Citation: *Canada Employment Insurance Commission v MG*, 2024 SST 256

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	Canada Employment Insurance Commission
Representative:	Angèle Fricker
Respondent:	M. G.
Support person:	K. G.

Decision under appeal:	General Division decision dated July 18, 2023 (GE-23-349)

Tribunal member:	Glenn Betteridge
Type of hearing:	Teleconference
Hearing date:	February 6, 2024
Hearing participants:	Appellant's representative Respondent Respondent's representative
Decision date:	March 13, 2023
File number:	AD-23-789

Decision

[1] I am allowing the Canada Employment Insurance Commission's (Commission) appeal, in part. The Commission has shown the General Division made an error.

[2] To fix (remedy) the error, I have made the decision the General Division should have made.

[3] My decision doesn't change the outcome in this case. M. G. has shown she was capable and available for work, but unable to find suitable employment while she was in full-time training. This means **she isn't disentitled from getting Employment Insurance (EI) benefits** during that time for that reason.

Overview

[4] I will call M. G. the Claimant because she made a claim for EI regular benefits in July 2021. The Commission approved her claim.

[5] In the summer of 2021, she started a job as an on-call (casual) medical laboratory assistant (MLA) at a hospital. She returned to school full-time in September 2021, in a practical nursing (PN) program. The hospital issued a record of employment. and the Commission continued to pay the Claimant benefits.

[6] In November 2022, the Commission reviewed her claim. It decided the Claimant wasn't entitled to benefits from September 5, 2021 to July 3, 2022, because she wasn't available for work. This led to a $19,740 overpayment.

[7] The Claimant was unsuccessful in her reconsideration request. So she appealed to the General Division of this Tribunal. The Tribunal granted her appeal. It decided she had shown she was available for work while in school. The Commission appealed that decision to the Appeal Division.

[8] I have to decide whether the General Division made an error. If I find it did, then I have the power to fix (remedy) the General Division's error.

Issues

[9] There are four issues in this appeal

- Did the General Division make a **legal error** when it didn't consider whether the Claimant was **unable to obtain suitable employment**?
- Did the General Division make a **legal error** when it didn't follow court and tribunal decisions that say a **person can't merely wait to be called back** to work?
- Did the General Division make an **important factual error** when it decided the Claimant had **made enough efforts to find a suitable job**?
- If the General Division made an error, should I **remedy (fix) the error** by giving the **decision the General Division should have given**?

Analysis

[10] The Commission has shown the General Division made a legal error. To fix the error, I have made the decision the General Division should have made. The rest of this decision sets out my reasons.

– The Appeal Division's role

[11] The Appeal Division's role is different than the General Division's role. The law allows me to step in and fix (remedy) a General Division error where a person can show the General Division

- made a **legal error** in its decision
- based its decision on an **important factual error**[1]

[12] If the General Division didn't make an error, I have to dismiss the appeal.

[1] Section 58(1) of the *Department of Employment and Social Development Act* (DESD Act) calls these the "grounds of appeal." I wrote these grounds in plain language.

– The law about availability for work

[13] Under section 18(1)(a) of the *Employment Insurance Act* (EI Act), a person who wants to get EI **regular benefits** has to show they are capable and **available for work**, and **unable to find a suitable job**. In other words, they have to prove they are looking for work on an ongoing basis but can't find a suitable job.

[14] A person has to demonstrate their availability for every working day, which doesn't include Saturday and Sunday.[2]

[15] The EI Act doesn't say what it means to be **available**. Court decisions set out **three factors a person has to prove** to show they are available for work (the **Faucher factors**)

- They wanted to go back to work as soon as a suitable job was offered to them.
- They showed this by making reasonable efforts to find a suitable job.
- In the circumstances, they didn't set personal conditions that might unduly (in other words, overly) limit their chances of going back to work. [3]

[16] When the General Division considers each factor, it has to look at a person's attitude and conduct.[4]

[17] What work (in other words, job or type of job or employment) counts as **suitable** depends on the person's circumstances. The EI Act and *Employment Insurance Regulations* (EI Regulations) give guidance about what type of work is and isn't suitable for a person under section 18(1)(a) of the EI Act.[5] They describe suitable work with reference to the person's usual occupation held before their EI claim, including the rate

