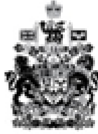

Citation: *KM v Canada Employment Insurance Commission*, 2023 SST 971

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	Canada Employment Insurance Commission
Respondent:	K. M.
Representative:	V. M.

Decision under appeal:	General Division decision dated January 3, 2023 (GE-22-3020)

Tribunal member:	Candace R. Salmon
Type of hearing:	Teleconference
Hearing date:	June 15, 2023
Hearing participants:	Appellant's representative Respondent Respondent's representative
Decision date:	July 25, 2023
File number:	AD-23-86

Decision

[1] The appeal is allowed. The General Division made an error of law (didn't follow the law correctly). I am substituting my decision for that of the General Division.

[2] The Claimant hasn't proven her availability for work from May 15, 2022, to December 9, 2022. This means she is disentitled from receiving Employment Insurance (EI) benefits for this period.

Overview

[3] K. M. is the Claimant. She applied for EI regular benefits. The Canada Employment Insurance Commission (Commission) decided that she wasn't entitled to receive benefits because she hadn't proven that she was available for work while taking training full-time.

[4] 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 made an error of law.

[5] I agree. The Tribunal must follow certain court decisions and must correctly interpret the law. Based on binding court decisions, the Claimant wasn't available for work and wasn't entitled to EI benefits while taking training.

Issues

[6] The issues in this appeal are as follows:

a) Did the General Division make an error of law by ignoring case law from the Federal Court and Federal Court of Appeal?

b) If the General Division made an error, what is the best way to fix it?

c) Was the Claimant available for work from May 15, 2022, to December 9, 2022?

Analysis

[7] The Tribunal must follow the law, including the *Department of Employment and Social Development Act* (DESD Act). It describes the Appeal Division's role. The Appeal Division doesn't provide an opportunity for the parties to re-argue their cases. It determines whether the General Division made one of the errors listed in the DESD Act.

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

The General Division made an error of law by ignoring case law from the Federal Court and Federal Court of Appeal

[9] The General Division had to decide whether the Claimant was available for work.[2]

[10] A decision called *Faucher* lists three factors to consider when assessing availability:[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 overly limit their chances of going back to work?

[11] The Claimant worked as an uncertified continuing care assistant (CCA). During the pandemic, the employer decided it preferred to use certified staff. It offered uncertified CCAs the option of getting certified through a college program. It didn't

[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).
[2] Section 18(1)(a) of the *Employment Insurance Act* (EI Act) says that a person must be capable of and available for work to receive EI benefits.
[3] See *Faucher v Canada (Employment and Immigration Commission)*, 1997 CanLII 4856.

sponsor the Claimant in the program, and the program wasn't an apprenticeship under EI law.

[12] The Claimant says that she might not have lost her job if she didn't get certified. But, she was going to lose working hours because the employer preferred using certified caregivers.[4]

[13] The Claimant took the CCA program from May 15, 2022, to December 9, 2022. She says that she was in mandatory online classes every Monday to Wednesday from approximately 8 a.m. until 5 p.m. She also worked in a practicum at her employer on Thursdays and Fridays for 8 hours each day. While these hours were required as part of her program, she was paid for them.[5]

[14] The General Division noted that full-time students who work around their course schedules are presumed to be unavailable for work.[6] This is called the "presumption of non-availability."

[15] However, the General Division decided that while taking training was a personal choice, it didn't overly limit the Claimant's chances of going back to work. This is because she had a job where shifts were available 24 hours per day. The General Division found that the 24-hour shift availability in her industry meant that she had exceptional circumstances that overcame the presumption of non-availability.[7]

[16] The Commission argues that the General Division misunderstood the law on availability. It says that students who restrict their availability around their class schedules aren't available for work.

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[4] See the General Division hearing recording at 0:22:25.
[5] See the General Division hearing recording at approximately 0:34:20.
[6] See the General Division decision at paragraph 39. See also *Horton v Canada (Attorney General)*, 2020 FC 743 at paragraph 35.
[7] See the General Division decision at paragraph 42.

[17] In particular, the Commission relies on several Federal Court of Appeal decisions that the General Division should have followed.[8] Those decisions say that wanting to work evenings and weekends shows a lack of availability under the *Employment Insurance Act* (EI Act). They also say that restricting availability to evenings and weekends is a personal condition that overly limits a person's chances of going back to work.

[18] The Claimant says that despite her training commitments from May to December 2022, she still had 16 hours per day available to work.[9] She argues that saying she wasn't available for work because she wasn't available from 8 a.m. until 5 p.m. on weekdays is "tunnel visioned." She says it also ignores the fact that she worked in health care, where shifts are available 24 hours per day.

- **Federal Court and Federal Court of Appeal decisions and the presumption of non-availability**

[19] I agree with the Commission. The General Division didn't have a good reason for ignoring binding decisions from the Federal Court and Federal Court of Appeal, such as *Horton* and *Gagnon*.[10] In short, the Claimant put her training first and work second. The courts have made it clear that a person can't reduce and change their hours of availability because of training.

