Citation: *AS v Canada Employment Insurance Commission*, 2024 SST 148

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	A. S.
Representative:	H. S.
Respondent:	Canada Employment Insurance Commission
Representative:	Isabelle Thiffault

Decision under appeal:	General Division decision dated July 4, 2023 (GE-23-1133)

Tribunal member:	Solange Losier
Type of hearing:	Teleconference
Decision date:	February 16, 2024
File number:	AD-23-675

Decision

[1] The appeal is dismissed. The General Division made an error of law.

[2] I am giving the decision it should have given and reached the same conclusion. The Claimant has not proven that he was available for work. This means that he is not entitled to get Employment Insurance (EI) regular benefits.[1]

Overview

[3] A. S. is the Claimant. He is a high school student and he applied for EI benefits when he stopped working.

[4] The Canada Employment Insurance Commission (Commission) retroactively decided that he was not entitled to get EI benefits because he had not proven that he was available for work while he was in school.[2]

[5] The Claimant appealed to the Tribunal's General Division and it concluded that he was not entitled to get EI benefits for the same reason.[3]

[6] The Claimant appealed the General Division's decision to the Appeal Division. He argues that the General Division made several errors.[4]

[7] The General Division made an error of law when it misinterpreted the case law dealing with availability. This allows me to give the decision: The Claimant was not available for work and is not entitled to the EI benefits he received.

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[1] See section 18(1) of the *Employment Insurance Act* (EI Act). This results in a disentitlement to Employment Insurance benefits.
[2] See Commission's initial decision at page GD3-27 and Commission's reconsideration decision at page GD3-38.
[3] See General Division decision dated July 3, 2023 at pages ADN1A-1 to ADN1A-15. This file was previously heard by the General Division (file GE-22-2571). The Claimant appealed that decision to the Appeal Division (file AD-22-976). The Appeal Division found that the General Division had made errors, so it was returned back to the General Division for reconsideration. The decision under appeal today is the General Division's subsequent decision dated July 4, 2023 (file GE-23-1133).
[4] See application to the Appeal Division at pages ADN1-1 to ADN1-29. The Tribunal asked the Claimant for more information about his application to the Appeal Division and his reply is at page ADN1B-1.

Issues

[8] The issues in this appeal are:

a) Did the General Division make a reviewable error when it decided that the Claimant was not available for work?

b) If so, how should the error or errors be fixed?

Analysis

[9] The Appeal Division can only consider reviewable errors that fall within one of the following grounds of appeal:[5]

- made an error in law
- based its decision on an important error of fact
- proceeded in a way that was unfair
- acted beyond its powers or refused to exercise those powers

[10] Any of these types of errors would allow me to intervene in the General Division decision.[6]

– The Claimant argues that the General Division made several errors

[11] At the Appeal Division hearing, the Claimant did not speak and instead permitted his father as his Representative to speak on his behalf. So, when I refer to the Claimant in this decision, I am referring to what his Representative, his father argued on his behalf.

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[5] The grounds of appeal are found in section 58(1) of the *Department of Employment and Social Development* (DESD Act).
[6] See section 59(1) of the DESD Act.

[12] The following is a summary of the Claimant's written arguments and oral arguments made at the Appeal Division hearing:[7]

- He was unfairly targeted by the Commission after making a mistake on one of his bi-weekly reports. It was an honest mistake and he wasn't trying to scam anyone.
- The Commission told him that he didn't have enough hours to get EI benefits.
- He wants the Commission to provide information about the total number of students that collected EI for that particular year.
- He says that the government gave EI benefits to everyone whether someone was eligible or not.
- The General Division put words in his mouth and twisted the law to make him lose. It confused the term "training" versus "education."
- The General Division ignored all the facts on "favour 2" and took sides with the Commission.
- Nobody has helped him with his case, including giving him case law that could help him. He is not a lawyer and they don't have the money to hire a lawyer.
- He was prevented from fully presenting his case at the General Division because he couldn't talk about the past.
- Lastly, he submits that he has proven he was available for work, unable to find a job and entitled to EI benefits.

– **The Commission argues that the General Division didn't make any errors**

[13] The Commission argues that the Claimant's appeal should be dismissed because the General Division didn't make any reviewable errors.

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[7] See pages ADN01-1 to ADN01-29 and ADN01B-1.

[14] The following is a summary of the Commission's written arguments and oral arguments at the Appeal Division hearing: [8]

- The General Division didn't make any reviewable errors when it found that he was not available for work.
- The General Division weighed all the evidence that was before it and applied the correct legal test to determine whether the Claimant was available for work while going to school full-time.
- The Commission submits that the recent Federal Court of Appeal (FCA) decision called *Page* is distinguishable from the facts from this case.[9]

Did the General Division make a reviewable error when it decided that the Claimant was not available for work?

