class attendance rules.[41]

[92] The General Division found that the only restriction facing the Claimant was the number of hours he could work each week under his student visa. His student visa let him work no more than 20 hours per week. I have already addressed the issue of the student visa, so will focus on the Claimant's school schedule.

[93] The General Division determined that students do not have to be more available than they were in their previous jobs. For the Claimant, the General Division found this meant he did not have to look for full-time work. The General Division concluded that the Claimant did not unduly limit his chances of returning to work when he was available for only part-time work.

– The evidence the Commission says the General Division overlooked

[94] The General Division examined the Claimant`s student visa to determine whether it represented a personal condition that could limit his chances of returning to work. But, the Commission argues that there was other evidence that the General Division also had to consider.

[95] The Commission argues that there was other evidence that showed the Claimant set personal conditions. The Commission argues that the General Division overlooked this evidence. This evidence consists of the following:

- Application for Employment Insurance benefits – the application form asked the Claimant whether he was obligated to attend any scheduled classes or sessions. The Claimant responded "yes".[42]

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[41] General Division decision, at para 42.
[42] Claimant's Application for Employment Insurance benefits, filed on November 30, 2020, at GD3-24. As the Claimant completed the application before January 2021, I have not relied on the application to determine the Claimant's availability from January 6 to April 24, 2021.

- Supplementary Record of Claim – the Claimant reportedly told the Commission over the phone that he would not leave his training or course if it conflicted with a full-time job.[43]

- Training Course Information questionnaire – the Claimant answered that he intended to find full-time work while taking a course of instruction. He also answered that he was not willing to change his course schedule in order to accept work.[44]

- In the same questionnaire, the Claimant indicated the days and hours he was prepared to work.[45] He said that he was available Tuesdays and Thursdays from 3 p.m. to 12 a.m. and from Fridays to Sundays from 8 a.m. to 12 p.m. He did not say whether he was prepared to work on Mondays or Wednesdays.

- Supplementary Record of Claim – the Claimant reportedly told the Commission over the phone that he was only available for work in the evenings and weekends because his studies took priority during the day. He stated that he was not capable of working full-time hours because his school schedule was too exhausting. He did not have enough time to work full-time hours.[46]

[96] Generally, a decision-maker does not have to refer to all of the evidence before it. But, it does have to address any evidence that could have some importance to the issues and could change the outcome. The Commission argues that this evidence meets that threshold.

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[43] Supplementary Record of Claim, dated March 16, 2021, at GD3-17, and September 1, 2021, at GD3-29.
[44] Training Course Information questionnaire, date stamped received by Service Canada on March 22, 2021, at GD3-19.
[45] Training Course Information questionnaire, date stamped received by Service Canada on March 22, 2021, at GD3-20.
[46] Supplementary Record of Claim, dated November 10, 2021, at GD3-38.

– The Commission's arguments

[97] The Commission says the evidence was critical. It could have changed the outcome.

[98] The Commission also argues that the evidence stood in "direct contradiction to the General Division's findings on the [claimant's] personal restrictions on his availability, making this a perverse and capricious error of fact."[47]

[99] For all of these reasons, the Commission says the General Division should have addressed this evidence.[48]

– The General Division overlooked some of the evidence

[100] At the General Division, the Claimant argued that he did not have any personal conditions, apart from his student visa. He denied that he had to attend classes. Because of COVID-19, all of his classes were online. He could attend classes at any time.

[101] However, the Claimant's arguments and evidence at the General Division hearing were inconsistent with the statements that he made in his application, and in the statements that he gave to the Commission. The General Division did not address the inconsistencies in the evidence at the hearing or in its decision.

[102] There is also the matter of the Claimant's phone calls with the Commission in September and November 2021. Three months before the General Division hearing, the Claimant reported that he would not leave his training or course if it conflicted with a fulltime job. The last phone call took place within six weeks of the General Division hearing. The Claimant reported that he could only work evenings and weekends.

[103] The General Division member did not refer to any of this evidence from September or November 2021. The General Division should have addressed it because it suggested that the Claimant set personal restrictions that limited his chances of

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[47] Commission's submissions, at AD3-8.
[48] *Rahal v Canada (Citizenship and Immigration)*, 2012 FC 319 at para 39 (CanLII).

finding work. The evidence also seems to conflict with statements that the Claimant gave at the General Division hearing.

Remedy

[104] Having found that the General Division overlooked vital evidence, I have to determine how to fix this error.

[105] I have two options: I can return this matter to the General Division for redetermination, or I can substitute my own decision. Generally, I would substitute my own decision if the underlying facts are not in dispute and the evidentiary record is complete. I would also have to be satisfied that there is no allegation by either party that they did not get a fair hearing at the General Division or that they did not have a reasonable opportunity to present their case at the General Division.

[106] The parties disagree over the evidence regarding the Claimant's schooling commitments. But, I can re-weigh and reassess the evidence.[49] Despite the parties' disagreement over the evidence, I find that there is a sufficient evidentiary record for me to decide most issues.

[107] There is no suggestion by either party that the process at the General Division was unfair. The General Division gave the parties a fair opportunity to present their case and explain the evidence.

[108] The General Division did not ask the Claimant about the inconsistences in his evidence regarding his availability. But, the Claimant recognized that he said he had a set school schedule. He tried to explain why he had given this evidence.[50] He explained that, while he had given a class schedule, the lectures were asynchronous. He explained that he was completely flexible and was willing to work at any time.

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[49] Section 59 of the *Department of Employment and Social Development Act*. If I substitute my own decision, this means I may make findings of fact: *Weatherley v Canada (Attorney General)*, 2021 FCA 58, at paras 49 and 53, and *Nelson v Canada (Attorney General)*, 2019 FCA 222, at para 17.
[50] Request for Reconsideration, dated October 26, 2021, at GD3-35.