[20] The General Division referred to *Horton* to support the statement that full-time students who work around their course schedules are presumed to be unavailable for work.[11] The decision also says that the presumption of non-availability can be overcome only in exceptional circumstances. It adds that a claimant who is only available for work

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[8] See, for example, *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.
[9] At the hearing, the Claimant said that she was usually done classes at 4 p.m., so she would have been free to work after that. It isn't important for me to decide whether she finished at 4 p.m. or 5 p.m., because it doesn't affect the outcome of this decision.
[10] See *Canada (Attorney General) v Gagnon*, 2005 FCA 321; and *Horton v Canada (Attorney General)*, 2020 FC 743.
[11] See the General Division decision at paragraph 39.

outside their course schedule is restricting their availability and isn't available for work within the meaning of the law.[12]

[21] In *Horton*, the claimant thought he could make himself available for work while going to university full-time. The Court found that this wasn't availability within the meaning of the EI Act or the *Employment Insurance Regulations*. It said that adapting a work schedule to a full-time educational program isn't availability under the law.[13]

[22] In *Gagnon*, the claimant left a full-time job to work part-time and go to school full-time.[14] Initially, he was considered available for work because he hadn't severed his employment ties and remained part of the workforce while in school. The Court said that this finding showed a misunderstanding of the concept of availability.

[23] While the Claimant didn't limit her availability in the same way as Mr. Gagnon did, the outcome is the same. Courts have consistently said that a person must not impose such restrictions on their availability as to overly limit their chances of working.

[24] The Claimant changed her work availability to take training and wants EI benefits, presumably to make up the income lost from not working full-time. Finding that she has overcome the presumption of non-availability isn't logically consistent with the fact that she applied for benefits to supplement lost income while taking training instead of working.

[25] To overcome the presumption, the General Division relied on two facts:

- Shifts are available 24 hours per day in the Claimant's industry.
- The Claimant worked some shifts while taking training.[15]

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[12] See *Horton v Canada (Attorney General)*, 2020 FC 743 at paragraph 35. *Horton* also references *Duquet v Canada (Employment and Immigration Commission)*, 2008 FCA 313 at paragraph 2; and *Canada (Attorney General) v Gagnon*, 2005 FCA 321 at paragraph 6.
[13] See *Horton v Canada (Attorney General)*, 2020 FC 743 at paragraph 36.
[14] See *Canada (Attorney General) v Gagnon*, 2005 FCA 321.
[15] See the General Division decision at paragraphs 41 to 46.

[26] People who have overcome the presumption of non-availability have shown at least one of the following:

- a history of working full-time while studying full-time
- a flexible course schedule
- a willingness to quit their course if a suitable job became available

[27] So, in the absence of relevant evidence, the General Division concluded that the Claimant had overcome the presumption of non-availability.

[28] In this case, there was no evidence to support the General Division's finding that the Claimant overcame the presumption of non-availability. She didn't have a history of working full-time while studying full-time, and she was unwilling to leave her training to accept a job.[16] Shifts being available outside the regular hours of 9 a.m. to 5 p.m. isn't exceptional. The evidence doesn't support that the Claimant overcame the presumption.

[29] The General Division should have followed the significant body of Federal Court and Federal Court of Appeal decisions relating to student availability, including *Horton* and *Gagnon*. A claimant must not limit their availability to take a course. The General Division made an error of law by departing from the principles of these court decisions to find that the Claimant overcame the presumption of non-availability.

I will fix the General Division's error by giving the decision it should have given

[30] Since the General Division made an error, I will intervene in this case.

[16] The presumption of non-availability can be overcome by a history of working full-time while studying, but it has to be established over years: See *Canada (Attorney General) v Rideout*, 2004 FCA 304; and *Canada (Attorney General) v Lamonde*, 2006 FCA 44. It can also be overcome by the presence of exceptional circumstances: See *Canada (Attorney General) v Gagnon*, 2005 FCA 321; and *Canada (Attorney General) v Primard*, 2003 FCA 349. On July 7, 2022, the Claimant told the Commission that she would not leave her training to accept a job: See GD3-25.

[31] To fix the General Division's errors, I can either send the file back to the General Division for reconsideration or give the decision the General Division should have given.[17]

[32] The Commission says that the record is complete and asks that I substitute my decision for that of the General Division.

[33] At the hearing, the Claimant wasn't sure whether I should give the decision the General Division should have given or send the file back to the General Division for a new hearing. She said the thought of doing another hearing was "disheartening." But, since she didn't know which option would be better for her, she didn't have an opinion.

[34] I am satisfied that the parties had a full and fair opportunity to present their cases before the General Division. I am also satisfied the record is complete and I can give the decision the General Division should have given.

– **The Claimant wasn't available for work from May 15, 2022, to December 9, 2022**

[35] To get EI regular benefits, a person must show (among other things) that they are "capable of and available for work" but aren't able to find a suitable job.[18] 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**

[36] I can't just apply the case law without considering the evidence. Availability is a question of fact. That means I still have to consider whether, in this case, only being able to work around her training overly limited the Claimant's chances of going back to work. A person doesn't have to show that they are available for all jobs. Instead, the focus is on a suitable job.[19]

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[17] See section 59(1) of the DESD Act.
[18] See section 18(1)(a) of the EI Act.
[19] See the first two *Faucher* factors along with *Canada (Attorney General) v Whiffen*, 1994 CanLII 10954 (FCA) at paragraphs 13 and 14.