– **The General Division did not proceed in a way that was unfair to the Claimant**

[15] One of the things the Claimant argues is that he was prevented from fully presenting his case at the General Division because he couldn't talk about the past. Also, he also says that nobody has helped him with his case, including giving him case law that could help him.

[16] Here, the Claimant is essentially arguing that the General Division didn't follow a fair process. This is a reviewable error that I can consider.[10]

[17] The right to a fair hearing before the Tribunal includes certain procedural protections. This includes a right to an unbiased decision maker, the right of a party to know the case against him or her and to be given an opportunity to respond to it.

[18] I reviewed the file, the General Division decision and listened to the audio recording from the hearing. The hearing lasted 58 minutes.

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[8] See pages ADN04-1 to ADN04-5.
[9] See *Page v Canada (Attorney General),* 2023 FCA 169.
[10] See section 58(1)(a) of the DESD Act

[19] The Claimant doesn't say what information from the past that he was prevented from talking about at the General Division hearing.

[20] But, the audio recording from the General Division hearing shows that the Claimant testified and that his Representative also had a chance to present all of his arguments. So, there is no evidence that that he was unable to fully present his case (or, "talk about the past") at the General Division hearing.

[21] The audio recording also shows that the General Division asked the Claimant if he understood the law on availability. When it was clear that he did not understand, the General Division explained the law on availability and the three *Faucher* factors that it would be considering.[11]

[22] The General Division also gave the Claimant an opportunity to submit more information about the jobs he applied for after the hearing took place.[12] The Claimant said that he would send it to the Tribunal by the deadline. In its decision, the General Division noted that he failed to provide any additional documents after the hearing to support his job search efforts.[13]

[23] There is no evidence that the General Division proceeded in a way that was unfair to the Claimant. The process and hearing held by the General Division was fair.

[24] The General Division is an independent and impartial decision-maker, so it cannot conduct legal research for the Claimant or act on behalf of any of parties.

[25] Accordingly, I find that the General Division did not proceed in a way that was unfair to the Claimant. There was no breach of natural justice.[14]

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[11] Listen to audio recording at 5:26 to 10:38.
[12] Listen to audio recording at 41:10 to 43:25.
[13] See paragraphs 11-13 of the General Division decision.
[14] See section 58(1)(a) of the DESD Act.

– **The General Division made an error of law when it decided that the presumption could only be rebutted with a history of full-time work**

[26] One of the ways that an error of law happens is when the General Division doesn't follow the law correctly, or applies the law but misunderstands what it means or how to apply it.[15]

[27] The General Division stated the relevant law and legal test in its decision.[16] It said that full-time students are presumed to unavailable for work.[17] It explained that the presumption could be overcome in exceptional circumstances or if the person had a history of working full-time and being in school or training full-time.[18]

[28] The General Division found that the Claimant was a full-time student because he was in school from Monday to Friday for around 35 hours a week.[19] It said that the presumption of non-availability applied to him, unless otherwise proven.[20]

[29] The General Division considered whether working part-time could rebut the presumption or was an exceptional circumstance. However, it was not satisfied that the presumption could be overcome by showing a history of part-time work.[21]

[30] It decided that part-time work during evenings and weekends would not be considered when determining if a claimant has rebutted the presumption of non-availability.[22]

[31] It also found that working part-time was not an exceptional circumstance.[23]

[32] The General Division explained why it found that the presumption could not be rebutted by working part-time. It said that the FCA always refers to full-time work in its

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[15] See section 58(1)(b) of the DESD Act.
[16] See paragraphs 15-22 of the General Division decision.
[17] See paragraphs 20-21 of the General Division decision.
[18] See paragraph 32 of the General Division decision.
[19] See paragraph 27 of the General Division decision.
[20] See paragraphs 29-30 of the General Division decision.
[21] See paragraphs 31-36 of the General Division decision.
[22] See paragraphs 39-40 of the General Division decision.
[23] See paragraph 37 of the General Division decision.

decisions about rebutting the presumption of non-availability by proving a work history while attending school or training.[24] It also found no cases where the Court accepted that part-time work history as an exceptional circumstance in order to rebut the presumption.[25]

[33] However, in a recent decision called *Page*, the FCA reviewed existing principles of availability for work while attending school and the presumption of non-availability.[26]

[34] In *Page*, the FCA confirms there is a rebuttable presumption that claimants who are attending full-time studies are not available for work.[27] It says that a "contextual analysis" is required in order to decide whether it is rebutted and that is a factual determination.[28]

[35] The Court provides some specific examples of fact patterns where the presumption has been successfully rebutted and they include the following:[29]

- When a claimant indicates a willingness to give up their studies to accept employment;
- Where a claimant has a history of being regularly employed while attending school and is searching for employment at hours similar to those formerly worked;
- The ability of a claimant to follow classes online at a time of their choice.

