Citation: *OK v Canada Employment Insurance Commission*, 2024 SST 111

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	O. K.
Respondent:	Canada Employment Insurance Commission
Representative:	Julie Villeneuve

Decision under appeal:	General Division decision dated February 2, 2023 (GE-22-2848)

Tribunal member:	Stephen Bergen
Type of hearing:	Teleconference
Hearing date:	January 26, 2024
Hearing participants:	Respondent's representative
Decision date:	February 6, 2024
File number:	AD-23-141

Decision

[1] I am allowing the appeal. The General Division made an error of law and I have made the decision that the General Division should have made.

[2] The Claimant was unable to work because of illness and "otherwise available for work," from November 15, 2021, and for at least long enough to receive 15 weeks of sickness benefits.

Overview

[3] O. K. is the Appellant. I will call him the Claimant because he applied for Employment Insurance (EI) sickness benefits.

[4] The Claimant is a foreign student who held a study permit that allowed him to work in Canada with some restrictions. He was going to school as well as working part time when he became ill in November 2021. He took a sick leave from his employer starting November 15, 2021, and his school eventually permitted him to withdraw from his fall school term.

[5] The Respondent told the Claimant that he was not entitled to sickness benefits because his illness was not the only reason he could not work. It said that the Claimant's withdrawal from school invalidated his study permit. This meant that he could no longer legally work.

[6] The Claimant asked the Commission to reconsider but it would not change its decision. Next, he appealed to the General Division of the Social Security Tribunal (Tribunal). The General Division dismissed his appeal. It agreed with the Commission that his illness was not the only reason he could not work. The Claimant is now appealing the General Division decision to the Appeal Division.

[7] I am allowing the appeal. The General Division made errors of law and fact in its evaluation of whether the Claimant was "otherwise available." I have given the decision that the General Division should have made and find that the Claimant was entitled to

sickness benefits from November 15, 2021, until he received the full 15 weeks of benefits.

Preliminary matters

[8] The Claimant did not attend the Appeal Division hearing.

[9] This was the second scheduled hearing. The Claimant did not attend the first hearing on December 20, 2023, so I adjourned it.

[10] I proceeded with the hearing on January 26, 2024, under section 9(2) of the *Social Security Tribunal Rules of Procedure*. The Tribunal has made multiple efforts to contact the Claimant using the contact information he provided.

[11] The Claimant provided the Tribunal with a physical address and an email address in his Application to the Appeal Division. He called the Tribunal on May 18, 2023, to update his email address. He asked the Tribunal to send documents to him at the new email address.

[12] The Tribunal sent the Notice of Hearing for the December 20, 2023, hearing by email to the updated email address on October 16, 2023. It then attempted to confirm his attendance at the hearing by calling the Claimant at the phone number he provided on December 15, 18, and 19. The Tribunal left messages on December 15 and 18, but received a message on December 19 that the requested number “cannot be dialed.”

[13] The Tribunal sent a new Notice of Hearing for the January 26, 2024, hearing on December 21, 2023, by email, and by regular mail and courier to the physical address given by the Claimant. The mail and courier package were both returned to the Tribunal undelivered. The Tribunal called the Claimant’s phone number on January 22 and January 24, 2024, again receiving the message that the number could not be dialed.

[14] The Commission representative appeared and made submissions on behalf of the Commission. I also have some written submissions from the Claimant.

Issues

[15] Did the General Division make an error of law in how it analyzed the Claimant's availability?

Analysis

[16] 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]

[17] The Claimant asserts that the General Division made an error of jurisdiction, an error of law, and an important error of fact.

Error of Jurisdiction

[18] The Claimant's reasons for appeal and his submissions do not reveal any error of jurisdiction.

[19] An error of jurisdiction is where the General Division considers some issue that it has no authority to consider, or where it fails to consider an issue that it was required to consider.

[20] The only issue before the General Division was whether the Claimant was entitled to sickness benefits. It had to consider whether he was unable to work because of illness and whether he would have been available for work if he had not been ill. The General Division considered both these issues and did not stray into other issues.

[1] This is a plain language version of the three grounds. The full text is in section 58(1) of the *Department of Employment and Social Development Act* (DESDA).