– **Evidence about the Claimant's availability**

[109] The Claimant's student visa limited him to no more than 20 hours of work per week. The Claimant's student visa on its own would not have been disentitling. The Claimant could have worked or remained available during regular hours for every working day of the week, subject to any restrictions his school schedule might have posed. Thus, the Claimant's availability will turn on any restrictions his school scheduling might have had.

[110] The evidence about the Claimant's school schedule is mixed. Evidence that showed that his school schedule limited his availability includes the following:

- From January 6 to April 24, 2021, the Claimant spent about 20 to 30 hours per week in training and 20 to 30 hours on his studies. This included classroom time, studies, working on assignments, research labs, distance learning, among other things.[51]

- The Claimant reported that from January 6 to April 30, 2020, he attended classes as follows:

    - Mondays: 8:30 a.m. to 5:30 p.m.
    - Tuesdays and Thursdays: 1:00 p.m. to 2:30 p.m.
    - Wednesdays: 1:00 p.m. to 5:30 p.m.

    The Claimant was prepared to work on Tuesdays and Thursdays from 3 p.m. to 12 a.m. and weekends, including Fridays, from 8 a.m. to 12 a.m. The Claimant was unprepared to changes his course schedule to accept work.[52]

- The Claimant's training questionnaire indicated that he spent 25 or more hours per week on his studies studying.[53]

[51] Supplementary Record of Claim, dated March 22, 2021, at GD 3-17.
[52] Training Course Information, dated March 19, 2021, at GD3-19 to 20.
[53] Training questionnaire submitted on March 26, 2021, at GD3-22.

- In a phone call with the Commission in November 2021, the Claimant confirmed that he was only available for work in the evenings and weekends because his studies took priority during the day. He reportedly said that he had open availability and the only restriction was that he could not work during the morning and afternoon on the weekdays and that he could not work more than about 20 hours a week.[54]

[111] Evidence that showed that the Claimant had a flexible school schedule includes the following:

- In his request for reconsideration in late October 2021, the Claimant wrote that all of his lectures were asynchronous and flexible. This meant he was able to work regular business hours during the week. He noted that he had 35 hours of lecture and study hours. He wrote that he was prepared to work at any given time "despite the schedule [he] provided".[55] The Claimant included this letter with his Notice of Appeal to the General Division.[56]

- At the General Division hearing in January 2022, the Claimant testified that he "was willing to look at any given time. [He] didn't have a fixed time on [his] lectures. It was completely flexible."[57]

- The Claimant testified that once his lectures ended, his student visa no longer restricted him from working more than 20 hours per week. He was allowed to work on a full-time basis. His courses ended on March 25, 2021.[58] He had exams after this date. He stated that his exams were "mostly after 7 p.m.", which did not interfere with his availability.[59]

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[54] Supplementary Record of Claim, dated November 10, 2021, at GD 3-38.
[55] Request for Reconsideration, dated October 26, 2021, at GD3-34 to GD3-35.
[56] Notice of Appeal filed on November 29, 2021, at GD2-8.
[57] At approximately 22:55 of the audio recording of the General Division hearing.
[58] Supplementary Record of Claim dated November 10, 2021, at GD3-38, and at approximately 10:13 of the audio recording of the General Division hearing.
[59] Request for Reconsideration, dated October 26, 2021, at GD3-35.

– The Claimant's availability between January 6, 2021 and March 25, 2021

[112] Throughout March 2021, the Claimant stated that he had a set school schedule. He was very specific as to when he could work. This was limited to Tuesdays and Thursdays, and weekends.

[113] Later that year, in late October 2021, after the Commission had already denied his application for benefits, the Claimant stated that he had a flexible schedule and that he could have worked at any time.

[114] Yet, a month later, the Claimant reverted to his earlier statements about when he was available.

[115] There may have been some flexibility in the Claimant's scheduling, but the balance of the evidence shows that the Claimant did have some restrictions, in that he was unable or unprepared to work during some mornings and afternoons on weekdays. I find it particularly compelling that the Claimant had detailed the dates and times when he was prepared to work.

[116] From this, I can only conclude that the Claimant was not available during regular hours for every working day of the week between January 6, 2021 and March 25, 2021.

– The Claimant's availability after March 25, 2021

[117] The Claimant states that after the lecture portion of his schooling ended, he was no longer under any restrictions. His student visa no longer limited how many hours he could work. He also did not have any lectures or classes.

[118] The Claimant had exams after March 25, 2021. He says the evidence shows that his exams were mostly after 7 p.m., so by this point was available for full-time work during regular hours for every working day of the week.[60]

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[60] At approximately 10:13 and 21:42 of the audio recording of the General Division hearing.

[119] However, the Claimant obviously would not have been available for work on the dates and at the times when his exams were during regular hours. The Claimant would have needed to write the exams when they were scheduled to take place.

[120] But, information about the Claimant's exam schedule did not surface during the General Division proceedings. There is no evidence that shows how many exams the Claimant had and when each exam took place. For that reason, I am unable to determine the Claimant's availability after March 25, 2021.

[121] I am returning this matter to the General Division on one issue only—to determine the Claimant's availability after March 25, 2021. The General Division can determine how many exams the Claimant had between March 25, 2021 and April 24, 2021, and whether any of those took place during regular business hours during the weekday.

Conclusion

[122] I am allowing the appeal.

[123] The Claimant was not available for work between January 6, 2021 and March 25, 2021 because of his school schedule.

[124] The Claimant's availability between March 25, 2021 and April 24, 2021 is indeterminate at this point. I am returning this matter to the General Division so that it may address this outstanding issue.

Janet Lew
Member, Appeal Division