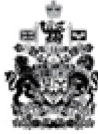

Citation: *FN v Canada Employment Insurance Commission*, 2023 SST 584

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	F. N.
Representative:	H. N.
Respondent:	Canada Employment Insurance Commission
Representative:	Melanie Allen

Decision under appeal:	General Division decision dated September 19, 2022 (GE-22-2031)

Tribunal member:	Janet Lew
Type of hearing:	In person, videoconference and teleconference
Hearing date:	March 31, 2023
Hearing participants:	Appellant (in person) Appellant's representative (in person) Respondent's representative (via videoconference and teleconference)
Decision date:	May 9, 2023
File number:	AD-22-758

Decision

[1] The appeal is allowed. The General Division made an error because it did not consider section 9.002(1)(b) of the *Employment Insurance Regulations*. The Claimant was available for work.

Overview

[2] This is an appeal of the General Division decision. The General Division found that the Appellant, F. N. (Claimant) had not proven that she was available for work. It found that she had set personal conditions that could have unduly limited her chances of returning to the labour market.

[3] In particular, the General Division found that the Claimant avoided jobs that required dealing with English-speaking customers. It also found that she restricted her hours of availability. The General Division concluded that the Claimant was disentitled from receiving Employment Insurance benefits.

[4] The Claimant argues that the General Division failed to recognize that she was available during regular working hours, evenings, and weekends.

[5] The Claimant also says that the General Division overlooked the fact that she tried to look for work that included dealing with people in English and that she also tried to find childcare. She also says that the General Division made a mistake when it found that the Respondent, the Canada Employment Insurance Commission (Commission), tried phoning her in March 2022.

[6] The Claimant asks the Appeal Division to allow the appeal and find that she is entitled to receive benefits.

[7] The Commission argues that the General Division did not make any mistakes. The Commission says that there are no grounds of appeal. The Commission asks the Appeal Division to dismiss the appeal.

Issues

[8] The issues in this appeal are:

a) Did the General Division overlook the fact that the Claimant looked for work that included dealing with people in English?

b) Did the General Division overlook the fact that the Claimant could not find childcare?

c) Did the General Division make a mistake about whether the Commission tried phoning her in March 2022?

Analysis

[9] 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 overlook the fact that the Claimant looked for work that included dealing with people in English?

[10] The Claimant argues that the General Division made a mistake when it found that she avoided jobs that required dealing with people in English. The General Division wrote that the Claimant did not apply for jobs that required interacting with people in English because of her limited English skills.[2]

[11] When the Claimant spoke with the Commission in May 2016, she disclosed that she applied for three jobs: at Rona, Home Depot, and Purdy's Chocolate.[3] The Claimant did not give a job description about these jobs. So, it is unclear whether these jobs required much, if any, customer interaction.

[12] At the General Division hearing, the member asked the Claimant whether she avoided customer service type jobs that involved speaking English. The Claimant

[1] Section 58(1) of the *Department of Employment and Social Development Act*.
[2] General Division decision at para 31.
[3] See Supplementary Record of Claim, dated May 16, 2022, at GD 3-36.

acknowledged that she had limited English skills and that she was not confident about speaking English. She testified that this is why she took English language classes.[4]

[13] The Claimant testified that she applied for jobs that did not necessarily require a lot of customer service or speaking.[5] She testified that one of the jobs was stocking shelves, another was on a production line, another was with a cell phone company (whose customers were largely Japanese-speaking students), and another was dealing with Japanese speakers.

[14] The Claimant testified that these four jobs were the only jobs to which she applied. It is unclear from the Claimant's testimony whether any of these four jobs included Rona or Home Depot.

[15] The General Division member confirmed that the Claimant had also applied to Purdy's Chocolates.[6] The General Division did not ask the Claimant for any details about the jobs with Rona or Home Depot. It is unclear whether any of these positions might have required her to deal with people in English and, if so, to what extent.