[21] The General Division did not make an error of jurisdiction.

Error of law

[22] At the Appeal Division, the Commission acknowledged that the General Division might have made an error in how it evaluated the job search factor. However, it maintained that the appeal should still be dismissed because the General Division decision would have been the same regardless. It relied on its argument that the Claimant was not otherwise available because he was not legally authorized to work.

– Application of Faucher test

[23] The EI Act does not define "available for work," so the courts chose to apply three factors to define availability. These factors came to be known as the *Faucher* test.[2] The Commission applies this test to evaluate whether a claimant is available for work.

[24] The Claimant argued that the General Division made an error of law in how it applied the *Faucher* test to his circumstances.

[25] As the General Division noted, the first *Faucher* factor is whether a claimant has a desire to return to work. The second factor is whether they express that desire through their job search efforts. The third factor is whether they have set personal conditions that unduly limit their chances of returning to employment.

[26] The courts developed the *Faucher* test for the purpose of assessing the availability of claimants for *regular* benefits. Regular benefit claimants are claimants who are both available for work and capable of work. They are not prevented from working because of illness or injury.

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[2] See *Faucher v. Canada (Employment and Immigration Commission)* A-56-96, A-57-96.

[27] Sickness benefits are only available to claimants who are too ill to work. It is self-evident that a claimant who is too ill to work will be unlikely to satisfy one or more of the *Faucher* factors. However, the General Division did not require the Claimant to show that he actually met the *Faucher* factors. Instead, it required the Claimant to prove that he *would have* met each of the *Faucher* factors if he had not been ill.

[28] A few older Umpire decisions support this approach.[3] These decisions employed the *Faucher* criteria for availability in the context of a claimant who cannot work because of illness.

[29] At the same time, the "otherwise available" analysis does not **require** the application of the *Faucher* test. Decisions of the Umpire may be persuasive, but they do not bind the Tribunal. To my knowledge, no binding authority has applied the *Faucher* test for the purpose of evaluating whether a sickness benefit claimant is "otherwise available."

[30] In my view, the *Faucher* test is ill-suited to the purpose of evaluating whether a claimant would otherwise be available. In her oral arguments to the Appeal Division, the Commission representative acknowledged that the question of whether a sickness benefit claimant is "otherwise available" cannot be considered in the same way as a regular benefit claimant's availability.

[31] When used to determine the availability of workers who are claiming regular benefits, the *Faucher* test evaluates both the claimant's intention (whether they would have had a desire to return to work if not for their illness), and their actions (in terms of their job search or whether they may have set limiting conditions on the work they would accept).

[32] But, in the "otherwise available" context, the *Faucher* factors are generally addressed to the claimant's intention, requiring them to prove what their intention would have been in circumstances which are necessarily hypothetical (except where the

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[3] See Canadian Umpire Reports, CUB 59838, CUB 68162, and CUB 70058.

claimant is already committed to some course of action that interferes with their availability).

[33] The *Faucher* test may be useful in that uncommon situation where the claimant actually admits that they would not have satisfied one of the factors even if they had not been ill (or there is sufficient credible evidence that they made such an admission), or where they have resolutely committed to a course that would prevent them from satisfying one of the factors - regardless of their illness. Where such evidence exists, the *Faucher* test could be used to rule out availability.

[34] A claimant may assert that they would have satisfied each *Faucher* factor if they had not been ill, but it would probably be difficult to find other evidence to support that assertion.

[35] In this case, the General Division found that the Claimant failed to show that he would have met the second and third *Faucher* factors. If found that he did not show that he would have searched for work or that he would not have set personal conditions that were unduly limiting.

– **Demanding standard of proof**

[36] This brings me to one of the General Division's errors of law.

[37] The Claimant questioned what sort of proof could have satisfied the General Division.[4] It is a good question.

[38] To meet the "job search" factor in the *Faucher* test, the General Division required the Claimant to show that he would have made an "appropriate" and "sufficient" "active," "on-going and wide-ranging," job search.[5]

[4] See GD5-1.
[5] See para 27 of the General Division decision.

