Citation: *KF v Canada Employment Insurance Commission*, 2023 SST 15

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	Canada Employment Insurance Commission
Representative:	Rachel Paquette
Respondent:	K. F.

Decision under appeal:	General Division decision dated June 17, 2022 (GE-22-1310)

Tribunal member:	Jude Samson
Type of hearing:	Teleconference
Hearing date:	November 1, 2022
Hearing participants:	Appellant's representative Respondent
Decision date:	January 9, 2023
File number:	AD-22-434

Decision

[1] I am allowing the appeal. The Claimant is not entitled to the Employment Insurance (EI) benefits that she received between October 4 and December 16, 2020.

Overview

[2] K. F. is the Claimant in this case. She applied for and received EI regular benefits. The Canada Employment Insurance Commission (Commission) later reviewed her file and decided that the Claimant wasn't available for work while she was studying full-time. As a result, it asked her to repay some of the benefits that she had received.

[3] The Claimant successfully appealed the Commission's decision to the Tribunal's General Division. Now, the Commission is appealing the General Division decision to the Tribunal's Appeal Division. It argues that the General Division didn't apply the law correctly. I agree. The Tribunal has to follow certain court decisions. Based on those decisions, the Claimant wasn't available for work and wasn't entitled to the EI benefits that she received while studying.

Issue

[4] This appeal raises one main issue: Did the General Division make an error of law by failing to apply binding decisions from the Federal Court of Appeal?

Analysis

[5] I can intervene in this case if there's an error of law in the General Division decision.[1]

[1] The errors I can consider, also known as "grounds of appeal," are listed under section 58(1) of the *Department of Employment and Social Development Act* (DESD Act).

The General Division made an error of law by failing to apply Federal Court of Appeal decisions

[6] Here, the General Division needed to decide whether the Claimant was available for work, as required by the law.[2]

[7] Three factors guide the Tribunal's assessment of a person's availability. These are often called the *Faucher* factors:[3]

- Does the person want to go back to work as soon as a suitable job is available?
- Has the person made reasonable efforts to find a suitable job?
- Has the person set personal conditions that might unduly (overly) limit their chances of going back to work?

[8] Here, the main question was whether the Claimant's course schedule was a personal condition that overly limited her chances of working. The Claimant established that she wanted to work and that she made significant efforts to find a new job.

[9] The Claimant worked as an early childhood educator with her local school board for about 10 years.[4] She generally worked during school hours, Monday to Friday. However, her course schedule meant that she had to leave her job when she returned to university.[5] Instead, she looked for childcare jobs, providing before and after school care.

[10] Nevertheless, the General Division concluded that the Claimant hadn't overly limited her chances of finding work. To reach its conclusion, the General Division relied

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[2] Section 18(1)(a) of the *Employment Insurance Act* (EI Act) says that a person has to be capable of and available for work to get EI benefits.
[3] This is a reference to a Federal Court of Appeal decision in which these factors appear: *Faucher v Canada (Employment and Immigration Commission)*, 1997 CanLII 4856. I am providing a plain-language summary of the *Faucher* factors.
[4] Listen to the audio recording of the General Division hearing starting at about 12:30.
[5] This case is somewhat unusual because the Commission might also have disqualified the Claimant from receiving EI benefits for leaving her job without just cause: see section 30 of the EI Act. The Federal Court of Appeal's decision in *Canada (Attorney General) v Gagnon*, 2005 FCA 321,underlines the connection between availability and voluntarily leaving a job in circumstances like these.

on the Claimant's evidence showing that she applied for a number of positions and was quickly offered a new job. However, the Claimant was delayed starting the job because of the time needed to get a criminal record check during the COVID-19 pandemic.

[11] The Commission argues that the General Division misunderstood the law on availability. It says that students who restrict their availability around their class schedule aren't available for work. In particular, the Commission relies on several Federal Court of Appeal decisions that the General Division should have followed.[6]

[12] I agree that the General Division didn't have a good reason for departing from binding decisions from the Federal Court of Appeal. In short, the Claimant put her schooling first and work second.

[13] I applaud the Claimant's efforts to return to work so quickly. However, the Claimant's usual occupation was in the education field. She had worked in that area for about 10 years. But the Claimant's course schedule was incompatible with work in that field, so she had to quit her job and move to a different (albeit related) sector.

