



Citation: *CC v Canada Employment Insurance Commission*, 2023 SST 216

Social Security Tribunal of Canada Appeal Division

Decision

Appellant: C. C.
Representative: R. M., MP

Respondent: Canada Employment Insurance Commission
Representative: Melanie Allen

Decision under appeal: General Division decision dated May 9, 2022
(GE-22-206)

Tribunal member: Janet Lew

Type of hearing: Teleconference
Hearing date: November 9, 2022
Hearing participants: Appellant
Appellant's representative
Respondent's representative

Decision date: February 27, 2022
File number: AD-22-361

Decision

[1] The appeal is dismissed.

Overview

[2] The Appellant, C. C. (Claimant), is appealing the General Division decision.

[3] The General Division found that the Claimant was not available for work for the purposes of the *Employment Insurance Act*. The Claimant was attending school on a full-time basis. The General Division found that he set personal restrictions that could limit his chances of finding work. As a result, the Claimant was disentitled from receiving Employment Insurance benefits.

[4] The Claimant argues that the General Division made both legal and factual errors. In particular, he says the General Division overlooked or failed to consider some of his evidence that shows that he was available for work. He asks the Appeal Division to allow his appeal and to find that he was available for work for the purposes of the *Employment Insurance Act*.

[5] The Respondent, the Canada Employment Insurance Commission (Commission) denies that the General Division made any errors. The Commission ask the Appeal Division to dismiss the appeal.

Issues

[6] The issues in this appeal are:

- a) Did the General Division fail to consider the Claimant's past work history?
- b) Did the General Division fail to consider, or did it mischaracterize the Claimant's evidence regarding his availability?

Analysis

[7] The Appeal Division may intervene in General Division decisions if there are jurisdictional, procedural, legal, or certain types of factual errors.¹

Did the General Division fail to consider the Claimant’s past work history?

[8] The Claimant argues that the General Division failed to consider his past work history. He says that the evidence shows that he worked full-time in past while attending school on a full-time basis. He argues that, if the General Division had considered this evidence, it would have accepted that he was available for work, for the purposes of the *Employment Insurance Act*.

[9] The Commission argues that a past work history is irrelevant. The Commission says that a claimant’s past work history has no bearing on the issue of availability. Rather, the Commission says that availability is assessed using the “*Faucher* factors.”

[10] In a case called *Oh v Canada (Attorney General)*, the Federal Court of Appeal wrote:

While availability is not defined in the [*Employment Insurance Act*], this Court wrote in *Faucher v Canada (Employment and Immigration Commission)*, [1997] F.C.J. No. 215 (QL) at paragraph 3, that a claimant’s availability is determined by examining 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.²

[11] The Court then went on to say that a claimant attending a course of full-time studies is presumed to be unavailable for work, though that presumption can be rebutted through proof of exceptional circumstances. Such a circumstance could include where a claimant has a history of holding full-time employment while attending school.³

¹ Section 58(1) of the *Department of Employment and Social Development Act*.

² See *Oh v Canada (Attorney General)*, 2022 FCA 175 at para 13.

³ See *Oh*, at para 14.

[12] The General Division acknowledged that there was evidence that the Claimant worked full-time in past while attending school. The General Division referred to the Claimant's request for reconsideration. There, the Claimant stated that he had worked up to and over 25 hours a week.

[13] The General Division did not fail to consider this evidence. The General Division simply rejected it, preferring instead the Claimant's earlier evidence that he worked 12 to 16 hours a week. In his application for Employment Insurance benefits, the Claimant stated that he had worked 8 hours weekly from January 12, 2021 to June 27, 2021 for one employer, and 8 hours weekly from September 18, 2020, to May 28, 2021, for a second employer.⁴

[14] The General Division found that the Claimant did not have a history of full-time work. Even so, it found that he had rebutted the presumption that he was unavailable for work. It found that there were exceptional circumstances, in that he had both synchronous and asynchronous classes.

[15] In other words, it did not matter whether the General Division found that the Claimant did not have a history of full-time work while attending school on a full-time basis. The General Division accepted that the Claimant had rebutted the presumption that he was unavailable for work.

[16] While the General Division accepted that the Claimant had rebutted the presumption that he was unavailable for work, this did not mean that he was necessarily available for work. Having rebutted the presumption, this still left the General Division with the task of examining whether the Claimant was actually available for work.

⁴ See Claimant's application, at GD 3-12 to GD 3-13.

Did the General Division fail to consider, or did it mischaracterize the Claimant's evidence regarding his availability?