[39] In so doing, the General Division misinterpreted the meaning of "otherwise available" and made an error of law. It held the Claimant to a more demanding standard of proof than that which is required or implied by the law.

[40] It is one thing for a claimant to credibly assert their hypothetical availability in general terms, or even to assert that they would have looked for work in general terms. But it is unreasonable to expect a claimant to credibly establish – not only that they would have looked for work – but that their job search would have been appropriate, sufficient, active, and on-going and wide ranging.

[41] It almost appears that the General Division expected the Claimant to provide evidence of some kind of actual and acceptable job search while he was ill, as proof of how extensive his job search would have been if he had not been ill.

[42] As noted, the application of the *Faucher* test is not strictly necessary to interpret "otherwise available." But if these criteria are used to evaluate whether a claimant is "otherwise available," they should be applied delicately, given the inherent difficulty in proving a hypothetical.

[43] The factor concerned with "job search efforts" cannot require sickness benefit claimants to prove their hypothetical job search **in detail**. The General Division should not have required the Claimant to prove that his job search would have been appropriate, sufficient, active, on-going and wide-ranging.

[44] If a claimant is to prove that he was "otherwise available" in circumstances where there is nothing to show that he was not, the burden of proof must be light.

– **Irrelevant factors**

[45] The General Division also made an error of law because it considered an irrelevant factor.

[46] In concluding that the Claimant did not meet the second *Faucher* factor, the General Division stated that it "[could] not ignore the Claimant's statement that he was

not aware he would need to prove that he would have been able to meet the *Faucher* factors but for his illness …"

[47] Since the General Division said it could not ignore the Claimant's statement, it is clear that the statement was relevant to its decision. However, the General Division did not explain how it was relevant – and it is not obvious. A claimant may be in a better position to *prove* that they were available if they knew what they would be expected to prove. But whether they would have been available does not depend on what they knew about what they would have to prove.

[48] The General Division either took into consideration something that it ought not to have considered, or it failed to provide adequate reasons. The General Division did not explain how the Claimant's knowledge, or lack of knowledge, affected its decision.

Important error of fact

– Evidence of job search

[49] The Claimant asserted that the General Division overlooked evidence of his job search. He submitted emails and screenshots from May and June 2022, to show that he was looking for work even while he was ill. He had also testified that his condition affects his ability to look for work, as not just ability to work.

[50] The General Division referred to those particular efforts.[6] However, it did not accept that they were sufficient to show that he would have made enough effort to find work if he had not been ill.[7]

[51] The General Division did not make an error of fact by overlooking the Claimant's job search evidence.

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[6] See General Division decision at para 25.
[7] See General Division decision at para 23.

– **Other reasons the Claimant was not available**

[52] However, the General Division did make an important error of fact in finding that the Claimant's illness was not the only reason she was not available.

[53] The Claimant's study permit gave him temporary legal status in Canada so that he could study. It required him to leave the country by July 31, 2022.[8] It also allowed him to work under certain conditions. The Claimant could accept full-time employment during school breaks and could work up to 20 hours per week during school sessions, but only if he was a full-time student.[9] It required that he cease work if he was no longer a full-time student.

[54] The Claimant was required to comply with the conditions of the study permit, but neither his failure to go to class, nor his withdrawal from school, operates to revoke or change the conditions of the permit.[10] Had the Claimant recovered from his illness and been able to re-enroll in school, the existing permit authorized him to return to work.

[55] At the General Division, the Commission used the language of the third *Faucher* factor to argue that his "immigration conditions" were personal conditions that unduly limited him from seeking and accepting work.[11] In doing so, the Commission omitted part of the language that defines the third *Faucher* factor.

[56] The third *Faucher* factor considers whether a claimant has **set** personal conditions that unduly limit their ability to re-enter the labour force. Even if the conditions of a study permit may properly be considered as a "personal condition," it is clear that these conditions are set by the Government of Canada, not the claimant.

[57] The General Division was more precise. It found that the Claimant had set personal conditions that unduly limited his job search *by withdrawing from school*. The

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[8] See copy of permit at GD3-26.
[9] See section 186(f) and (v) of the *Immigration and Refugee Protection Regulations* (Immigration Regulations).
[10] See section 183(4) of the Immigration Regulations.
[11] See GD4-5.