[14] In these circumstances, the General Division should have followed the Federal Court of Appeal decisions on which the Commission relies. It made an error of law by departing from those decisions.

[15] Beyond this, I find that the General Division made an error of law by concluding that a recent addition to the law displaced the presumption that full-time students are unavailable for work.[7] The General Division didn't explain why it was interpreting this new section of the law as changing the law on availability, including past decisions from the Federal Court of Appeal.

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[6] See, for example: *Canada (Attorney General) v Gagnon*, 2005 FCA 321, *Duquet v Canada (Employment and Immigration Commission)*, 2008 FCA 313, *Vézina v Canada (Attorney General)*, 2003 FCA 198, and *Canada (Attorney General) v Gauthier*, 2006 FCA 40.

[7] See paragraph 14 of the General Division decision. The Federal Court of Appeal established the presumption of unavailability in cases like *Canada (Attorney General) v Gagnon*, 2005 FCA 321 at paragraph 6. The General Division concluded that the presumption does not apply since Parliament added section 153.161(1) to the EI Act.

I will give the decision the General Division should have given

[16] The parties agree that I should give the decision the General Division should have given.[8] The Claimant acknowledged that she was able to fully present her case at the General Division level.

[17] I've listened to the recording of the General Division hearing and agree that it's appropriate for me to give the decision the General Division should have given. Indeed, the facts of the case are not especially complex or controversial.

The Claimant is not entitled to the EI benefits that she received

[18] As I mentioned above, a person who wants EI regular benefits has to show (among other things) that they are "capable of and available for work" but aren't able to find a suitable job.[9] The law doesn't define "available," but the Federal Court of Appeal established the *Faucher* factors to guide the Tribunal when assessing a person's availability.

– The Tribunal considers context when assessing a person's availability

[19] The Tribunal can't assess a person's availability in the abstract. In other words, a person doesn't have to show that they are available for all jobs. Instead, the focus is on a suitable job.[10]

[20] The importance of a suitable job is reinforced in other parts of the law too. A person who wants EI benefits has to be available for a suitable job **and** has to be making reasonable and customary efforts to find a suitable job.[11]

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[8] Sections 59(1) and 64(1) of the DESD Act give me the power to fix the General Division's error in this way. Also, see *Nelson v Canada (Attorney General)*, 2019 FCA 222 at paragraphs 16–18.
[9] See section 18(1)(a) of the EI Act.
[10] See the first two *Faucher* factors along with *Canada (Attorney General) v Whiffen*, 1994 CanLII 10954 (FCA) at paragraphs 13 and 14.
[11] See section 50(8) of the EI Act.

[21] The law provides some guidance about what a suitable job is.[12] It depends on factors like a person's usual occupation, personal circumstances, past earnings, and working conditions.

– The law presumes that full-time students are unavailable for work

[22] The law presumes that full-time students are unavailable for work.[13] The presumption is especially strong for students who leave full-time work to go to school.

[23] The presumption appears to be a short-handed way of signalling that, to accommodate their course schedule, full-time students normally restrict their availability in a patchwork fashion. As a result, it is often challenging for full-time students to meet the third *Faucher* factor.

[24] However, the presumption does not apply to students who can show that they have exceptional circumstances, including a history of working and studying at the same time.[14]

– The Claimant has not shown that she was available for work

[25] The presumption of unavailability applies to the Claimant.

[26] The Claimant was a full-time student, and she has not shown that she has any of the special circumstances needed to remove the presumption of unavailability.

[27] I recognize that the Claimant maintained some availability for work and that she was able to find work in a different field reasonably quickly.

[28] However, the Claimant put her education first.

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[12] See section 6(4) of the EI Act and section 9.002 of the *Employment Insurance Regulations* (EI Regulations).
[13] For example, see *Landry v Canada (Attorney General)* (1992), 152 NR 121 (FCA), *Canada (Attorney General) v Rideout*, 2004 FCA 304, and *Canada (Attorney General) v Cyrenne*, 2010 FCA 349.
[14] Factors that can be considered when assessing if a person has exceptional circumstances include the student's history of working and studying, the flexibility of their course schedule, their willingness to change or abandon their program, and their efforts to find a new job: T. Stephen Lavender, *The 2022 Annotated Employment Insurance Act* (Toronto, ON: Thomson Reuters, 2021) at pages 137–138.

