Citation: *Canada Employment Insurance Commission v DP*, 2023 SST 932

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	Canada Employment Insurance Commission
Representative:	Gilles-Luc Bélanger
Respondent:	D. P.

Decision under appeal:	General Division decision dated February 6, 2023 (GE-22-2883)

Tribunal member:	Stephen Bergen
Type of hearing:	Teleconference
Hearing date:	July 17, 2023
Hearing participant:	Appellant's representative
Decision date:	July 17, 2023
File number:	AD-23-188

Decision

[1] I am allowing the appeal. The Claimant is not entitled to benefits from January 6, 2022, to April 8, 2022. She was not available for work during that period.

Overview

[2] D. P. (Claimant) applied for Employment Insurance (EI) benefits in February 2022. She expected to receive EI benefits during a school term that began in January and would run to the end of April 2022. The Appellant, the Canada Employment Insurance Commission (Commission), decided that the Claimant was not entitled to benefits from January 2, 2022. It found that she was not available for work while she was going to school. When the Claimant asked the Commission to reconsider, the Commission modified its decision. It still found that the Claimant was not available for work, but specified that this was for the period from January 6, 2022, to April 8, 2022.

[3] The Claimant appealed to the General Division of the Social Security Tribunal. The General Division decided that she was available for work from January 6, 2022, to April 8, 2022, even though she was going to school full-time.

[4] The Commission appealed the General Division decision to the Appeal Division.

[5] The General Division failed to apply relevant case law from the Federal Court of Appeal. In so doing, it made an error of law.

[6] I have made the decision the General Division should have made. I have applied the case law and I find that the Claimant has not proven her availability for work from January 6, 2022, to April 8, 2022.

Preliminary Issue

[7] The Claimant did not join the teleconference hearing when it commenced. The Appeal Division immediately contacted the Claimant, and she confirmed that she did not intend to participate. The appeal proceeded in the absence of the Claimant.

Issue

[8] The issue in this appeal is:

a) Did the General Division make an error of law when it found that the Claimant had not set personal conditions that unduly limited her chances of going back to work?

Analysis

[9] The Appeal Division may only consider errors that fall within one of the following grounds of appeal:

a) The General Division hearing process was not fair in some way.

b) The General Division did not decide an issue that it should have decided. Or, it decided something it did not have the power to decide (error of jurisdiction).

c) The General Division made an error of law when making its decision.

d) The General Division based its decision on an important error of fact.[1]

[10] The law says that a Claimant must be able to prove that they are capable and available for work on each day of their benefit period.[2] Availability is evaluated using a test in a decision called *Faucher*. [3]

[11] In its written submission, the Commission argued that the General Division misinterpreted the meaning of the third *Faucher* factor, and made an error of law.

[12] The Commission's written submissions also asserted that the General Division confused the presumption of unavailability for full-time students with the "*Faucher* test"

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[1] This is a plain language version of the grounds of appeal. The full text is in section 58(1) of the *Department of Employment and Social Development Act* (DESDA).
[2] See section 18(1) of the *Employment Insurance Act* (EI Act).
[3] See the decision in *Faucher v Canada Employment and Immigration Commission*, A-56-96, and A-57-96.

for availability. Its submissions made additional comments about how the General Division misinterpreted the facts.

[13] At the teleconference Appeal Division hearing, the Commission did not dispute the General Division's finding that the Claimant had rebutted the presumption, and it clarified that it was not arguing an error of fact. It argued only that the General Division made an error of law in how it interpreted and applied the third *Faucher* factor.

Error of Law

[14] There is a legal presumption that full-time students are not available for work. A claimant may rebut (or overcome) this presumption by proving a history of working while attending school full-time, or by showing other exceptional circumstances.[4]

[15] The General Division found that the Claimant rebutted the presumption. It referred to her history of evening and weekend employment during her September to December 2020 school term. It also noted that the January to April 2022 school term was a practicum term, which involved certain job search activities. The General Division considered that this was an exceptional circumstance.

[16] Having found that the Claimant's circumstances rebutted the presumption, the General Division turned to whether the Claimant met the "*Faucher* test" for availability. That test requires a claimant to prove three factors:

1) That they had a desire to return to work as soon as a suitable opportunity should become available,

2) That they expressed that desire through a job search, and

3) That they did not set conditions that unduly limited their chances of going back to work.[5]

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[4] See, for example, the decisions in *Canada (Attorney General) v. Rideout*, 2004 FCA 304; *Canada (Attorney General) v Cyrenne*, 2010 FCA 349.
[5] See the decision in *Faucher v Canada Employment and Immigration Commission*, A-56-96, and A-57-96.

[17] The General Division found that the Claimant met all three criteria for availability. When it decided that the Claimant satisfied the third factor, the General Division was persuaded by a decision of the former Umpire.[6] That decision found that a student claimant was available for work because she remained available for as many hours of work as she had worked before she went to school.

[18] The Commission argued that the General Division made an error when it relied on evidence that the Claimant would have been available for work in the evenings to find that the Claimant had not unduly limited her chances to go back to work.

[19] The Commission referred to the Federal Court of Appeal decision in *Duquet,* which also considered the availability of a full-time student. [7] In the *Duquet* decision, the Court found that a student had unduly limited his availability because he was only available for work on certain times and days.

