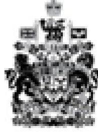

Citation: *Canada Employment Insurance Commission v CL*, 2022 SST 1246

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	Canada Employment Insurance Commission
Representative:	Angèle Fricker
Respondent:	C. L.

Decision under appeal:	General Division decision dated August 1, 2022 (GE-22-946)

Tribunal member:	Pierre Lafontaine
Type of hearing:	Teleconference
Hearing date:	November 3, 2022
Hearing participants:	Appellant's representative Respondent
Decision date:	November 10, 2022
File number:	AD-22-504

Decision

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

[2] However, the file returns to the General Division only to decide whether the Commission had the power to disentitle retroactively the Claimant and if so, whether the Commission should act and acted judicially when deciding to reconsider the claim.

Overview

[3] The Respondent (Claimant) was not able to work because of her illness. The Appellant (Commission) decided that the Claimant would not have been otherwise available for work because the Claimant is a full-time student. The Commission disentitled the Claimant from receiving EI sickness benefits. The Commission maintained its initial decision after reconsideration. The Claimant appealed the reconsideration decision to the General Division.

[4] The General Division determined that the Claimant wanted to go back to work, made sufficient efforts to find a job, and did not set personal conditions that would have unduly limited her chances of going back to work while attending a fulltime training program. The General Division concluded that if the Claimant had not been ill, she would have been available for work within the meaning of the law

[5] The Appeal Division granted the Commission leave to appeal of the General Division’s decision. The Commission submits that the General Division made an error of law when it concluded that had the Claimant not been ill, she would have been available for work.

[6] I must decide whether the General Division made an error in law when it concluded that had the Claimant not been ill, she would have been available for work.

[7] I am allowing the Commission's appeal on the issue of availability. However, the file returns to the General Division only to decide whether the Commission had the power to disentitle retroactively the Claimant and if so, whether the Commission should act and acted judicially when deciding to reconsider the claim.

Issue

[8] Did the General Division make an error in law when it concluded that had the Claimant not been ill, she would have been available for work, even though she was attending full-time school?

Analysis

Appeal Division's mandate

[9] The Federal Court of Appeal 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]

[10] 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]

[11] 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.

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

Did the General Division make an error in law when it concluded that had the Claimant not been ill, she would have been available for work, even though she was attending full-time school?

[12] To be eligible for sickness benefits, a claimant must establish that they are unable to work and if it were not for their illness, they would be available for work.

[13] 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.

[14] 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

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

[15] Furthermore, availability is determined for **each working day** in a benefit period for which a claimant can prove that on that day they were capable of and available for work, and unable to obtain suitable employment.[4]

[16] 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.[5]

[17] The central issue of the present case is the General Division's interpretation of the third factor of the *Faucher* test, namely, not setting personal conditions that might unduly limit the chances of returning to the labour market.

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[3] *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96.
[4] *Canada (Attorney General) v Cloutier*, 2005 FCA 73.
[5] Section 32 of the *Employment Insurance Regulations*.

[18] The Appeal Division recent case law on this question is not unanimous. In a recent case J.D., it was held that the claimant who expressed the intention to seek only part-time work that did not interfere with her full-time studies with the similar constraints to those that pre-existed her lost of employment, did not unduly limit her chances of returning to the labour market.[6]

[19] In another recent case R. J., the Appeal Division found that restricting availability to only certain times on certain days represented setting personal conditions that might unduly limit the chances of returning to the labour market.[7]

[20] The issue of a claimant's availability when taking training courses full time has been the subject of numerous decisions over the years.

[21] The following principle emerged from the previous Umpire case law:

> - Availability has to 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]

[22] The Federal Court of Appeal (FCA) has also rendered several decisions regarding a claimant's availability when taking training courses full time.

[23] In *Bertrand*, the Court indicated that availability restricted to the hours of work between 4 p.m. and midnight, is not availability for purposes of the EI Act.[9]

[24] In *Vézina*, the Court followed *Bertrand* and found that the Claimant's intentions of working weekends and evenings demonstrated a lack of availability for work under the EI Act.[10]

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[6] *J.D. v Canada employment Insurance Commission*, 2019 SST 438; the 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] *Bertrand*; A-613-81.
[10] *Vézina v Canada (Attorney General)*, 2003 FCA 198.

[25] In *Rideout*, the Court found that the claimant being only available for work two days per week plus weekends was a limitation on his availability for full-time work.[11]

[26] In *Primard* and *Gauthier*, the Court noted that a working day excluded weekends under the *Employment Insurance Regulations* and found that a work availability restricted to evenings and weekends alone is a personal condition that might unduly limit the chances of returning to the labour market.[12]

[27] In *Duquet*, the Court applying the *Faucher* factors determined that being available only at certain times on certain days restricted availability and limited a claimant's chances of finding employment.

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

> 1- A claimant must 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—represents a limitation on availability for full-time work and sets a personal condition that might unduly limit the chances of returning to the labour market.

[29] Based on these principles, I cannot, with great respect, follow the Appeal Division decision in J. D.. First, the decision does not specify what days of the week the claimant is available to work. Secondly, the Appeal Division does not explain why it chose not to follow the FCA case law regarding a claimant's availability when taking training courses full time.

[30] The Claimant insists that her school was not a personal condition that might have unduly limited my chances of going back to work because she had a lengthy history of working irregular hours (afternoons, evenings and weekends)

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[11] *Canada (Attorney General) v Rideout*, 2004 FCA 304.
[12] *Canada (Attorney General) v Primard*, 2003 FCA 349; *Canada (Attorney General) v Gauthier*, 2006 FCA 40.

on a full-time basis while attending school. She maintains that her health was the reason that prevented her from working.

[31] I acknowledge that a claimant may establish a claim for benefits based on part-time work outside of their school schedule. However, during the benefit period, they must not set a personal condition that might unduly limit their chances of returning to the labour market to be considered available to work under the EI Act. Looking for work outside of school hours is a personal condition that can unduly limit the chances of re-entering the labor market.

[32] 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—afternoons, 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.

[33] 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.

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

Remedy

[35] Considering that both parties had the opportunity to present their case before the General Division on the issue of availability, I will render the decision that the General Division should have given.

[36] The evidence shows that the Claimant was enrolled full-time at Centennial College. She was available for work only outside of her class hours— afternoons, evenings and weekends. The Claimant was unwilling to drop her course to accept a full-time job. These two conditions kept her from finding work during regular hours, Monday to Friday.

[37] In applying the FCA case law, I find that if it were not for their illness, 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 Centennial College.

[38] For the reasons set out above, I am allowing the Commission’s appeal on the issue of availability.

[39] However, throughout the proceedings, the Claimant raised the issue whether the Commission could review her claim considering that she had truthfully declared in good faith her school situation to several representatives after submitting her application and when finishing her biweekly reports.

[40] Given its conclusion 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 act and acted judicial way when it decided to reconsider the Claimant's claim.

[41] I find it therefore appropriate to return the file to the General Division so that it can decide this issue.

Conclusion

[42] The Commission’s appeal is allowed on the issue of availability.

[43] The file returns to the General Division only to decide whether the Commission had the power to disentitle retroactively the Claimant and if so, whether the Commission should act and acted judicially when deciding to reconsider the claim.

Pierre Lafontaine
Member, Appeal Division