[16] Based on the Claimant's evidence, the General Division concluded that the Claimant avoided jobs that required dealing with people in English. It is clear that the Claimant looked mostly for jobs that required little customer interaction. Or, if there was any customer interaction, it was with mostly Japanese-speaking customers.

[17] However, while the Claimant might have focused on looking for jobs that did not require her to interact with English-speaking customers, this is different from saying that she avoided jobs that required dealing with people in English. After all, there was evidence that showed that the Claimant applied for jobs that involved having to deal with others in English, to some extent.

[18] Even if the General Division did not get details about the Claimant's statements to the Commission about her job applications to Rona, Home Depot, and Purdy's

[4] At approximately 20:20 to 23:10 of the audio recording of the General Division hearing.
[5] At approximately 25:20 to 25:50 of the audio recording of the General Division hearing.
[6] At approximately 24:25 of the audio recording of the General Division hearing.

Chocolate, and made a mistake that the Claimant avoided looking for work that included dealing with people in English, there is still the issue about whether the Claimant limited the hours she was available for work.

Did the General Division overlook the fact that the Claimant could not get childcare?

[19] The Claimant argues that the General Division overlooked the fact that she could not find childcare? She says that this was important to consider because she says she was available for work during regular working hours outside of her family obligations. Because of her childcare obligations, she denies that she limited her hours.

[20] In other words, the Claimant argues that the concept of availability under the *Employment Insurance Act* has to take into account childcare obligations.

– The Claimant had to show that she was available and looking for suitable employment

[21] Under the *Employment Insurance Act*, a claimant is not entitled to be paid benefits for a working day in a benefit period for which the claimant fails to prove that on that day they were "(a) capable of and available for work and unable to obtain suitable employment."[7] A working day is defined as every day of the week, except Saturday and Sunday.[8]

[22] This means that the Claimant had to show that she was available and looking for suitable employment.

– The Claimant argues that she was available for work subject to childcare obligations

[23] The Claimant argues that she was available for work because she was available from 9:30 a.m. to 2:45 p.m. from Mondays to Fridays. At the General Division, she testified that she could work from 9:30 a.m. to 2:30 p.m. but she also said that she tried

[7] Section 18(1)(a) of the *Employment Insurance Act*.
[8] Section 32 of the *Employment Insurance Regulations.*

to see if her child's school could keep her a little longer. These hours are about the same hours that she worked before.

[24] The Claimant's spouse testified at the General Division that, in past, the Claimant had worked for a distributor for about a year. She worked from 9:30 a.m. to 2 p.m. Those hours worked well. They were confident she could easily manage these hours.[9]

[25] The Claimant explains that she was available for work during from 9:30 a.m. to 2:45 p.m. because she had to drop off and then pick up her daughter from school. Her daughter was in Grade 3 in 2019. Childcare was not available. She testified that there was a huge waiting list and that it was very difficult to get childcare.[10]

[26] At the Appeal Division hearing, the Claimant explained that she could not rely on her parents or her husband's parents for childcare. They do not live in Canada.[11]

[27] The Claimant also says that she was available evenings and weekends. Her husband could look after their children then.

– **The Commission argues that the Claimant had to be available during regular working hours**

[28] The Commission argues that the Claimant was not available for work. The Commission says that claimants cannot put restrictions on their availability. The Commission says that this means not doing anything that could limit the chances of finding work. So, the Commission says this means a claimant cannot limit what hours they are prepared to work.

[29] In the Claimant's case, the Commission says that by limiting herself to working after 9:30 a.m., this meant she closed herself off to any work that started before 9:30 a.m. Also, if the Claimant could work to just 2:30 p.m., this would mean she closed herself off to any work after 2:30 p.m.

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[9] At approximately 36:13 of the audio recording of the General Division hearing.
[10] At approximately 14:00 of the audio recording of the General Division hearing.
[11] This represents new evidence that I cannot consider. As a general rule, the Appeal Division does not consider new evidence in employment insurance appeals.

