Citation: *Canada Employment Insurance Commission v RC*, 2022 SST 1008

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	Canada Employment Insurance Commission
Representative:	Angele Fricker
Respondent:	R. C.

Decision under appeal:	General Division decision dated April 22, 2022 (GE-22-800)

Tribunal member:	Pierre Lafontaine
Type of hearing:	Teleconference
Hearing date:	October 3, 2022
Hearing participants:	Appellant's representative
Decision date:	October 13, 2022
File number:	AD-22-322

Decision

[1] The appeal is allowed.

Overview

[2] The Appellant, (Commission) decided that the Respondent (Claimant) was disentitled from receiving Employment Insurance (EI) regular benefits from September 6, 2021, to April 8, 2022, because she was in school full-time on her own initiative and had not proven her availability for work. The Commission maintained its initial decision after reconsideration. The Claimant appealed the reconsideration decision to the General Division.

[3] The General Division found that the Claimant had shown that she was capable of, and available for work but unable to find a suitable job. The General Division determined that the Claimant wanted to go back to work and made sufficient efforts to find a job. It determined that the Claimant did not set personal conditions that would have unduly limited her chances of going back to work while attending a fulltime training program because her classes were online and she could work Wednesdays, evenings and weekends.

[4] The Appeal Division granted the Commission leave to appeal of the General Division's decision to the Appeal Division. The Commission submits that the General Division made an error of law when it concluded that the Claimant was available for work from September 6, 2021, to April 8, 2022.

[5] I must decide whether the General Division made an error in law by misapplying the legal test for availability.

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

Issue

[7] Did the General Division make an error in law by misapplying the legal test for availability?

Analysis

Appeal Division's mandate

[8] The Federal Court of Appeal (FCA) has determined that when the Appeal Division hears appeals pursuant to section 58(1) of the *Department of Employment and Social Development Act* (DESD Act), the mandate of the Appeal Division is conferred to it by sections 55 to 69 of that Act.[1]

[9] The Appeal Division acts as an administrative appeal tribunal for decisions rendered by the General Division and does not exercise a superintending power similar to that exercised by a higher court.[2]

[10] Therefore, unless the General Division failed to observe a principle of natural justice, erred in law, 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.

Preliminary matters

[11] The Claimant did not appear at the hearing.

[12] I proceeded with the hearing in the Claimant's absence because I was satisfied that she had received the notice of hearing.[3]

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[1] *Canada (Attorney general) v Jean*, 2015 FCA 242; *Maunder v Canada (Attorney general)*, 2015 FCA 274.
[2] *Idem*.
[3] In accordance with section 12(1) of the *Social Security Tribunal Regulations*.

Did the General Division make an error in law by misapplying the legal test for availability?

[13] The General Division found that the Claimant had shown that she was capable of, and available for work but unable to find a suitable job. The General Division determined that the Claimant wanted to go back to work and made sufficient efforts to find a job. It determined that the Claimant did not set personal conditions that would have unduly limited her chances of going back to work while attending a fulltime training program because her classes were online and she could work Wednesdays, evenings and weekends.

[14] The Commission submits that the General Division erred in law by misapplying the legal test for availability. More precisely, the Commission submits 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 submits that the Claimant's school schedule restricted her availability for work.

[15] The Commission submits that the General Division ignored the case law of the FCA, which 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] To be considered available for work, a claimant must show that they are capable of, and available for work and unable to obtain suitable employment.[4]

[17] Availability must be determined by analyzing three factors:

(1) the desire to return to the labour market as soon as a suitable job is offered,

(2) the expression of that desire through efforts to find a suitable job, and

[4] Section 18(1) (a) of the *Employment Insurance Act*.

(3) not setting personal conditions that might unduly limit the chances of returning to the labour market.[5]

[18] Furthermore, 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 obtain suitable employment.**[6]

[19] For the purposes of sections 18 of the Employment Insurance (EI) Act, a working day is any day of the week except Saturday and Sunday.[7]

[20] The FCA has rendered a number of decisions about the availability of a claimant attending full-time training courses.

[21] 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]

[22] 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]

[23] 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]

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

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[5] *Faucher v Canada (Employment and Immigration Commission)*, A-56-96.
[6] *Canada (Attorney General) v Cloutier*, 2005 FCA 73.
[7] Section 32 of the *Employment Insurance Regulations*.
[8] *Bertrand*, A-613-81: The FCA followed this case in student cases 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.

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]

[25] 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.[12]

[26] 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.

[27] The evidence shows that the Claimant was a full-time student in a full-time program, and that she was available for work only outside of her class hours—Wednesdays, evenings and weekends. She was not willing to give up her course to take a full-time job. Both of those restricted her from going back to work during regular business hours, Monday to Friday.

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

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

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[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.

Remedy

[30] Considering that both parties had the opportunity to present their case before the General Division, I will render the decision that the General Division should have given.[13]

[31] The evidence shows that the Claimant was enrolled full-time at the X University. She was available for work only outside her class hours Wednesdays, evenings and weekends.[14] The Claimant was unwilling to drop her course to accept a full-time job.[15] These two conditions kept her from finding work during regular hours, Monday to Friday.

[32] In accordance with section 18(1)(a) of the EI Act, and in applying the 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 at the X University.

[33] 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.[16]

[34] For the reasons set out above, I am allowing the Commission's appeal.

Conclusion

[35] The appeal is allowed.

[36] The Claimant was not entitled to EI regular benefits from September 6, 2021, to April 8, 2022, because she was in school full-time on her own initiative and was not available for work within the meaning of the law.

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[13] Pursuant to section 59(1) of the DESD Act.
[14] See GD3-20.
[15] See GD3-21.
[16] *Canada (Attorney General) v Gauthier*, 2006 FCA 40 at para. 5.

Pierre Lafontaine
Member, Appeal Division