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[2] See section 32 of the *Employment Insurance Regulations* (EI Regulations).
[3] These three factors come from the Federal Court of Appeal's decisions in Canada (Attorney General) v Whiffen, A-1472-92; and *Faucher v Canada Employment and Immigration Commission*, 1997 CanLII 4856 (FCA). I have written the three factors using plainer language than the decisions.
[4] Two decisions from case law set out this requirement. Those decisions are *Canada (Attorney General) v Whiffen*, A-1472-92; and *Carpentier v Canada (Attorney General)*, A-474-97.
[5] See sections 6(4) and 6(5) of the EI Act. And see section 9.002 of EI Regulations.

of pay, working conditions and their personal circumstances. And they indicate suitable employment can change as a person's period of unemployment goes on.[6]

[18] **Full-time students**, like the Claimant, are **presumed to be unavailable** for work and not entitled to EI regular benefits.[7] It's up to a full-time student to prove this presumption doesn't apply to them.

[19] Finally, in every case availability is a **question of fact**.[8]

The General Division made a legal error by ignoring the "unable to obtain suitable employment" part of section 18(1)(a)

[20] The General Division **makes a legal error** if it doesn't state the correct legal test, misinterprets the law, or misapplies a legal test.

[21] Section 18(1)(a) of the EI Act says the Commission can't pay a person benefits for a working day unless they prove they are capable and available for work and **unable to obtain suitable employment**.

[22] The Commission argues the General Division didn't consider whether the Claimant proved she was **unable to find suitable employment**.[9] It says this says this is part of the legal test under section 18(1)(a). So the General Division made a **legal error** when it didn't consider and apply this part of the test.

[23] For the vast majority of people receiving EI regular benefits the "unable to obtain suitable employment" part of section 18(1)(a) will not be an issue. It will be obvious the person hasn't obtained suitable employment. In this appeal it is an issue. And **in the circumstances of this appeal**, I agree with the Commission's argument.

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[6] See Canada *(Attorney General) v Whiffen*, A-1742-92 (FCA); and *Page v Canada (Attorney General), 2023 FCA 169*.
[7] The Federal Court of Appeal recently confirmed this in *Page v Canada (Attorney General)*, 2023 FCA 169.
[8] See *Canada (Attorney General) v Whiffen*, A-1742-92 (FCA); *Faucher v Canada (Attorney General)*, 1997 CanLII 4856 (FCA); *Canada (Attorney General) v Lativa*, 2017 FCA 82; and *Page v Canada (Attorney General)*, 2023 FCA 169.
[9] See the second paragraph on page AD03-5 of the Commission's written arguments..

[24] The Tribunal's General Division (and one Umpire) has decided that "unable to obtain suitable employment" is a distinct part of the legal test under section 18(1)(a).[10]

- In the **Bergeron case**, the General Division found the claimant didn't meet that part of the test because she was working full-time on commission, which was suitable employment for her.[11] Then it went on to briefly consider the Faucher factors.[12] The Appeal Division and Federal Court didn't address the General Division's statement that unable to find suitable employment is part of the legal test under section 18(1)(a).[13] Each focused on the Faucher factors.

- In its decision in the **KP case**, the General Division accepted that the inability to obtain suitable employment is a distinct element of the section 18(1)(a) test.[14]

- In KP the General Division relied on the umpire's decision in **CUB 16305**.[15] The Umpire said availability for work and inability to obtain suitable work are different concepts.

[25] In the **circumstances of this appeal**, I am going to adopt this approach. There is no question the Faucher factors set out the test for "availability." This is what the Federal Courts have told us. And there may be an argument that the Faucher factors incorporate and make redundant the phrase "unable to find suitable employment." The first and second factors refer to accepting and making efforts to find "suitable

