Citation: *AM v Canada Employment Insurance Commission*, 2023 SST 1745

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	A. M.
Representative:	A. A.
Respondent:	Canada Employment Insurance Commission
Representative:	Julie Villeneuve

Decision under appeal:	General Division decision dated May 10, 2023 (GE-22-3766)

Tribunal member:	Stephen Bergen
Type of hearing:	Videoconference
Hearing date:	November 6, 2023
Hearing participants:	Appellant Respondent's representative
Decision date:	December 4, 2023
File number:	AD-23-585

Decision

[1] I am dismissing the appeal.

[2] The Claimant was not available for work while he was going to school, so he remains disentitled from May 5 to July 25, 2022.

Overview

[3] A. M. is the Appellant. He made a claim for Employment Insurance (EI) so benefits, so I will call him the Claimant. The Claimant collected benefits while he attended a full-time training program to which he was referred. Then he continued with additional related training without a referral.

[4] The Respondent, the Canada Employment Insurance Commission (Commission), decided that the Claimant was disentitled to benefits during the second part of his training because he was not available for work. The Claimant disagreed and asked it to reconsider but it would not change its decision. When the Claimant appealed to the General Division of the Social Security Tribunal, it dismissed his appeal. Next, he appealed to the Appeal Division.

[5] I am dismissing the appeal. The General Division made errors in how it reached its decision, but those errors do not affect its final decision.

Issues

[6] The issues in this appeal are:

a) Did the General Division make an error of jurisdiction by

   i. failing to consider a certain period of disentitlement?

   ii. considering whether the Claimant made reasonable and customary efforts?

b) Did the General Division make an error of procedural fairness by not giving the Claimant the opportunity to comment on a document?

c) Did the General Division make an error of law by requiring that the Claimant show a history of work-study that is longer than one year to rebut the presumption of non-availability?

d) Did the General Division make an error of fact

   i. when it found that the Claimant had said he would not leave his training for a job?

   ii. by misunderstanding that the Claimant was upgrading his training to find a job?

   iii. by inferring that information technology (IT) and administration sector jobs are typically Monday to Friday, 9 a.m. to 5 p.m.?

Analysis

Jurisdiction

– **Period of disentitlement**

[7] I granted leave because there was an arguable case that the General Division had not fully exercised its discretion.

[8] The General Division considered only whether the Claimant should be disentitled to EI benefits from May 5, 2022, to July 25, 2022. The Commission decision stated that the Claimant was disentitled from April 4, 2022, to July 25, 2022.[1] Its reconsideration decision maintained the original decision.[2]

[1] See GD3-32.
[2] See GD3-41.

[9] The Commission had made submissions to the General Division that its decision included a clerical error, and that it had meant to disentitle the Claimant from May 5, 2022, to July 25, 2022. It argued that the clerical error did not prejudice the Claimant.

[10] The General Division did not acknowledge that there had been a clerical error, or explicitly state that it accepted the Commission's correction because of the lack of prejudice.

[11] Despite its lack of reasons, it is apparent that the General Division accepted the corrected dates given by the Commission. It would have been preferable if the General Division had stated the basis on which it accepted the correction. However, the absence of prejudice to the Claimant is obvious. The correction to the period of disentitlement could only decrease the length of the Claimant's disentitlement.

[12] Therefore, I accept that the Commission properly exercised its jurisdiction by considering only the Claimant's disentitlement for the period from May 5, 2022, to July 25, 2022.

– **Reasonable and customary efforts**

[13] The Claimant also argued that the General Division made an error of law in finding that he did not make "reasonable and customary efforts." He believes that the General Division misinterpreted the meaning of "reasonable."[3]

[14] The part of the General Division decision that addresses "reasonable and customary efforts" identifies a separate method by which the Commission may disentitle a claimant. A claimant who fails to comply with a request by the Commission to prove "reasonable and customary efforts" may be disentitled until they provide the requested information.[4]

[15] The General Division made an error of jurisdiction or of law.

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[3] See section 9.001 of the *Employment Insurance Regulations* (Regulations).
[4] See section 50(8) and section 50(1) of the *Employment Insurance Act* (EI Act).

[16] Neither the original decision letter nor the reconsideration decision, discuss whether the Claimant should be disentitled for failing to comply with a request for information. The decision that was appealed to the General Division was a decision to disentitle the Claimant because he was not "capable and available for work."[5]

[17] It is not clear to what end the General Division raised the issue of "reasonable and customary efforts." It did not have jurisdiction to consider whether the Claimant should be disentitled for not doing so.

[18] If the General Division did not mean that the Claimant should be disentitled for this reason, then it made an error of law, nonetheless. It stated that "claimants have to prove their efforts to find a job were reasonable and customary." However, the law only requires this if the Commission chooses to require proof of reasonable and customary efforts. Nothing in the brief exchanges between the Commission and the Claimant suggests that the Commission asked the Claimant to supply the kind of proof contemplated by the Regulations.