General Division said that the Claimant's withdrawal from school meant that he could not work under the terms of his study permit.

[58] However, the Claimant's withdrawal could only have been "setting a personal condition" if he were making a personal choice. If the Claimant's illness meant that he had no choice but to withdraw from school, he was not setting a personal condition.

[59] The General Division did not analyze why the Claimant left school, or how his leaving was "setting a personal condition." However, it summarized some of the Claimant's evidence earlier in its decision. According to the General Division, the Claimant said that the only reason he left school was to avoid an "F" grade on his academic record.

[60] It is correct that the Claimant testified that he had wanted to avoid an "F." This was why he asked the school to make his withdrawal effective retroactively to mid-November. However, he said this as part of an argument that he should be considered a student for the entire term.

[61] The General Division made an error when it ignored evidence that the Claimant left school because of his illness. The Claimant had agreed with the member that he was unable to continue work and school *for medical reasons*.[12] He also said that he had hoped he would be able to register again in January but that he was still too ill.[13]

[62] This omission is relevant to the decision. The General Division stated that the Claimant could not be "otherwise available" unless his illness was the **only reason** that he was not available." But it is more accurate to say that the Claimant would not be "otherwise available" if there were other reasons for his unavailability that were **independent** of his illness.

[63] If the General Division had accepted that the Claimant withdrew because of his illness, then the loss of his legal ability to work would have also been because of his

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[12] Listen to the audio recording of the General Division hearing at timestamp: 14:10.
[13]Listen to the audio recording of the General Division hearing at timestamp: 19:45.

illness. The Claimant would have been otherwise available because he would have been available **but-for** the illness. The illness and the other consequences of the illness together could have been understood as a single reason.

[64] The General Division decision itself uses language suggesting that such a "but-for" analysis is appropriate. In its consideration of the second *Faucher* factor, the General Division said that it "saw nothing to show the Claimant would have made enough effort to find a suitable job if he were not ill." This is essentially the same as saying that he had to show he would have made enough effort "if his illness had not prevented him from making enough efforts" or, he would have made enough effort, "but for his illness."

[65] I am not alone in the use of a but-for analysis. Other Tribunal and Umpire decisions support this analysing "otherwise available" in this way.[14] One General Division decision involved an injured claimant who chose not to renew her work permit because she could not have worked anyway. The General Division applied a but-for test in its analysis, and found she would have renewed her work permit but-for her injury.[15]

[66] I recognize that the Appeal Division overturned this General Division decision in *GS*.[16] It found that the General Division's but-for analysis contradicted its own statement that the claimant's illness must be the only reason that they were not available. When the Appeal Division substituted its decision, it found the claimant was not otherwise available because she knew her work permit was going to expire but chose not to renew. The Appeal Division said another way to look at it is that the claimant unduly limited her chances of returning to work by not applying to renew.

[67] However, the circumstances in this case are significantly different from *GS*. In the facts of the Appeal Division decision, the claimant's injury did not prevent the claimant from applying for the work permit. While it influenced her decision to not apply for legal

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[14] See the Appeal Division decision in *B.D. v Canada Employment Insurance Commission*, 2019 SST 1396, at para 26 and 59, where the but-for test was used. Likewise, the former Umpire applied a but-for test in Canadian Umpire Benefits (CUB) 10602, and CUB 17784.
[15] See *GS v Canada Employment Insurance Commission*, 2021 SST 865, at para 39.
[16] See *Canada Employment Insurance Commission v GS,* 2022 SST 32.

status to work, it did not require her to make that decision. She had a choice. Her legal ability to work did not depend on her physical ability to work. It was an independent reason for her non-availability.

[68] In this case, the Claimant did not have a choice. His illness required him to withdraw from school, which meant that he could not work under his study permit. The Claimant's illness is the reason he could not work legally, so it is all one reason. This decision is not inconsistent with the Appeal Division's decision in *GS*.

[69] I have found that the General Division made errors of law and an error of fact. These errors have the potential to affect the outcome of the appeal. That means that I must allow the appeal. And I must now consider what is the appropriate remedy.