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[10] See *Bergeron v Commission de l'assurance-emploi du Canada* (GE-14-4320; 14 avril 2015 (DG). See also *Canada Employment Insurance Commission v KP*, 2020 SST 592 (GD); and *CUB 16305*. The French decision has not been translated into English. I read the French decisions.
[11] See the General Division decision at paragraphs 23 to 27. At paragraph 23, it explicitly recognizes this part of the legal test: "Le Tribunal note que l'alinéa 18 (1) a) de la Loi précise que pour être admissible au bénéfice de prestations, un prestataire doit prouver qu'il est capable de travailler et disponible à cette fin et incapable d'obtenir un emploi convenable [les soulignements sont de nous]."
[12] See the General Division decision at paragraphs 29 to 31.
[13] See *Bergeron v Commission de l'assurance-emploi du Canada* (AD-15-275; 22 juin 2015); and *Bergeron v Canada (Attorney General)*, 2016 FC 220.
[14] See paragraphs 11 to 13 in *Canada Employment Insurance Commission v KP*, 2020 SST 592 (GD).
[15] See *CUB 16305*, where the Umpire writes: "In my opinion, the board of referees erred in law in that it confused two different concepts, namely, availability for work and inability to obtain suitable work. These two notions will be based on distinct facts and will require the claimant to take different action."

employment," respectively. But the leading court cases about availability under section 18(1)(a) use the term "availability" without stating whether the court is referring to all of section 18(1)(a), only available for work, or available for work **and** unable to find suitable employment. And there is no case from the Federal Courts that explicitly interprets **unable to find suitable employment** alone or in relation to the Faucher factors.

[26] Without that explicit direction from the Federal Courts, I am going to follow the test as set out by the legislature in the words of the statute. This approach is supported by the interpretation in the cases I have cited. So **in the circumstances of this appeal**, the General Division should have considered whether the Claimant was **unable to find suitable employment**.

[27] The General Division found the Claimant's best chance for suitable employment was to continue to be available for her call-in position as an MLA with the hospital (paragraph 46). It also found she worked in casual call-in employment as an MLA while she was in the PN program, which was consistent with her past work history (paragraph 49).

[28] Given these two findings, the General Division should have asked whether the Claimant was **unable to find suitable employment**. It didn't and **that is a legal error**.

[29] The Commission argues the General Division made two more errors. I am going to analyze the Commission's arguments because it is important to how I fix the error(s).

The General Division didn't make a legal error under the second Faucher factor

[30] The Commission argues the General Division made an **error of law** under the second Faucher factor. That factor says a person has to **show** they want to get back to work as soon as a suitable job is available **by making reasonable efforts to find a suitable job**.

[31] The Commission says the General Division made a legal error when it

- accepted the Claimant wasn't required to look for work other than the part-time job she already had, because she had to make reasonable and customary efforts to find other **suitable employment** (either part-time or full-time)[16]

- didn't apply case law that establishes that a **person can't merely wait to be called back to work** and must look for work to be entitled to benefits[17]

[32] I understand the first part of the Commission's argument to be about **suitable employment**. At the hearing I asked the Commission if it was arguing that suitable employment for someone who qualified for benefits based on part-time earnings included part-time **and full-time work**.

[33] The Commission raised the COVID pandemic and temporary changes the government made to the EI Act to respond to the pandemic. It said that the temporary flat rate of $500 benefit confuses what counts as suitable employment in this case. The Claimant qualified for EI based on part-time earnings. But under the COVID flat rate benefit of $500 per week she was receiving more in benefits than she would have otherwise received. So the Claimant didn't make enough efforts to look for suitable work. Her part-time work fit with her school schedule, and she was getting $500 per week in benefits.

[34] I disagree with the Commission's arguments.

[35] The Commission's argument is legally and logically flawed. It has the law backwards**. Suitable employment** isn't determined based on the EI benefit amount. Suitable employment is based on numerous factors including the employment—including the **rate of pay**—the person held before they had an interruption of earnings. So the Commission is wrong to argue the Claimant had to look for full-time work, or additional part-time work, because her benefit amount was $500 per week.

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[16] See the third paragraph on page AD03-5 of the Commission's written argument.
[17] See the Commission's written argument at page AD03-6, including footnote 12.

[36] Second, the cases cited by the Commission don't show the General Division made a legal error. The Commission says these cases establish the principle that a person can't merely wait to be called back to work and must look for work to be entitled to benefits. Because availability is a question of fact, the factual findings in these cases are important to consider. These cases involved

- absolutely no evidence a teacher was available for work during summer months since they made no efforts to find work while waiting to return to teaching in September[18]
- a union member sitting back "on vacation" waiting to be called into work[19]
- as a student waiting to return to work part time for her usual employer during her studies[20]
- a school board employee waiting to be called back to a part-time job that suited her, who did only a few job searches during the summer[21]

[37] These cases don't apply in the Claimant's case. They can be distinguished on the facts. The General Division found—as a matter of fact—the Claimant's efforts to find work with her former employer and in her community taken together with her seniority-based call-in position, demonstrate she made efforts to find a suitable job (paragraph 46). In other words, she wasn't waiting to be called back to work.