[20] I note that the Commission cited *Primard*[8] as well. In *Primard*, the Court said that the claimant had not been successful finding work, "undoubtedly" because she was only available evenings and weekends. The Court found that the Board of Referees[9] made an error by overlooking the third *Faucher* factor.

[21] *Primard* also considered the claimant's contention that it was "possible" for her to take her courses at night if she found employment. The Court said that the absence of current availability or even a possible or conditional availability, did not satisfy the *Faucher* meaning of availability.

[22] The General Division did not consider or apply the case law which interprets the meaning of "unduly limit" for full-time students. Instead, the General Division was persuaded by the reasoning of CUB decision, 52355.

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[6] See Canada Umpire Benefits decision No. 52365.
[7] *Duquet v Canada (Employment and Immigration Commission)*, 2008 FCA 313
[8] *Canada (Attorney General) v Primard* 2003 FCA 349.
[9] The Board of Referees was the body that made decisions on appeals of Employment Insurance decisions at one time.

[23] Unlike the decisions of the Federal Court of Appeal, CUB decisions are not binding on the General Division. However, the reasons given in CUB 52365 do not support the General Division's conclusion.

[24] The CUB decision compared the availability for work of a full-time student to how much that person worked **before** they were a student. It did not say that a full-time student - who had previously limited their hours of availability for work while they were a student - will be considered` available (for EI purposes) if they again limit their availability in a similar fashion.

[25] I agree with the Commission. The General Division made an error of law by failing to consider or apply the case law relevant to the Claimant's circumstances.

Remedy to fix the error

[26] I have found an error in how the General Division reached its decision, so I must now decide what I will do about that. I can make the decision that the General Division should have made, or I can send the matter back to the General Division for reconsideration.[10]

[27] The Commission suggests that I should go ahead and make the decision. The Claimant did not attend the hearing so I do not know what her position would be.

[28] I agree with the Commission. I have all the information I require to make the decision.

Was the Claimant available for work from January 6, 2022, to April 8, 2022?

[29] I find that the Claimant was not available for work from January 6, 2022, to April 8, 2022.

[10] See section 59(1) of the DESDA.

[30] The Claimant was enrolled in what is described as a practicum term from January 6, 2022, until April 22, 2022. However, she was still a full-time student.

[31] She testified at the General Division that there were no formal classes during the term but that there was some course work, which was self-paced. The last two weeks of the term were exam preparation.

[32] From January 6, 2022, until April 8, 2022, she worked full-time at three different unpaid practicum placements (except for a spring break around the end of February 2022). Depending on the placement, her workday ran from either 7:00 a.m. to 3:00 p.m. or from 8:00 a.m. to 4:00 pm.

[33] The Claimant agreed with the General Division that she needed to be physically present at the work placements. She could not say for certain whether she could have stopped the practicum to take a job. She told the General Division that she needed to attain a minimum number of hours of occupational therapy experience and of physiotherapy experience. She obtained these hours through the work placements.

[34] The Claimant could not recall how many hours she needed, but she knew that she had exceeded the required hours by the end of her practicum. She stated that she might have been able to leave the practicum and take a job once she had obtained the hours she needed.

[35] The evidence suggests that the Claimant could only have been available to work on workdays after 3:00 p.m. or 4:00 p.m. (or before 7:00 a.m. or 8:00 a.m.). Given that the Claimant could not say how many experience hours she needed or when she would have achieved them, I am unable to conclude that she had a greater availability for work (than permitted by her regular practicum schedule) at any time prior to April 8, 2022. In addition, the *Primard* case says that I cannot accept a worker's claim to be available when their availability is only "possible" or "conditional."

[36] According to the EI Act, the Claimant must prove her availability on "working days."[11] The *Employment Insurance Regulations* (Regulations), excludes Saturdays and Sundays from "working days."[12] Therefore, I do not need to consider that she may have been available for additional hours of work on weekends.

[37] There are a number of Federal Court of Appeal cases that deal with the restricted availability of full-time students. *Primard* says that a full-time student's availability on evenings and weekends is not enough.[13] *Duquet* [14]says such a claimant may not restrict their availably to certain times on certain days. In *Boland*[15], the student claimant was only available after 5:00 pm most weekdays (and available after noon on Friday). The Court found that the claimant set conditions that unduly limited his chances of employment because he did not make himself available "during regular hours." This was despite the fact that the claimant had been going to school while working as a night security guard previously.

[38] In the present case, the Claimant is only available at certain times, on the evenings or weekdays, and not during regular hours. Applying the law to these circumstances, I find that the Claimant set personal conditions that unduly limited her chances of going back to work. The Claimant was not available for work within the meaning of the EI Act, as interpreted by the Courts.

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[11] Supra note 2.
[12] See section 32 of the Regulations.
[13] Supra note 8.
[14] Supra note 7.
[15] *Canada (Attorney General) v Boland* 2004 FCA 251.

Conclusion

[39] I am allowing the Commission's appeal. The General Division made an error by failing to consider or apply relevant case law.

[40] I have made the decision the General Division should have made. The Claimant is not entitled to benefits from January 6, 2022, to April 8, 2022, because she was not available for work.

Stephen Bergen
Member, Appeal Division