[30] The Commission argues that claimants have to be available for work during regular working hours. It agrees that 9:30 a.m. to 2:30 p.m. is part of regular working hours. But the Commission argues that, while the courts have not defined what regular working hours means, the cases say that regular working hours is more than just 9:30 a.m. to 2:30 p.m.

[31] The Commission relies on two cases: (1) one is called *Bertrand*[12] from the Federal Court of Appeal and (2) the second one is from the Umpires, *CUB 72532*.

[32] In the first case, Ms. Bertrand had babysitter problems. She could not get a reliable babysitter. She could only work evenings, from 4 p.m. to 10 p.m. The Federal Court of Appeal concluded that she was not available because she placed restrictions on when she could work. The Court said that claimants have to be available for work during regular hours for every working day.[13] But it did not set out any guidelines for what regular hours are.

[33] In *CUB 72532*, the applicant looked for part-time work on evenings and weekends. She tried to get a part-time job with a food distribution company and a grocery store. These employers only offered full-time employment. She refused these jobs. The Umpire found that the applicant's good faith and credibility, or the sympathy that one had for her, were not relevant. The Umpire found that the applicant was not available. She had imposed restrictions on her availability.

– **Section 9.002(1)(b) of the *Employment Insurance Regulations* defines suitable employment**

[34] My colleague considered the availability issue in *S.A. v Canada Employment Insurance Commission*.[14] In particular, she examined section 9.002(1)(b) of the *Employment Insurance Regulations*. My colleague conducted a thorough and well-reasoned analysis. I adopt her reasoning and approach.

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[12] *Canada (Attorney General) v Bertrand,* 1982 CanLII 3003 (FCA).
[13] *Bertrand.*
[14] *S.A. v Canada Employment Insurance Commission*, 2022 SST 1490.

[35] As my colleague pointed out, section 9.002(1)(b) sets out the criteria for determining what constitutes suitable employment, for the purposes of deciding whether a claimant is "capable of and available for work and unable to obtain suitable employment."[15]

[36] Under the section, suitable employment includes employment in which "(b) the hours of work are not incompatible with the claimant's family obligations or religious beliefs."[16] So, if work requires hours of work that are incompatible with a claimant's family obligations, the law says that work is not suitable.

[37] My colleague noted that the Federal Court of Appeal decided *Bertrand* before section 9.002 (1) of the EI Regulations became law. I agree with her that, given the evolution of the law, one should no longer rely on *Bertrand* in certain circumstances. These include circumstances when there are family obligations.

[38] If a claimant has family obligations that restricts their available hours of work, then they may not be setting personal conditions that might unduly limit their chances of returning to the labour market.

[39] That means that a claimant who has family obligations might not be unavailable for work, even if they have limited hours they can work.

– **The General Division failed to consider section 9.002(1)(b) of the *Employment Insurance Regulations***

[40] The General Division did not consider whether the Claimant had family obligations. Yet, there was evidence that the Claimant had family obligations. She Claimant testified that she had to drop off and pick up her daughter from school.

[41] Because there was evidence that the Claimant might have had family obligations, the General Division should have considered whether section 9.002(1)(b) of the EI Regulations applied in the Claimant's situation. The General Division should have

[15] Under section 18(1) *Employment Insurance Act*, a claimant is not entitled to be paid benefits for a working day in a benefit period for which the claimant fails to prove that on that day the claimant was (a) capable of and available for work and unable to obtain suitable employment.
[16] Section 9.002(1)(b) of the EI Regulations.

considered whether the section applied when it determined what was suitable employment for the Claimant.

[42] The General Division did not overlook the fact that the Claimant could not get childcare. But it did not consider section 9.002(1)(b) of the EI Regulations.

[43] It was an error of law for the General Division not to consider whether and how section 9.002(1)(b) of the EI Regulations might have applied in the Claimant's situation. The General Division should have examined whether the Claimant's hours of work were "not incompatible" with her family obligations.

