[TRANSLATION]

Citation: *Canada Employment Insurance Commission v JL*, 2022 SST 1110

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	Canada Employment Insurance Commission
Representative:	Julie Meilleur
Respondent:	J. L.
Representative:	M. L.

Decision under appeal:	General Division decision dated May 24, 2022 (GE-22-414)

Tribunal member:	Pierre Lafontaine
Type of hearing:	Teleconference
Hearing date:	October 20, 2022
Hearing participants:	Appellant's representative Respondent Respondent's representative
Decision date:	October 28, 2022
File number:	AD-22-369

Decision

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

[2] However, the file returns to the General Division to decide whether the Commission could retroactively disentitle the Claimant and, if so, whether the Commission should have acted and did act judicially when it decided to reconsider the Claimant's claim.

Overview

[3] The Appellant, the Canada Employment Insurance Commission (Commission), decided that the Respondent (Claimant) was not entitled to Employment Insurance (EI) regular benefits from September 28, 2020, to July 12, 2021, because she was taking unauthorized training and was not available for work within the meaning of the law.

[4] The General Division found that the Claimant wanted to go back to work and that she had made efforts to find a job while in school. It also found that the Claimant had not limited her chances of finding a job. The General Division decided that the Claimant was available for work from September 28, 2020, to July 12, 2021.

[5] The Appeal Division granted the Commission leave to appeal the General Division decision. The Commission argues that the General Division made an error of law in finding that the Claimant was available for work while in school full-time.

[6] I have to decide whether the General Division made an error of law in finding that the Claimant was available for work within the meaning of the law.

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

Issue

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

Analysis

Appeal Division's mandate

[9] The 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]

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

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

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

[12] The Commission says that the General Division made an error in finding that the Claimant had not unduly limited her chances of going back to work despite the demands of her training. It argues that studying full-time restricted her availability.

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

[14] The Commission says that the General Division made an error of law by inserting the presumption of non-availability into its analysis of the third *Faucher* factor.

[15] The Claimant says that she was entitled to benefits because she was available to work as many hours as possible while in school full-time before her layoff due to the

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

pandemic. She says that the General Division did not make an error when it found that she was available for work within the meaning of the law.

[16] The General Division found that the Claimant had rebutted the presumption that she was not available for work while taking training full-time. It accepted that the Claimant had shown an ongoing and lengthy history of working part-time while also taking training full-time.

[17] 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.

[18] 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]

[19] Availability has to be determined by analyzing three factors:

a) wanting to go back to work as soon as a suitable job is available

b) expressing that desire through efforts to find a suitable job

c) not setting personal conditions that might unduly limit the chances of going back to work[3]

[20] 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]

[21] 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]

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

[22] The Commission says that the General Division made an error in finding that the Claimant had not unduly limited her chances of going back to work despite the demands of her training. It argues that studying during the day on weekdays restricted her availability.

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

[24] In *JD*, it was decided that the claimant, who had expressed intention to seek only part-time work that did not interfere with her full-time studies with constraints similar to those that existed before she lost her job, had not unduly limited her chances of going back to work.[6]

[25] However, in *RJ*, the Appeal Division found that restricting availability to only certain times on certain days represents setting personal conditions that might unduly limit the chances of going back to work.[7]

[26] 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.

[27] 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.[8]

[28] 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.[9]

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[6] *JD v Canada Employment Insurance Commission*, 2019 SST 438: The Appeal Division member found CUB 52365 to be persuasive.
[7] *Canada Employment Insurance Commission v RJ*, 2022 SST 212.
[8] CUB 74252A; CUB 68818; CUB 52688; CUB 37951; CUB 38251; CUB 25041.
[9] CUB 68818.

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

[30] 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.[10]

[31] 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.[11]

[32] In *Rideout*, the Court found that the fact that the claimant was available for work only two days per week plus weekends was a limitation on his availability for full-time work.[12]

[33] In *Primard* and *Gauthier*, the Court pointed out that a working day excludes weekends under the *Employment Insurance Regulations*. It 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.[13]

[34] In *Duquet*, the Court, applying the *Faucher* factors, found that being available only at certain times on certain days restricts availability and limits a claimant's chances of finding employment.[14]

[35] From the case law of the FCA, I can draw the following principles:

1. A claimant has to be available during regular hours for every working day of the week.

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[10] *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.
[11] *Vezina v Canada (Attorney General)*, 2003 FCA 198.
[12] *Canada (Attorney General) v Rideout*, 2004 FCA 304.
[13] *Canada (Attorney General) v Primard*, 2003 FCA 349; *Canada (Attorney General) v Gauthier*, 2006 FCA 40.
[14] *Duquet v Canada (Attorney General)*, 2008 FCA 313.

2. Restricting availability to 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.

[36] Based on these principles established by the FCA, I simply cannot follow the Appeal Division's decision in *JD*.

[37] And I see no explanation in the decision as to why the General Division chose not to follow the binding case law from the FCA concerning the availability of a claimant who is taking full-time training courses.

[38] The Claimant says that she was entitled to benefits because she was available to work as many hours as possible while in school full-time before her layoff due to the pandemic.

[39] I admit that claimants can establish benefit periods based on part-time work. However, to be considered available for work under the EI Act, a claimant must not, during that period, set personal conditions that might unduly limit the chances of going back to work. Looking for work outside school hours is a personal condition that might unduly limit the chances of going back to work.

[40] The evidence shows that the Claimant was taking training full-time and that she was available for work only outside her school hours. She indicated that she was unwilling to withdraw from her training to work a full-time job during regular weekday hours.

[41] 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.

[42] In my view, 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.[15]

[43] I am also of the view that the General Division made an error of law by ignoring the binding case law from the FCA and by misinterpreting the third *Faucher* factor—not setting conditions that might unduly limit a claimant's availability for work.

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

Remedy

[45] 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.

[46] The evidence shows that the Claimant was enrolled full-time at X College. She was taking training full-time and was available for work only outside her school hours. In addition, she was unwilling to give up her course for a full-time job. These two conditions kept her from having jobs during regular hours, Monday to Friday.

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

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

[49] However, I note that the Claimant has always said that she indicated in reports that she was a full-time student. She mentioned speaking with Commission agents

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[15] *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.

three times to make sure that she was fully entitled to benefits. She says that she took every precaution to avoid ending up in this situation.[16]

[50] Given its finding on the issue of availability, the General Division did not consider whether the Commission could retroactively disentitle the Claimant and, if so, whether the Commission should have acted and did act judicially when it decided to reconsider the Claimant's claim.

[51] For this reason, the file should be returned to the General Division for it to decide this issue.

Conclusion

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

[53] However, the file returns to the General Division to decide whether the Commission could retroactively disentitle the Claimant and, if so, whether the Commission should have acted and did act judicially when it decided to reconsider the Claimant's claim.

Pierre Lafontaine
Member, Appeal Division

[16] See GD2-6 and GD3-42.