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[24] See paragraphs 35-36 of the General Division decision.
[25] See paragraphs 37, 38 and 40 of the General Division decision.
[26] See *Page v Canada (Attorney General),* 2023 FCA 169. In *Page*, the FCA set aside the Appeal Division's decision and reinstated the General Division decision that found he was available for work and entitled to EI benefits.
[27] See *Page v Canada (Attorney General),* 2023 FCA 169, at paragraph 67. Also, the presumption only applies to claimants who don't fall under section 25(1) of the EI Act (which deals with employment support measures).
[28] See *Page v Canada (Attorney General),* 2023 FCA 169, at paragraphs 68 and 69.
[29] See *Page v Canada (Attorney General),* 2023 FCA 169, at paragraph 69. The Court notes that there might be considerations that might be relevant.

[36] Importantly, the FCA says that there is no bright line rule establishing that full time students who must attend daytime classes from Monday to Friday are not entitled to EI benefits.[30] It points out that students pay EI premiums on their part-time wages as well, so there are circumstances where they can collect EI benefits.[31]

[37] The Commission argues that the *Page* decision doesn't apply here because the facts are different.[32] For example, it says that the Claimant in this case wasn't available to work 40 hours a week, like Mr. Page was.

[38] The Commission also argues that Mr. Page had a longer work history, of around 26 weeks and had worked irregular hours for years, unlike the Claimant in this case. It says that the Mr. Page at one point worked three jobs while simultaneously attending school.

[39] Since I wasn't sure if the Claimant and his Representative had a copy of the recent *Page* decision, the Tribunal sent them a copy so that they could review it in advance of the Appeal Division hearing.[33]

[40] At the Appeal Division hearing, the Claimant and his Representative confirmed receiving a copy of the *Page* decision, but said that they hadn't read it. So, they didn't have anything specific to say about the case.

[41] I acknowledge that the General Division didn't have the *Page* decision to consider when it issued its decision.

[42] The *Page* case says that one must take a contextual approach to determine if the presumption was rebutted. So, that means that the General Division should have considered the Claimant's part-time work schedule and irregular hours when it was assessing whether he had rebutted the presumption of non-availability. As the Court

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[30] See *Page v Canada (Attorney General),* 2023 FCA 169, at paragraphs 55 and 72.
[31] See *Page v Canada (Attorney General),* 2023 FCA 169, at paragraph 71.
[32] See Commission's submissions at ADN1-1 to AND1-5.
[33] See pages ADN5-1 to ADN5-3.

notes there is no bright line rule establishing that full time students who have to attend daytime classes from Monday to Friday are not entitled to EI benefits.

[43] I find that the General Division made an error of law when it decided that a Claimant who is relying on their work history to rebut the presumption can only rely on a history of full-time work only.[34] The *Page* decision tells us that we have to take a contextual approach, so the Claimant's part-time work history was relevant to its determination of whether he had rebutted the presumption.

[44] I have found an error of law, so I don't need to consider any other errors that the Claimant says the General Division made. I will now consider how to fix the error.

Remedy – how to fix the error

[45] There are two options for fixing an error made by the General Division.[35] I can either send the file back to the General Division for reconsideration or give the decision that the General Division should have given.

[46] The Claimant says that the matter should go back to the General Division for reconsideration because the Appeal Division does not have all the information to make the decision. He explains that things have been dragging on for over a year and he deserves a new hearing.

[47] In the alternative, the Claimant says that if I am going to make a fair decision, then I should do that instead of sending it back to the General Division for reconsideration.

[48] The Commission says that the Appeal Division should render the decision that the General Division should have given. It says that the record is complete.

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[34] See section 58(1)(b) of the DESD Act.
[35] See section 59(1) of the DESD Act.

– **I will render the decision the General Division should have given**

[49] I am satisfied that the record is complete. This file has already been before the General Division twice. The Claimant had a full opportunity to present his case before the General Division. If there had been a breach of natural justice, then it would usually mean the matter has to be returned to the General Division. However, I have already found that there was no breach of natural justice.

[50] So, I will substitute my decision for the General Division's decision. This means that I can decide whether the Claimant was available for work within the meaning of the EI Act and make necessary findings of fact.

The Claimant is not entitled to the EI benefits he received

[51] A person who wants EI regular benefits has to show that they are "capable of and available for work" but aren't able to find a suitable job.[36]

[52] The EI Act doesn't define what it means when it says "available." There are three factors to guide the Tribunal's assessment of a person's availability. As noted above, these are often called the *Faucher* factors:[37]

- 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 unduly (overly) limit their chances of going back to work?