[29] While trying to avoid judging the Claimant's priorities, her course schedule imposed a significant limit on her availability for work. It led to her unemployment and meant that she had to find work in a different field. The Claimant demonstrated, and repeatedly told the Commission, that she would not leave her program or adjust her schedule for the sake of accepting work.[15]

[30] In the circumstances, I'm unable to find a meaningful difference between this case and others in which the courts concluded that a person's class schedule restricted their availability in a way that meant they were unavailable for work and ineligible for EI benefits.[16]

[31] I recognize that the Claimant paid into the EI scheme for many years and argues that it should have been available to her during her time of need. However, EI benefits are not handed out based on a person's needs. Instead, the law sets out various criteria that must be met for a person to receive EI benefits.

– **The Tribunal's limited powers to oversee the quality of service the Commission provided to the Claimant**

[32] At both Tribunal hearings, the Claimant expressed concern about the quality of service that she received from the Commission. She said that she answered the Commission's questions about her course schedule truthfully, the Commission confirmed her eligibility for benefits, and then changed its mind much later based on the same information.

[33] Though not framed in this way, the Claimant seems to be arguing that the Commission didn't act judicially when it used its discretionary powers to reopen her claim.[17] For example, the Commission reviewed the information she provided about her

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[15] The Claimant answered questions about her course schedule and availability for work on various forms and in phone calls with the Commission: see pages GD3-16 to 19 and GD3-32 to 40 of the appeal record.
[16] In addition to the cases above, see also *Horton v Canada (Attorney General)*, 2020 FC 743 at paragraph 35.
[17] The Commission's discretionary decisions can be set aside if it fails to act judicially: see, for example, *Canada (Attorney General) v Purcell*, 1995 CanLII 3558 (FCA).

availability and approved her claim. The Commission shouldn't then be able to change its mind and demand a repayment based on the same information.

[34] I agree that the Commission provided the Claimant with poor service in this case. However, the Federal Court of Appeal has said that misinformation and poor service from the Commission can't change the requirements of the law or relieve a person from having to repay benefits that they should not have received.[18]

[35] I also have to recognize that the law gives the Commission broad powers to reconsider a person's claim.[19] In all the circumstances of this case, the Claimant hasn't shown that the Commission failed to use its discretionary powers in a judicial way.

[36] The Claimant also complains that the Commission withheld benefits owing to her as a way of collecting its debt, even though her appeal with the Tribunal was still outstanding.

[37] I sympathize with the Claimant and understand how this might have put her into a difficult financial situation. As I understand it, the Commission does not normally proceed in this way. However, I don't have the power or the information needed to address this complaint. Instead, I would point the Claimant to Service Canada's Office for Client Satisfaction.[20]

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[18] See decisions like *Canada (Attorney General) v Shaw*, 2002 FCA 325, *Lanuzo v Canada (Attorney General)*, 2005 FCA 324, and *Faullem v Canada (Attorney General)*, 2022 FCA 29 at paragraphs 43-48.
[19] The Commission's reconsideration powers are set out under sections 52 and 153.161 of the EI Act. The Explanatory Note to Interim Order No. 10, which added section 153.161 to the EI Act, says that the Commission was adopting a modified operational approach to assess the availability of students, like the Claimant: see Part II of the *Canada Gazette*, volume 154, number 21 at pages 2423 to 2424.
[20] Information about the Office for Client Satisfaction can be found on the Internet at Office for Client Satisfaction - Canada.ca.

Conclusion

[38] The General Division misunderstood the law on availability. As a result, I'm allowing the Commission's appeal and giving the decision the General Division should have given. The Claimant wasn't available for work between October 4 and December 16, 2020, meaning that she wasn't entitled to the EI benefits that she received between those dates.

[39] This decision also means that the Claimant needs to repay a significant amount of benefits. If she hasn't already done so, the Claimant could contact the Canada Revenue Agency to ask if some or all her debt could be written off (cancelled) because it's causing her serious financial hardship.[21] Alternatively, the Claimant and the Canada Revenue Agency might be able to agree on a manageable repayment plan.

Jude Samson
Member, Appeal Division

[21] See section 56 of the EI Regulations. The Canada Revenue Agency's Debt Management Call Centre can be reached at 1-866-864-5823.