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

[37] The law presumes that full-time students are unavailable for work.[20]

[38] The presumption appears to be a way of signalling that, to accommodate their course schedules, full-time students normally restrict their availability. So, it is often difficult for full-time students to meet the third *Faucher* factor.

[39] However, as discussed above, the presumption doesn't apply to students who can show that they have exceptional circumstances, including a history of working and studying at the same time.[21]

- **The Claimant hasn't shown that she was available for work**

[40] The presumption of non-availability applies to the Claimant.

[41] The Claimant was a full-time student, and she hasn't shown that she has any of the special circumstances needed to overcome the presumption of non-availability.

[42] The Claimant had 40 hours per week of training commitments.[22] This means she was in training full-time. This is a significant limit on her availability for work.

[43] As part of her program, the Claimant continued to work for her employer on Thursdays and Fridays for eight hours each day. She also picked up extra shifts where possible. It isn't clear to me that there was actually an interruption in earnings. However, that issue wasn't argued, and it isn't necessary that I consider it.[23]

[44] The Claimant chose to take training. The General Division said she had the option of working any time of the day, so she wasn't overly limiting her chances of working by taking training. But, the fact is that she applied for EI benefits because her

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[20] For example, see *Landry v Canada (Attorney General)*, A-719-91; *Canada (Attorney General) v Rideout*, 2004 FCA 304; and *Canada (Attorney General) v Cyrenne*, 2010 FCA 349.
[21] See *Canada (Attorney General) v Gagnon*, 2005 FCA 321 at paragraph 6.
[22] The Claimant had to attend classes online from Monday to Wednesday each week. She also worked an eight-hour practical shift as part of her program on Thursday and Friday each week.
[23] Section 7 of the EI Act says that you need an interruption in earnings to qualify for benefits. Section 14(1) of the *Employment Insurance Regulations* explains what it means to have an interruption in earnings. It isn't clear here that the Claimant had an interruption in earnings.

training interrupted her pattern of availability. If she intended to continue to work full-time while also taking training full-time, she would not have needed the EI program. The EI program isn't intended to subsidize the Claimant's choice to take training.[24]

[45] The Claimant told the Commission that her employer recommended the training program.[25] She said that she continued to work part-time, depending on shift availability, and would not leave her training or accept a full-time job until she finished the training in December 2022.

[46] The Claimant also said that the same employer that recommended the program hired her full-time as of December 10, 2022, when her training was done.[26]

[47] I recognize that the Claimant maintained some availability for work and that she continued working for her employer. But, she didn't have any special circumstances that would allow her to overcome the presumption of non-availability that applies to full-time students.[27]

[48] Having 24 hours of shift availability doesn't overcome the presumption. It isn't an exceptional circumstance that shows a history of working full-time while studying or a willingness to leave training to get a full-time job. The Claimant wasn't available for work from approximately 8 a.m. until 5 p.m. from May to December 2022. While she still worked part-time for her employer, she could not be available for other jobs that required daytime availability.

[49] I find the Claimant doesn't meet the third availability factor in *Faucher*. She set a personal condition in that she was only able to work around her course schedule. The

[24] In general, EI isn't available to those who choose to take training instead of working. While it may sound harsh, EI isn't meant to "subsidize self-improvement, the acquisition of new skills, or the education of individuals who have left the work force to attend courses of instruction": T. Stephen Lavender, The 2022 Annotated Employment Insurance Act (Toronto, ON: Thomson Reuters, 2021) at page 130.
[25] See GD3-25.
[26] See GD3-29.
[27] Factors that can be considered when assessing whether a student 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 and 138.

courts have repeatedly said that students who limit their availability for work around their course schedules aren't available for work.[28]

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

[51] I also understand that the Claimant was trying to improve her life. She was in a position where she would have worked fewer hours because she wasn't a certified CCA. However, she made the ***personal choice*** to take training. In these circumstances, she isn't entitled to receive EI benefits.

[52] The Claimant hasn't proven her availability for work from May 15, 2022, to December 9, 2022. This means she is disentitled from receiving EI benefits for this period.

Conclusion

[53] The General Division ignored binding case law about availability. Because of this, I am allowing the Commission's appeal and giving the decision the General Division should have given. The Claimant wasn't available for work from May 15, 2022, to December 9, 2022. This means she can't get EI benefits for this period.

Candace R. Salmon
Member, Appeal Division

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[28] See, for example, *Canada (Attorney General) v Gagnon*, 2005 FCA 321; *Duquet v Canada (Employment and Immigration Commission)*, 2008 FCA 313; *Canada (Attorney General) v Primard*, 2003 FCA 349; *Canada (Attorney General) v Rideout*, 2004 FCA 304; and *Horton v Canada (Attorney General)*, 2020 FC 743.