[17] The Claimant argues that the General Division misapprehended the evidence that showed he would leave his schooling for full-time work. In particular, he says the evidence shows that:

- (1) many of his classes were virtual so he could attend these classes at his convenience,
- (2) he could have moved his schedule to free up his availability for work. This could have included simply dropping one to two classes, without losing about \$18,000 he spent towards his schooling, or his full-time status as a student. At most, he would lose the tuition for that term, or just the course(s) that he dropped, and
- (3) he would have left school altogether if he found a full-time job.

[18] The Claimant argues that, if the General Division had not misapprehended this evidence, it would have accepted that he was available for work for the purposes of the *Employment Insurance Act*.

– Review of the evidence

[19] The evidence discloses the following:

Application for Employment Insurance benefits

- The Claimant applied for Employment Insurance benefits on September 13, 2021. The Claimant reported on the application form that, in his first term of schooling, he attended classes or participated in sessions from Mondays to Fridays.⁵
- The Claimant also reported that he was not available for work or capable of working under the same conditions compared to before he started his

⁵ See application for Employment Insurance benefits, at GD 3-10 to 3-11.

course/program. He wrote, "During the summer I was under full-time employment (40 hours a week) but now I cannot accept that however, I can work a lot on the weekend and certain days of the week so I could work around 30 hours per week."⁶

- The Claimant said that he was available as follows:
 - o Monday - afternoons and evenings
 - o Tuesdays and Thursdays - only in the evenings
 - o And Saturdays and Sundays.⁷
- , Tuesdays, Thursdays, Saturdays, and Sundays.⁸
- The application form asked what he would do if he found full-time work that conflicted with his course/program. The options were:
 - o drop the course/program to accept the job
 - o finish the course/program
 - o accept the job as long as he could delay the start date to allow him to finish the course/program
 - o change his course schedule to accept the job

The Claimant chose this last option. He responded that he would change his course schedule to accept the job.⁹

⁶ See application for Employment Insurance benefits, at GD 3-11.

⁷ See application for Employment Insurance benefits, at GD 3-11 to GD 3-12.

⁸ See application for Employment Insurance benefits, at GD 3-11.

⁹ See application for Employment Insurance benefits, at GD 3-12.

Request for Reconsideration

- The Claimant asked the Commission to reconsider its decision. He explained that he was available for work and actively looking for work. He stated that his current training did not prevent him from accepting full-time or part-time work.¹⁰

Conversations with the Commission

- When the Claimant spoke with the Commission, he reported the following:
 - o He spent 12 hours per week in class. He would not be able to work a full-time job due to his school schedule. He stated that he was only looking for part-time work.¹¹
 - o The Claimant stated that he was required to attend in-person classes Monday, Wednesdays, and Fridays from 12:30 to 1:20 p.m. and Tuesdays and Thursdays from 11:30 a.m. to 12:20 p.m. and 2:30 p.m. to 3:50 p.m.

When asked if he would leave the training if it conflicted with full-time employment, he responded that he would not leave unless it was a “really good job,” but then stated that he was unsure as he had invested quite a bit of money in the course.¹²

- In his request for reconsideration¹³ and also at the General Division hearing, the Claimant explained that he felt intimidated, rushed, and unable to provide truthful responses when he spoke with the Commission in October and December 2021.

The Claimant says the Service Canada agent suggested what his responses should be, and he felt pressured to agree to those responses.¹⁴ He denies that he had any restrictions or limitations to working full-time.

¹⁰ See Claimant's Request for Reconsideration dated November 18, 2021, at GD 3-24 to GD 3-26.

¹¹ See Call-Back dated October 28, 2021, at GD 3-21 to GD 3-22.

¹² See Supplementary Record of Claim dated December 17, 2021, at GD 3-27.

¹³ See Claimant's Request for Reconsideration dated November 18, 2021, at GD 3-24 to GD 3-26.

¹⁴ At approximately 1:13:45 to 1:19:44 of the audio recording of the General Division hearing on March 29, 2022.

Claimant's oral testimony at the General Division hearing

- At the General Division hearing, the Claimant testified that he had the following in-person school commitments:

First semester

- o Mondays, Wednesdays, Fridays from 12:30 to 1:20 p.m.
- o Tuesdays from 2:30 to 3:50 p.m.¹⁵

Second semester

- o Tuesdays from 2:30 to 3:50 p.m. – geography course
- o Tuesdays and Thursdays from 4 to 5:20 p.m. – physics labs
- o Thursdays from 2:30 to 3:50 p.m. – calculus lab¹⁶

The remainder of his classes were on-line. He attended these when it was convenient for him.