[44] To properly assess what suitable employment was for the Claimant, the General Division had to examine whether the Claimant's hours were incompatible with her family obligations.

[45] And, if the General Division determined that that employment was not compatible with the Claimant's childcare obligations, only then could it properly assess whether the Claimant had set personal conditions that might have unduly limited her chances of returning to the labour market.

Did the General Division make a mistake about whether the Commission had contacted the Claimant in March 2022?

[46] The Claimant argues the General Division made a mistake in finding that Service Canada[17] had tried calling her by phone on March 11 or 15, 2022.

[47] The Commission claims that Service Canada tried contacting the Claimant for more information on March 11 and 15, 2022. But it says that it could not reach her. The Commission documented these phone calls in its notes.[18] The Claimant denies that either Service Canada or the Commission tried to reach her on these dates.

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[17] Service Canada represents the point of access for the Commission.
[18] See Supplementary Record of Claim (notes of the Commission), March 11, 2022, at GD 3-29 to GD 3-30.

[48] For there to be a factual error that would let the Appeal Division intervene in the General Division decision, the General Division had to have based its decision on that factual error, and it had to have made that error in a perverse or capricious manner, or without regard for the evidence before it.[19]

[49] The General Division did not make any findings about whether Service Canada or the Commission had tried calling the Claimant on either March 11 or 15, 2022. The General Division did not base its decision on whether Service Canada had phoned the Claimant in March 2022. So, the General Division did not make a factual error on this point.

[50] In any event, there was evidence that suggested the Commission had tried to phone the Claimant. The Commission simply did not speak with the Claimant because it could not get hold of her.

[51] In addition, these facts about whether the Commission tried calling the Claimant are not relevant to the issue about whether the Claimant was available for work, or whether she had set personal conditions. So, even if there had been no evidence of this, it would have had no bearing on the outcome.

Remedy

[52] The General Division failed to consider section 9.002(1)(b) of the EI Regulations. To remedy this error, I can send the appeal back to the General Division for reconsideration or I can give the decision that the General Division should have given.[20]

[53] The Claimant asks me to give the decision that she says the General Division should have made. I note that the parties had a fair hearing at the General Division. They had the chance to produce any documents and any witnesses. There is no suggestion that either party needs to file any additional documents or call any extra witnesses.

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[19] Section 58(1) of the *Department of Employment and Social Development Act*.
[20] Section 59(1) of the *Department of Employment and Social Development Act*.

[54] There are some gaps in the evidence about the Claimant's efforts to seek childcare. For instance, the Claimant and her spouse say they cannot rely on family or their parents to care for their child. They do not have other family here in Canada. They also state that childcare is expensive. Some of this evidence would likely help the Claimant. But I cannot rely on this evidence because the Appeal Division generally does not consider new evidence.

[55] Even so, I find that there was enough evidence so that I can give the decision that the General Division should have given.

– **General principles**

[56] A claimant must be capable of and available for work and unable to obtain suitable employment.[21] For suitable employment, the hours of work must not be incompatible with their family obligations.[22]

[57] In *S.A.*, my colleague examined what family obligations means. She found that it can include childcare obligations. This point is not contentious.

[58] Of greater contention in *S.A.* was whether and to what extent a claimant must look for childcare. The Commission argued that a claimant has to make every effort to remove their family obligations so they can seek and accept work. S.A. argued that it is sufficient for a claimant to make reasonable efforts to remove their family obligations.

[59] My colleague determined that a claimant has to show that they have family obligations during certain hours. This means that a claimant is not simply choosing to be off work for family reasons. Having childcare obligations means it is largely outside their control. Practically speaking, this means a claimant must take reasonable steps, such as looking for childcare, to remove barriers to returning to work—like family obligations.

