Citation: *Canada Employment Insurance Commission v SR*, 2022 SST 1464

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	Canada Employment Insurance Commission
Representative:	Josée Lachance
Respondent:	S. R.

Decision under appeal:	General Division decision dated June 13, 2022 (GE-22-1191)

Tribunal member:	Jude Samson
Type of hearing:	Teleconference
Hearing date:	October 18, 2022
Hearing participants:	Appellant's representative Respondent
Decision date:	December 8, 2022
File number:	AD-22-419

Decision

[1] The appeal is allowed. The Claimant is not entitled to the Employment Insurance (EI) regular benefits that she received while studying.

Overview

[2] S. R. is the Claimant in this case. She received EI regular benefits between February 1 and August 19, 2021, while studying full-time. Later, the Canada Employment Insurance Commission (Commission) reviewed her file and asked her to reimburse the benefits that she had already received.[1] According to the Commission, the Claimant wasn't available for work, which is a requirement for getting EI benefits.

[3] The Claimant successfully appealed the Commission's decision to the Tribunal's General Division. The Commission is now appealing the General Division decision to the Tribunal's Appeal Division. It argues that the General Division made errors of law.

[4] The General Division misunderstood the law on availability. This allows me to give the decision the General Division should have given: the Claimant wasn't available for work during her studies. As a result, I'm allowing the Commission's appeal.

Issues

[5] The issues in this appeal are:

a) Did the General Division misunderstand the law on availability?

b) If so, how should I fix the General Division's error?

c) Is the Claimant entitled to the EI benefits that she received?

---

[1] My decision refers to the Commission, even though the Claimant was dealing with Service Canada. The law gives the Commission the power to make decisions about the EI program, but Service Canada delivers the EI program for the Commission.

Analysis

[6] I can intervene in this case if the General Division misunderstood parts of the law that it needed to apply.[2]

The General Division misunderstood the law on availability

[7] The main issue the General Division needed to decide was whether the Claimant was available for work, as required by the law.[3]

[8] In this case, the Claimant worked as a manager at a retail business. For several months, she worked regular, full-time hours. Then, in January 2021, she started a college program that changed her availability. During her studies, the Claimant was available from about 2:30 p.m. to 9:00 p.m. on weekdays and on weekends. As a result, the Claimant's employer demoted her to an associate position and reduced her hours to about two shifts per week.

[9] Nevertheless, the General Division concluded that the Claimant remained available for work. The General Division based its conclusion on two main factors:

- The Claimant was available to work for about 6.5 hours on weekdays and on weekends; and
- The Claimant asked for more hours from her employer.

[10] The General Division decision reveals a misunderstanding about the law on availability.

[11] First, the Tribunal has to assess availability from Monday to Friday; it cannot consider Saturdays and Sundays.[4]

---

[2] 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).
[3] 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.
[4] See section 32 of the *Employment Insurance Regulations* (EI Regulations) and *Canada (Attorney General) v Lamonde*, 2006 FCA 44 at paragraph 10.

[12] Second, availability is not just about whether a person is available to work for a minimum number of hours each day or each week. Instead, the courts have said that a person's pattern of availability can affect their chances of returning to work. As a result, it is especially important to consider when a person changes their availability or limits it to irregular hours.[5]

[13] The courts have been particularly strict when it comes to students whose availability depends on their class schedule.[6]

[14] However, the General Division overlooked the Claimant's pattern of availability, along with court decisions about students and their availability.

[15] The General Division's misunderstanding about the law on availability allows me to intervene in this case.

I will give the decision the General Division should have given

[16] The Commission argues that I should give the decision the General Division should have given.[7] The Claimant didn't oppose this approach.

[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. The Claimant had a full opportunity to present her case at the General Division level. Plus, 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've already mentioned, 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

---

[5] See, for example, *Canada (Attorney General) v Bertrand*, 1982 CanLII 3003 (FCA).
[6] The Commission relies especially on binding Federal Court of Appeal decisions like *Canada (Attorney General) v Primard*, 2003 FCA 349 and *Duquet v Canada (Employment and Immigration Commission)*, 2008 FCA 313.
[7] 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.

find a suitable job.[8] The law doesn't define "available," meaning that courts and tribunals have had to grapple with its meaning.

– Assessing a person's availability requires a contextual and fact-specific analysis

[19] Three factors guide the Tribunal's assessment of a person's availability. These are often called the *Faucher* factors.[9] It is an error to ignore any of the factors. Instead, the Tribunal needs to consider and weigh all three factors:[10]

- 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?

[20] As part of its assessment, the Tribunal considers the person's attitude, conduct, and all the circumstances of their case.[11]

[21] There's also an important connection between a person's availability and their efforts to find work. A person's job search efforts provide important information about labour market conditions, and the effect of any self-imposed restrictions. In fact, evidence of a serious and intensive job search weighs strongly in favour of a person's availability.[12]

– 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.

---

[8] See section 18(1)(a) of the EI Act.
[9] 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.
[10] This is a plain-language summary of the *Faucher* factors.
[11] See *Canada (Attorney General) v Whiffen*, 1994 CanLII 10954 (FCA) at paragraphs 12 and 17.
[12] See, for example, *Ricard v Canada (Attorney General)*, A-298-74, CUB 19058, and CUB 18691.
[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.

[23] The presumption appears to be a short-handed way of signalling that full-time students will often struggle under 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] First, the presumption of non-availability applies to the Claimant.

[26] The Claimant was a full-time student. And while the Claimant might have worked and attended college from January to April 2020, her history of working and studying is not long enough to remove the presumption of non-availability.[15]

[27] Second, the Claimant changed her availability in a way that significantly limited her chances of finding work. The Claimant's employer demoted her and significantly cut her hours because of her reduced availability. Plus, the Claimant provided documents suggesting that her availability was even more limited than what she told the General Division member.[16]

[28] It is the Claimant's duty to prove her availability. However, there's little proof of other jobs that could accommodate her course schedule either. In fact, the Claimant's evidence about her job search efforts was very vague. While the Claimant mentioned applying for six or seven jobs, she could only name two of them.

[29] In the circumstances, I'm unable to find a meaningful difference between this case and others in which the courts concluded that the person's class schedule

---

[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.
[15] See *Canada (Attorney General) v Loder*, 2004 FCA 18.
[16] See page GD6-13 in the appeal record, where the Claimant says that she's only available to work on Mondays and weekends.

restricted their availability in a way that meant they were unavailable for work and ineligible for EI benefits.

– EI benefits and the Canada Emergency Response Benefit are not the same

[30] At both Tribunal hearings, the Claimant expressed some confusion between EI benefits and the Canada Emergency Response Benefit (or CERB). These benefits are different and each has its own eligibility criteria.

[31] The Commission concluded that the Claimant wasn't eligible for the EI benefits that she received. As a result, I'm limited to deciding that issue too. I cannot, for example, decide whether the Claimant is entitled to some other benefit instead.

Conclusion

[32] 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. From February 1 to August 19, 2021, the Claimant wasn't available for work, meaning that she wasn't entitled to the EI benefits that she received between those dates.

[33] 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 of her debt could be written off (cancelled) because it's causing her serious financial hardship.[17] Alternatively, the Claimant and the Canada Revenue Agency might be able to agree on a manageable repayment plan.

Jude Samson
Member, Appeal Division

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