[38] To summarize this section, the Commission doesn't agree with the General Division's finding that the Claimant made sufficient efforts to find suitable employment. But the Commission **hasn't shown the General Division made a legal error** under the second Faucher factor.

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[18] See *Canada (Attorney General) v Cornelissen-O'Neil*, A-652-93 (FCA).
[19] See *De Lamirande v Canada (Attorney General)*, 2004 FCA 311.
[20] See Canada Employment Insurance Commission v AM, 2021 SST 751 (Appeal Division).
[21] See *CUB 76450*.

The General Division didn't make an important factual error under the second Faucher factor

[39] The General Division makes an **important factual error** if it bases its decision on a factual finding it made by ignoring, misunderstanding, or mistaking the evidence.[22] So it's a factual finding that goes squarely against the evidence or isn't supported by the evidence.[23]

[40] Disagreeing with how the General Division weighed the evidence doesn't count as an important factual error. And the Appeal Division can't re-weigh the evidence considered by the General Division.

[41] The Commission argued that "a proper assessment of the evidence in this case leads to the conclusion" the Claimant hasn't met the availability test. Specifically, it says the General Division **disregarded** (in other words, ignored) **the fact** the Claimant's efforts to find work "consisted only of maintaining the part-time job she already held by providing her employer with the days and hours she was available to work and accepting shifts when they were offered."[24]

[42] I disagree with the Commission. The General Division didn't ignore any evidence.

[43] The General Division identified suitable employment for the Claimant by reviewing her job history while in school and immediately before she returned to full-time studies as well as her MLA training and professional designation (paragraphs 22, 23, 29, and 30). It reviewed her efforts to find suitable work (paragraphs 25, 44 and 45). And it found her efforts to find work with her former employer and in her community taken together with her seniority-based call-in position, demonstrate she made efforts to find a suitable job (paragraph 46).

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[22] Section 58(1)(c) of the DESD Act says it's a ground of appeal where the General Division based its decision on an erroneous finding of fact it made in a perverse or capricious manner or without regard for the material before it. I have described this ground of appeal using plain language, based on the words in the Act and the cases that have interpreted the Act.
[23] See *Garvey* v *Canada (Attorney General),* 2018 FCA 118; and *Walls v Canada (Attorney General)*, 2022 FCA 47.
[24] See the Commission's written argument at the third paragraph on page AD03-5.

[44] It seems in making this argument the Commission—not the General Division—ignored evidence about the Claimant's efforts to find a job. Or the Commission doesn't agree with the weight the General Division gave to the evidence. But the Commission **hasn't shown the General Division made a serious factual error** under the second Faucher factor.

Fixing the error: substituting the General Division's decision with my decision

[45] I found one error in the General Division decision. It didn't apply the "unable to find suitable employment" part of section 18(1)(a) of the EI Act.

[46] The law gives me the power to fix (remedy) the General Division's error. In appeals like this one, I will

- send the case back to the General Division to reconsider, **or**
- make the decision the General Division should have made (based on the evidence at the General Division without considering any new evidence)

[47] The Commission argued I should give the decision the General Division should have given.[25] The Commission says the Claimant was given an opportunity to present her evidence and the General Division asked her the questions needed to get the relevant evidence. It says it isn't changing its position from what it argued at the General Division.

[48] The Claimant said it would be fair for me to make the decision the General Division should have made.

[49] I agree with the parties. I have reviewed the evidence before the General Division and listened to the recording of the hearing. The parties had a full and fair opportunity to present their evidence to the General Division.

[25] See the "Conclusion" section of the Commission's written argument at page GD03-6.

– The Claimant wasn't able to obtain suitable employment

[50] I accept the General Division's finding that the Claimant's **best chance for suitable employment** was to continue to be available for her call-in position as an MLA with the hospital. The issue I have to decide is whether that chance (in other words, possibility) came into being during the time the Claimant received benefits. In other words, whether she **actually obtained suitable employment** as an MLA with the hospital during her claim.