Remedy

[70] I have to decide how to correct the General Division errors. I have the power to make the decision that the General Division should have made, or I can send the matter back to the General Division for reconsideration.[17]

[71] The record is complete. I have all the information that I require to decide the question of whether the Claimant was otherwise available, so I will make the decision that the General Division should have made.

The Claimant is medically incapable

[72] The Commission agreed that the Claimant was medically incapable of work because of his chronic migraine condition, and I accept this as fact.

[73] However, the Commission also said, that even if the Claimant had not been ill, he would not have been available for work. This was because the Claimant's study permit allowed him to work only so long as he was a full-time student. The Commission suggested that his legal inability to work was sufficient to establish that he was not available.

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

The Claimant is "otherwise available"

[74] The Claimant said that he would have been available if he had not been ill. He also said that he would not have had to look for work because he would still have been working. He testified that he stopped going to school at the same time as he stopped working. He said that his medical condition was the reason that he could not go to school and that he could not legally work.

[75] Even though the Claimant applied for sickness benefits because he was too ill to work, he must still prove that he would have been available for work if he had not been ill.

[76] Not many sickness benefit claimants will offer much in the way of corroborative or supportive evidence to establish their hypothetical intentions in hypothetical circumstances. For this reason, I accept that it is enough that the Claimant has asserted that he would have been available. This satisfies his *evidentiary* burden and shifts the burden to the Commission to prove that he would **not** have been available.

[77] At the same time, I note that the Claimant offered more than a bald assertion of availability. He supplied some positive evidence to suggest that he would have been available. The Claimant left work when he became ill in mid-November but was not removed as an employee until December.[18] He testified that he would have gone back to work if he got better.[19] He asked how he could pay his bills if he did not work, implying that he needed to work.[20] He also testified that he had been searching for jobs despite his illness[21] because EI was taking so long,[22] but that he had only found jobs that would require him to do full shifts.[23] He explained that he could not work until the afternoon because of his migraines.[24] He recalled one particular opportunity that he did

[18] Listen to the audio recording of the General Division hearing at timestamp: 13:40
[19] Listen to the audio recording of the General Division hearing at timestamp: 19:45
[20] Listen to the audio recording of the General Division hearing at timestamp: 36:45.
[21] Listen to the audio recording of the General Division hearing at timestamp: 38:15.
[22] Listen to the audio recording of the General Division hearing at timestamp: 35:00.
[23] Listen to the audio recording of the General Division hearing at timestamp: 35:35.
[24] Listen to the audio recording of the General Division hearing at timestamp: 37:10.

not pursue because it would have required him to do heavy work for long shifts including the morning.[25]

– **Withdrawal between mid-November 2022 and January 6, 2022.**

[78] The Claimant asserted that the terms of his study permit did not prevent him from working until the school confirmed his withdrawal, so he was "otherwise available."

[79] The Claimant's study permit allowed him to work so long as he was a "full-time student." The *Immigration Act* and the *Immigration and Refugee Protection Regulations* do not define "full-time" student. Citizen and Immigration Canada (Immigration) requires study permit holders to be actively pursuing their studies.[26] However, Immigration uses this provision for the purpose of verifying whether a foreign student may remain in Canada. I do not need to consider whether the Claimant might take some period of temporary medical leave and still be considered to be actively pursuing his studies (that is, without invalidating his status in Canada). In this case, the Claimant study permit that was apparently valid until July 31, 2022, and was able to remain in Canada.

[80] In my view, it is not relevant that the Claimant may have stopped going to class or otherwise stopped working on his studies in mid-November 2021. Nor does it matter that the school eventually agreed to his retroactive withdrawal to protect his academic record.

[81] By mid-November, the Claimant could no longer pursue his studies and requested that he be withdrawn. However, this does not mean the terms of his study permit immediately prohibited him from working. He was not officially "withdrawn" until his school agreed that he was withdrawn, which was not until February 2022. Until then he might have rescinded his request to withdraw, or the school might have refused to withdraw him. This would be true regardless of whether he was attending classes, writing examinations, or completing any other program requirement.