[21] Section 18(1) (a) of the *Employment Insurance Act*.
[22] Section 9.002 (1)(b) of the EI Regulations.

[60] As my colleague noted, this interpretation of the section is consistent with the purpose of the *Employment Insurance Act*, to help those who are involuntarily unemployed.[23]

[61] Hence, I am prepared to accept that the Claimant had family obligations in the form of childcare obligations. This is unlike the situation in the case of *Nikhat v Canada (Attorney General)*.[24] There, Ms. Nikhat chose to remove her son from school and stay at home to homeschool him. Thus, she could not return to work because she was at home caring for her child.

[62] Here, the Claimant stated that she did not have any options but to care for her daughter outside of school hours as she could not get childcare.

– **The Claimant had limited hours available for work**

[63] The Claimant testified that she was available for work from 9:30 a.m. to 2:30 p.m. from Mondays to Fridays. She explained that she had to drop off and pick up her daughter.

[64] The Claimant testified that she and her spouse had looked for childcare for their daughter, but there was a lengthy waiting list. They found it very difficult to get into childcare. She also stated that, even if they had managed to find childcare, she still would have had to pick up her daughter after childcare.

[65] The Claimant also testified that, over the summer, she would still have had to find a job that worked around her childcare obligations. Her daughter was in summer school, so the Claimant could still offer to be available for work between 9:30 a.m. and 2:30 p.m.

[66] The Commission does not challenge the Claimant's evidence.

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[23] *Canada (Employment and Immigration Commission) v Gagnon*, 1988 CanLII 48 (SCC), [1988] 2 SCR 29.
[24] *Nikhat v Canada (Attorney General)*, 2023 FC 372.

[67] The evidence regarding the Claimant's efforts to find childcare is very limited in detail, but I accept that the Claimant tried to find childcare but simply was unable to find any. I am prepared to accept that, because of the Claimant's childcare obligations, work outside the home before 9:30 a.m. and after 2:30 p.m. was not suitable employment.

– **The Claimant did not set personal conditions**

[68] Because work before 9:30 a.m. and after 2:30 p.m. was not suitable employment for the Claimant, she did not set personal conditions when she limited the hours that she was available for work.

– **The Claimant was available for work**

[69] The parties did not contest the General Division's findings that the Claimant's job search efforts were sufficient and that she demonstrated a desire to return to the labour market as soon as a suitable job was available. So, I would not disturb these findings. But I still have to consider whether the Claimant set any personal conditions that might have unduly limited her chances of returning to the labour market.

[70] Before the Claimant lost her job, she had been working for a distributor. She worked from 9:30 a.m. to 2 p.m.

[71] The Claimant was looking for a job with about the same schedule that she had before she applied for Employment Insurance benefits. On the training questionnaire that she filled out for the Commission, she said that she was "available for work […] under the same or better conditions (e.g. hours, type of work …)."[25]

[72] The Claimant looked for different types of jobs, including as a production line worker, as a representative for a cell phone company, and a shelf stocker. She also applied to Rona, Home Depot, and Purdy's Chocolates.

[73] As I noted above, because of the Claimant's childcare obligations, suitable work did not include work outside the home before 9:30 a.m. or after 2:30 to 2:45 p.m. These were about the same hours she had worked in past. Her restriction in hours was not a

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[25] See training questionnaire, at GD 3-25.

personal condition that the Claimant set. She had tried to find childcare, but nothing was available.

[74] Given these considerations, I am satisfied that the Claimant has proven her availability for work. She demonstrated a desire to return to the labour market as soon as a suitable job was available. The Claimant made efforts to find a suitable job, taking into account her childcare obligations, and she did not set personal conditions that might have unduly limited her chances of returning to the labour market.

Conclusion

[75] The appeal is allowed. The General Division made an error because it did not consider section 9.002(1)(b) of the EI Regulations. Taking section 9.002(1)(b) into account, I find that the Claimant was available for work.

Janet Lew
Member, Appeal Division