- The Claimant also testified that, at one job he applied for, he was available for full-time work, “but would not be able to work the afternoon of Tuesday but [he] could do a morning shift.”¹⁷
- When the General Division member asked the Claimant whether he could change his course schedule at all, he responded, “Not right now, but I don’t think that means that I wasn’t able to do all my work because half, three quarters of the majority of my courses are self-directed.”¹⁸

¹⁵ At approximately 31:07 to 33:50 of the audio recording of the General Division hearing

¹⁶ From approximately 28:13 to 38:25 of the audio recording of the General Division hearing.

¹⁷ At approximately 59:50 to 1:00:19 of the audio recording of the General Division hearing.

¹⁸ At approximately 59:50 to 1:00:19 of the audio recording of the General Division hearing.

- The Claimant testified that he would leave university for a job, including a minimum-wage job such as at a fast-food outlet.¹⁹

– **The General Division’s treatment of the evidence**

[20] A decision-maker does not have to refer to all of the evidence before them unless that evidence could have had some impact on the outcome. A decision-maker also does not have to accept a witness’s evidence. They can reject any evidence for a number of reasons. A decision-maker might find that there is conflicting evidence that they prefer. They might reject evidence that they do not find very credible or reliable. But they need to explain why it prefers or rejects any evidence.

- **The General Division accepted that most of the Claimant’s classes were virtual**

[21] The General Division accepted that the Claimant had on-line classes that he could attend at his own convenience. At paragraph 29, the General Division member wrote that the Claimant had five more classes in his first semester that he took at his own schedule. And, at paragraph 30, the Claimant’s classes in his second semester were recorded, other than for three in-person labs.

[22] I find that the General Division did not overlook or misapprehend the evidence regarding the Claimant’s virtual or online classes. The General Division’s focus was on the Claimant’s in-person class commitments.

- **The General Division did not overlook any evidence that the Claimant could change his school schedule**

[23] The Claimant says that there was evidence that he could and would have changed his school schedule to accommodate work.

[24] There was conflicting evidence from the Claimant about his availability. His application form and telephone discussions with Service Canada indicated that he had

¹⁹ At approximately 1:19:44 to 1:24:41 of the audio recording of the General Division hearing.

some restrictions against working. He did not suggest that he could or would have changed his school schedule.

[25] The Claimant explained that when he filed his application, it was early yet during the semester. So, he did not have a true appreciation of his class commitments until after mid-September 2021. He explained that when he spoke with the Service Canada agent in October and December 2021, he felt pressured by the agent to give certain responses. He felt he did not have a fair opportunity to explain his availability.

[26] Yet, some of the Claimant's testimony at the General Division hearing was generally consistent with the responses that he provided on his application form and what he told the Service Canada agent.

[27] The Claimant testified that he was available for full-time work, other than on Tuesday afternoons.²⁰ He also said he was unable to change his courses at that time, but still had full-time hours available, as the majority of his courses were self-directed.²¹

[28] When he asked the Commission to reconsider its decision, the Claimant did not say anything about being able to or that he would change his schedule.²² He simply suggested that his current schedule allowed him to work full-time or part-time.

[29] I could not find any evidence in either the written record or in the Claimant's oral evidence at the General Division that the Claimant could and would have changed his school schedule to accommodate work (as distinct from leaving his schooling altogether).

- **The General Division did not overlook or mischaracterize the Claimant's evidence that he would have left school for a full-time job**

[30] The Claimant says that the General Division overlooked or mischaracterized his evidence that he would have left school for a full-time job.

²⁰ At approximately 59:50 to 1:00:19 of the audio recording of the General Division hearing.

²¹ At approximately 59:50 to 1:00:19 of the audio recording of the General Division hearing.

²² See Claimant's Request for Reconsideration dated November 18, 2021, at GD 3-24 to GD 3-26.

[31] The General Division wrote:

The Claimant said he would leave his course for full-time work. I find this unlikely because university is expensive. He has invested close to \$20,000 in his course this year, plus the expenses of living away from home.²³

[32] The Claimant says that the General Division failed to appreciate that, at most, he would have lost the tuition for just that term that he left school. In other words, it would have been a loss of \$9,000, rather than \$18,000. If he left school in his first term, he would not have lost the tuition for the second term as he had not paid that amount yet. These amounts did not include the expenses of living away from home.