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[25] Listen to the audio recording of the General Division hearing at timestamp: 38:20.
[26] See section 220.1(1) of the *Immigration and Refugee Protection Regulations.*

[82] The Claimant remained a full-time student for as long as his school considered him a full-time student. He could continue working under the terms of his study permit until he either failed to enroll in January or until the school officially withdrew him. Had he continued to work from November 15, 2021, to the date the school finally decided on his withdrawal, the school's pronouncement that the withdrawal was "retroactive" would not suddenly change his authorized employment (from mid November 2021 to the date the withdrawal was accepted) into unauthorized employment.

[83] I accept that the Claimant was legally authorized to work until at least January 6, 2022, the date he was expected to re-enroll if he were to continue his studies.[27] There is no other evidence to rebut his own evidence that he would have been available until January 6, 2022.

– **Failure to enroll after January 6, 2022**

[84] The terms of the Claimant's study permit did not permit him to work unless he was a full-time student. However, he would still have been a full-time student for the term starting on January 6, 2022, but for his illness.

[85] I accept that the Claimant would have neither withdrawn from the 2021 fall term, nor failed to register for the term beginning in January 2022, if he had not been ill. He testified that his migraines had caused him to miss exams in the fall term.[28] He said he had been hoping his condition would improve to where he could register in January, but that his illness did not improve. He also noted that he could not afford to re-enrol because he had no income. His illness had forced him to leave his job, and he said he was not getting funding from Employment Insurance.[29]

[86] I also accept that the Claimant's illness was the underlying reason that he was not available for work. There is no evidence that there was any reason the Claimant would not have been available, that would have existed if he had not been ill. But for his illness, he would have stayed in school (and re-enrolled in the January term) and would

[27] Listen to the audio recording of the General Division hearing at timestamp: 45:25.
[28] Listen to the audio recording of the General Division hearing at timestamp: 22:05.
[29] Listen to the audio recording of the General Division hearing at timestamp: 22:30.

have been able to work under the terms of his study permit. This means that I do not accept that the limiting terms of his study permit are a separate reason that he was not available for work.

[87] I appreciate the Commission's position that the Claimant's illness must be the only reason that he is not available for work. I agree with this, except that I do not think the illness can be considered without regard for its direct consequences. The Claimant's migraines cannot be considered in isolation from how they interfered with his ability to study, how this caused him to withdraw from school, and how his withdrawal precluded him from legally working.

[88] I am persuaded by the other decisions I have mentioned that the appropriate test is whether the Claimant would have been available but-for the illness.[30] In one of those decisions, a sickness benefit claimant let her work authorization expire and did not renew it because her injuries prevented her from working regardless.[31] The Appeal Division held that she was "otherwise available" despite the fact that she could not work without a valid work authorization.

[89] The Claimant's study permit expired in July 2022, and he had still not renewed by the General Division hearing. When the permit expired, the Claimant's inability to meet the conditions of the permit would not matter. He would not have been able to work because he would have no permit at all.

[90] However, I do not need to decide whether he would have been "otherwise available" at the time that he failed to renew his study permit. Sickness benefits are for a maximum of 15 weeks and the Claimant's condition was apparently persistent.[32] His entitlement would have ceased long before his permit expired.

[91] I have considered the Claimant's assertions that he would have been available, that he needed to support himself, and that he made some efforts to try to find some

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[30] Those decisions do not bind me, and I am not required to follow them, but I have chosen to apply them.
[31] Canada Employment Insurance Commission v GS, *supra* note 11.
[32] See section 12(3)(c) of the EI Act.

work within his limitations. I accept that he would have worked if he were medically capable of doing so.

[92] I accept that the Claimant was “otherwise available” from November 15, 2021, to January 6, 2022, but also beyond January 6, 2022, until he exhausted the 15 weeks of sickness benefits that were available in total.

Conclusion

[93] I am allowing the appeal.

[94] The Claimant was medically incapable and “otherwise available” for work from the time he stopped working on November 15, 2021, at least until his study permit expired. That means he was entitled to the full 15 weeks of sickness benefits available under the law.

Stephen Bergen
Member, Appeal Division