[51] The Commission argued the Claimant was satisfied with the hours offered by the hospital in her on-call MLA position.[26] She was only available to work part-time, and the employer accommodated her. This meant she had obtained suitable part-time employment to the full extent of her availability. (And she was content with the $500 per week flat rate benefit.) So she couldn't show she was unable to "obtain suitable employment" under section 18(1)(a).

[52] The Claimant didn't make an argument about this issue.

[53] At the General Division hearing the Claimant testified she asked to be trained to work evening shifts at the hospital as an MLA. Her manager refused.[27] When she got her class schedule, she would tell her manager which days she could work a day shift (7:00 am to 3:00 pm).[28] If she had a half-day off from class, she would try to make it work as best she could, without evening training. She said she was often not considered for day shifts because people with more union seniority were called in.[29]

[54] She said from September 2021 to July 2022 she preferred to work in her field but was willing to accept a job elsewhere if it fit her work schedule.[30] And she was willing to accept jobs that required on-the-job training.[31]

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[26] See the second paragraph on page GD03-5 of the Commission's written argument.
[27] Listen to the hearing recording at 53:20.
[28] Listen to the hearing recording at 54:55.
[29] Listen to the hearing recording at 1:17:42.
[30] Listen to the hearing recording at 1:18:36.
[31] Listen to the hearing recording at 1:21:27.

[55] In her reconsideration request, the Claimant said she made herself available to work evenings and weekends.[32] And whenever she found out, she had half or full days free, she let her employer know she could work.

[56] The Commission says the Claimant wasn't looking for work while in training because she had a job and was only willing to work part time.[33] She was satisfied with the arrangement she had with the hospital.

[57] In the 14 weeks of work right before her PN program started, the Claimant earned an average of $725/week (range of nil to $2,126).[34] In the weeks she was receiving EI benefits, she worked and reported an average of $98/week (range of nil to $631) in earnings. I calculated these amounts from the documents in the General Division record. I have reviewed the Claimant's earnings because sections 6(4) and (5) of the EI Act consider earnings when determining what employment is or isn't suitable for a person.

[58] I accept the Claimant's evidence about her work scheduling and her work during her PN program. It is largely consistent with what she told the Commission.[35] I accept the Claimant's evidence that she wanted to work more, and could have worked more, if her manager had let her train for the night shift and if she had more union seniority. There is no evidence that goes against this. And I have no other reason to doubt what she said about this.

[59] Based on the evidence I have accepted I find the Claimant has shown she was unable to obtain suitable employment. She could have worked more if she had more seniority and had been trained for evening shifts. And her earnings as an on-call MLA during her claim were far below what she had previously earned as an on-call MLA.

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[32] See page GD03-36.
[33] See the Commission's notes of its calls with the Claimant at pages GD03-28 and GD03-39. And see the Commission's written argument at page AD03-5.
[34] See her record of employment at page GD02-16.
[35] See the Commission's notes of calls with the Claimant at page GD03-28.

[60] This tells me she wasn't employed to the full extent of her availability. In other words, she hadn't obtained suitable employment.

[61] This is the only issue I had to decide.

[62] I accept the General Division's factual and legal findings on the other issue challenged by the Commission at the Appeal Division. I accept the General Division's findings that the Claimant rebutted the presumption that full-time students aren't available for work. And I accept she showed she was available for work under the three Faucher factors.

– **The Claimant meets section 18(1)(a), so she isn't disentitled**

[63] My decision doesn't change the outcome of the General Division decision.

[64] The Claimant has shown that she meets section 18(1)(a) of the EI Act. So she isn't disentitled from receiving EI benefits from September 7, 2021 onwards while she was a full-time student.

Conclusion

[65] The General Division made a legal error in its decision. So I am allowing its appeal, in part.

[66] I have made the decision the General Division should have made.

[67] My decision doesn't change the outcome in this case.

[68] The Claimant has shown she was capable and available for work and unable to find suitable employment while she was in full-time training to become a PN. So she isn't disentitled from getting EI regular benefits for that reason.

Glenn Betteridge
Member, Appeal Division