[19] The General Division should not have considered the *legal* effect of the Claimant's inability to prove reasonable and customary efforts. However, this does not mean that it made an error in finding that the Claimant was not available for work. Furthermore, the General Division's findings in relation to reasonable and customary efforts are still of some relevance to its analysis of his availability.

Procedural Fairness

[20] The Claimant argued that he did not get a chance to comment on a document on which the General Division relied.

[21] When I asked him what document he was referring to, he re-characterized it as the General Division's assumption that students are not available for work.

[22] The General Division did not make an error of procedural fairness.

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[5] See section 18(1)(a) of the EI Act.

[23] The General Division was not relying on a document about the presumption that applies to students. It was relying on a legal doctrine. I will discuss this in more detail in the next section.

Error of law

– Presumption of non-availability

[24] There is a presumption of law that a claimant who is a full-time student is not available for work.[6] The General Division found that the Claimant was a full-time student, so the presumption applies.

[25] It also noted that a claimant can overcome the presumption by proving that he has a history of working full-time while also in school, or that other exceptional circumstances exist by which he could prove his availability.

[26] The Claimant had recently worked full-time while attending school for three months. Other than that, he had been working and had not been to school for decades. The General Division stated that three months of work-study was not a significant amount of time. It found that the Claimant had not rebutted the presumption after citing case law for the proposition that "a claimant should be able to establish a pattern of working while in school for at least a year to rebut the presumption of non-availability."[7] The General Division did not consider any other exceptional circumstances.

[27] The General Division made an error of law when it found that the Claimant had not rebutted the presumption.

[28] It appears the General Division understood the law to have established some kind of minimum work-study history. However, there is no legal requirement for a claimant to have some particular length of history in which full-time studies are combined with work. It is a question of fact whether a Claimant's work-study history rebuts the presumption.

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[6] See *Canada (Attorney General) v Gagnon, 2005 FCA 321*

[7] See para 23 of the General Division decision.

[29] None of the decisions cited by the General Division require that a claimant's work-study history be "at least a year" before it would be sufficient to rebut the presumption. *Landry* is the only one of the cited cases in which we know the claimant's work-study history to be in excess of a year, but the Court did not confirm that a work-study history needed to be any particular length. It found that the Umpire erred because it did not consider other exceptional circumstances, but it upheld the Umpire decision anyway, because the Umpire was entitled to reject other parts of the Claimant's evidence.[8] In the *Lamonde* and Rideout decisions, the claimant had no work-study history at all. *Graveline* was silent about the claimant's work-study history.[9]

[30] Furthermore, the very recent Federal Court of Appeal decision in *Page* considered a claimant who had a work-study history of about 6 ½ months (that is, less than a year). *Page* did not focus on whether the claimant's work-study history was extensive. Instead, it allowed that a claimant could be found available if they were available in accordance with their previous work schedule.[10]

Important error of fact

[31] When a claimant cannot rebut the presumption, the Commission, or the General Division, may find them unavailable for no other reason than that they are a full-time student.

[32] However, a student claimant who rebuts the presumption is not necessarily available for work. Rebutting the presumption means only that their full-time student status does not establish that they are "not available". All claimants must prove that they are "capable and available for work," whether they are students or not.

[33] The General Division's error of law affects only its finding that the Claimant has not rebutted the presumption. It does not affect the General Division's finding that the

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[8] The Umpire was the second level of appeal under a former Unemployment Insurance administrative appeal scheme.
[9] See *Graveline v Canada (Attorney General)*, 1995 FCA A-177-94; *Canada (Attorney General) v Rideout,* 2004 FCA 304; *Canada (Attorney General) v Lamonde,* 2006 FCA 44; and *Landry v Canada (Deputy Attorney General)*, 1992 FCA A-719-91.
[10] See *Page v Canada (Attorney General)*, 2023 FCA 169.

Claimant was not available for work, so it does not mean that the General Division was wrong to decide that the Claimant was not entitled to benefits from May 5, 2022, to July 25, 2022.

[34] A claimant's availability is evaluated by considering the factors described in *Faucher* (the "*Faucher* test"). The General Division applied the *Faucher* test to evaluate the Claimant, and still found that he was not available. If the Claimant is not available, he is not entitled to benefits.

[35] I will turn to whether the General Division made any error in how it found the Claimant to be available. To satisfy the requirements of the *Faucher* test, a claimant must show three things:

1. They desired to return to work as soon as a suitable job is available.
2. They expressed that desire through their job search efforts.
3. They did not set personal conditions that unduly limited their chances of getting back into the labour market.

[36] I will review how the General Division evaluated each *Faucher* factor to see whether the General Division made any errors when it concluded that the Claimant was not available.

– **Desire**

[37] The General Division found that the Claimant did not have a desire to return to work as soon as a suitable job was offered, because he would not have left his training program for a job.

[38] The Claimant disagrees that he ever said he would not leave his training for a job.

[39] I see no error in the General Division's finding that the Claimant would not leave his training for a job. The General Division acknowledged that there was file evidence that showed that the Claimant said that he was willing to quit for a job, but that there was other evidence in which the Claimant said he would not. It noted that the Claimant

did not directly state whether he would have left his program for a job. However, he did testify that he was looking for jobs that would work with his school schedule.