[33] In his application to the Appeal Division, the Claimant stated that he could have pursued full-time work, without having to drop his full-time virtual courses. So, if he was unable to reschedule his in-person class around any work schedule, he would lose only the tuition for the in-person class that he missed for work. In other words, the Claimant's loss would only relate to the specific class that he dropped for any work.

[34] However, I cannot consider the evidence from the Claimant's application to the Appeal Division regarding the loss of tuition for just one class, versus the loss of tuition for a semester. The General Division did not have this evidence. The Appeal Division generally does not accept new evidence.

[35] As the Federal Court of Appeal stated in *Gittens v Canada (Attorney General)*, "hearings before the Appeal Division are not redos based on updated evidence of the hearings before the General Division. They are instead reviews of General Division decisions based on the same evidence."²⁴ So, I am limited to considering the evidence that the General Division had before it.

[36] The General Division acknowledged the Claimant's evidence that he would leave school for full-time work.²⁵ But the General Division overlooked this evidence that the

²³ See General Division decision, at para 34.

²⁴ See *Gittens v Canada (Attorney General)*, 2019 FCA 256.

²⁵ See General Division decision at para 28. The member referenced the Claimant's Request for Reconsideration, at GD 3-26.

Claimant would have lost just that term's tuition, rather than tuition for the full school year, if he left school in the first semester.

[37] Even so, it is clear that the General Division simply did not accept the Claimant's evidence that he would have left school for even a minimum-paying job. The General Division did not find the Claimant's evidence credible. The General Division also wrote, "Further, if his intention was to work full-time, it's likely that he would have pursued the co-op job in Prince Edward Island in December 2021, rather than return to university in X."²⁶

[38] On this point, even if the Claimant maintained that he would have quit school to work at a fast-food outlet, the Claimant's evidence was that he found it unnecessary to leave school.²⁷ The Claimant testified, "I had the availability. I don't see why I couldn't have worked and done university at the same time."

[39] The evidence on the whole supports the General Division's conclusions. Even if the Claimant's statements in his application form and to the Commission in October and December 2021 are set aside, there is still the Claimant's Request for Reconsideration and his oral evidence from the General Division hearing.

[40] The Claimant's Request for Reconsideration suggests that he saw himself continuing to attend school while working at the same time. He did not mention in his reconsideration request that he was prepared to leave his course for work. For that matter, there was no further suggestion from him at that point that he would or could have changed his course schedule to enable him to work.

[41] There is a distinction between being available for work on a full-time basis and being available for the purposes of the *Employment Insurance Act*. It is not enough to simply be available for full-time hours if there are any personal conditions that might

²⁶ See General Division decision, at para 34.

²⁷ At approximately 1:22:50 of the audio recording of the General Division hearing.

unduly limit the chances of returning to the labour market. A claimant has to be available during regular hours for every working day.²⁸

[42] In the Claimant's case, he was able to attend most classes virtually at his convenience. However, he had a small number of classes or labs that he had to attend in person, typically in the afternoon. He intended and was available to work around these class commitments. He did not have many class commitments. But, as the General Division determined, these still represented personal conditions.

[43] There are some parallels to a case called *Canada (Attorney General) v Primard*.²⁹ Ms. Primard was a student. She was available for work evenings and weekends. Later, it emerged that she could take her courses part-time, in the evening, three evenings a week, if she found a job. However, the Federal Court of Appeal found that this was, at best, a possible availability, which was also conditional. The Court determined that Ms. Primard was not available for work, despite the possibility that she could have changed her schedule if she found a job.

[44] The General Division made a factual error, but I find that overall, it does not change the outcome. The General Division clearly did not accept the Claimant's evidence that he would have left school for work. The General Division found that, had that been his intention, the Claimant would have already left school. On top of that, the Claimant's own evidence also showed that he intended to balance both school and work and to work around his in-person school schedule, however limited his in-person school schedule and commitments might have been.

Conclusion

[45] The appeal is dismissed. The General Division did not fail to consider the Claimant's past work history. It simply was not relevant to the issue of the Claimant's availability. The General Division also did not overlook or mischaracterize the

²⁸ See, for instance, *Canada (Attorney General) v Gagnon*, 2005 FCA 321, *Duquet v Canada Employment Insurance Commission and Attorney General of Canada*, 2008 FCA 313, *Canada (Attorney General) v Bertrand*, 1982 CanLII 3003 (FCA).

²⁹ See *Canada (Attorney General) v Primard*, 2003 FCA 349.

Claimant's evidence, other than how much the Claimant might have lost in tuition fees, had he left school. But I find that this error would not have changed the outcome.

Janet Lew
Member, Appeal Division