[40] The Claimant did not point to any other evidence on which the General Division might have found that he had been willing to leave his training for a suitable job.

[41] The Claimant also argued that he took the cyber security training so that he could find a job. He said the additional upgrading was to increase his chances. He suggests that this is evidence of his desire to return to work as soon as possible.

[42] The General Division did not refer to the Claimant's reason for taking the training.

[43] The Commission determined that the Claimant was unavailable for work only because he did not obtain a referral to continue with more advanced or specialized training in the same field. It had accepted the original referral to training and paid him benefits while he was training, precisely to improve his employability.[11] There was no evidence to suggest that the Claimant's motivation had changed between the early part of his training to which he was referred, and when he went to school without a referral.

[44] However, the General Division did not make an error of fact by not referring to the Claimant's reason for upgrading.

[45] The Claimant's motivation for taking the training is relevant to his desire to return to work. At the same time, there was no evidence that the Claimant would not have been able to find work without the additional training, or the extent to which the additional training would improve his chances of finding work.

[46] Given the General Division's finding that he would not have left his training for a job, the fact that he wanted training to improve his prospects is of little value in proving that he desired to return to work, "as soon as a suitable job was available."

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[11] See section10.12.0 of the Digest of Benefit Entitlement Principles.

[47] Since the evidence is not that important, I may presume that the General Division considered it. The General Division is not required to refer to each and every piece of evidence before it.[12]

– **Other Faucher factors**

[48] The General Division found that the Claimant did not satisfy the first *Faucher* factor. It would not necessarily be an error for the General Division to find that the Claimant was not available - based on its finding on the first factor alone. However, *Faucher* says that the General Division must consider all three *Faucher* factors, so I will review the others as well.

Job search efforts

[49] The General Division made an error of fact in how it analyzed the second *Faucher* factor.

[50] The General Division determined that the Claimant's job search efforts were not enough. It based this, in part, on its finding that the Claimant had restricted his job search to the IT and Administration sectors.

[51] The General Division said the way the Claimant limited his job search was unreasonable because jobs in the IT and Administration sectors are "typically" Monday to Friday, 9 a.m. to 5 p.m., and the Claimant wasn't available during those hours because of his program. It said that he should have been looking for the kinds of jobs that accommodate student schedules, including jobs with flexible or non-standard schedules, like evenings, nights, and weekends.

[52] The Claimant disagrees with this. He argues that there is a "huge community of digital nomads, particularly in the IT industry," in which he could work remotely. And

[12] *See Simpson v Canada (Attorney General),* 2012 FCA 82; *Villeneuve v. Canada (Attorney General*), 2013 FC 498

since his classes were between 8:00 a.m. and 12:00 p.m., he believed he could still work full-time in such a position.[13]

[53] Whether or not the Claimant is right, there was no evidence before the General Division that the Claimant applied for positions with the "digital nomad" flexibility that he described, and no evidence of the general availability of such opportunities.

[54] At the same time, there was no evidence before the General Division on which it could infer that positions in the IT field are "typically" Monday to Friday, 9:00 a.m. to 5 p.m. This is not the kind of common knowledge that would allow the General Division to just accept it as true without proof. If IT jobs (or administrative jobs) with non-traditional hours are readily available, the Claimant's focus on those kinds of jobs may have been of little relevance to whether his job search efforts were enough.

[55] The General Division made an error because it relied on an inference that was unsupported by evidence.

Personal factors that unduly limited employment prospects

[56] The General Division considered the Claimant's class schedule again when it analyzed the third *Faucher* factor. It found that the Claimant unduly limited his chances of going back to work by only looking for work that fit with his school schedule. The General Division described the Claimant's school commitments, including his class hours as well as the additional time he would have to spend on his studies. The Claimant has not argued that the General Division misunderstood these facts.

[57] Nor did the General Division ignore relevant evidence about his availability. I note that it did not mention that the Claimant said that the lectures were recorded and that he could listen to them anytime. However, the Claimant clarified that the 8:00 a.m. to 12:00 p.m. class time was mandatory and that he would have to "ask" the college if it would waive that requirement if he got a job.[14]

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[13] AD9-3,4.
[14] Listen to the audio recording of the General Division decision at timestamp 00:16:15.

[58] The General Division did not make an error of fact in evaluating the third *Faucher* factor.

[59] The General Division made an error in how it assessed one of the three *Faucher* factors, but it properly found that the Claimant did not satisfy the other two *Faucher* factors. Therefore, its error would not have made a difference to the decision.

[60] The Claimant was not available for work from May 5, 2022, to July 25, 2022, because he did not have the desire to return to work as soon as a suitable job was available and because he set personal conditions that unduly limited his chances of getting a job. Since he was not available, he was not entitled to benefits.

Conclusion

[61] I am dismissing the Claimant's appeal. I have found errors in the General Division decision, but they do not change the result.

Stephen Bergen
Member, Appeal Division