[36] See section 18(1)(a) of the EI Act.
[37] See *Faucher* v *Canada Employment and Immigration Commission*, A-56-96 and A-57-96

– There is a rebuttable presumption that Claimants attending school full-time are not available for work

[53] The law presumes that full-time students are unavailable for work.[38] This is a rebuttable presumption and whether it is rebutted is a factual one.[39]

[54] I find that the Claimant is a full-time high school student, so the presumption that he is not available for work applies. The Claimant does not dispute this fact.

[55] I will now consider whether the Claimant has rebutted the presumption. The Tribunal has to take a contextual approach to determine whether the presumption is rebutted.

[56] The FCA in the *Page* decision says that the presumption has been successfully rebutted in fact patterns where a claimant indicates a willingness to give up their studies to accept employment, or where a claimant has a history of being regularly employed while attending school and is searching for employment at hours similar to those formerly worked, or the ability of a claimant to follow classes online at a time of their choice.[40]

[57] I will review whether any of these fact patterns are present in this case.

[58] First, the Claimant told the Commission and testified at the General Division that if he got a job and it conflicted with his school, he was not willing to give up his studies for a job.[41]

[59] Second, there is no indication in the record that the Claimant was able to attend his high school classes online or follow classes online at a time of his choice.

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[38] See *Landry* v *Canada (Attorney General)* (1992), 152 NR 121 (FCA); *Canada (Attorney General)* v *Primard*, 2003 FCA 349; *Canada (Attorney General)* v *Rideout*, 2004 FCA 304 at paragraph 3; *Canada (Attorney General)* v *Gagnon*, 2005 FCA 321 at paragraph 6; *Duquet* v *Canada (Employment and Immigration Commission)*, 2008 FCA 313; and *Canada (Attorney General)* v *Cyrenne*, 2010 FCA 349.
[39] See *Page v Canada (Attorney General),* 2023 FCA 169, at paragraphs 67 and 68.
[40] See *Page v Canada (Attorney General),* 2023 FCA 169, at paragraph 69.
[41] See pages GD3-21 and GD3-25 and listen to hearing recording at 45:43.

[60] Third, the Claimant has a history of working on a part-time basis while in high school, but according to the Commission it was only for a short period of time, of around 16 weeks.[42] They rely on three Records of Employment (ROE's) totalling 16 weeks of work for the Claimant which are part of the file.[43]

[61] The Claimant testified at the General Division that he started working at Western Restaurant in May 2021, this was his first job.[44] He agreed that he worked a maximum of 21 hours a week and most of those hours were on weekends, with some occasional hours after school on weekdays.[45]

[62] I find that the Claimant's usual employment was working part-time hours after school and on weekends, but not more than 21 hours a week. At the time, the evidence shows that he only had a work history of 16 weeks.

[63] I find that the Claimant has not rebutted the presumption. While he has some history of working after school and on weekends, it is only for a brief period. In my view, the Claimant does not have a history of being regularly employed while attending school. He was not willing to give up school for a job and there is no evidence that he could follow his classes online or at a time of his choice. Aside from the Covid-19 pandemic occurring at the time, I found no other circumstances to consider and none were raised.

[64] I will now consider the *Faucher* factors to determine whether the Claimant has proven that he was available for work.

– **The Claimant has shown that he wanted to go back to work as soon as a suitable job was available**

[65] I find that the Claimant has shown that he wanted to go back to work as soon as he could find a suitable job.

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[42] See page ADN4-5.
[43] See ROE's at pages GD3-19 to GD3-20; RGD4-4 to RGD4-6 and RGD6-4.
[44] Listen to hearing recording at 17:14 to 18:03.
[45] See paragraph 43 of the General Division decision and listen to audio recording at 21:36 to 25:03.

[66] He has shown that he wanted to find similar part-time work after school and on weekends. This is consistent with his testimony at the General Division hearing.[46] He explained that he was trying to save money for his education and future. As well, working provides him with some spending money.

[67] This means that he has met the first *Faucher* factor.

– **The Claimant has not made enough effort to find a suitable job**

[68] I find that the Claimant hasn't made enough effort to find a suitable job. I will explain why.

[69] The Claimant's efforts included distributing his resume to potential local employers, looking at help wanted advertisements and applying for part-time jobs that he saw posted.

[70] The Claimant testified at the General Division that he applied to and interviewed at the following places: [47]

- S*port Chek* in March 2022
- *Walmart* in Summer in 2022
- *Superstore* in August 2022
- *Volcom in September 2022*

[71] He applied to the *Dollarstore* in late August or September 2022 and *Footlocker* in October 2022, but he wasn't interviewed for a job.[48]

[72] The file shows that the Claimant applied for some jobs via a job searching website called *Indeed*. It shows that he applied at *Alley YMM, Supplement King,* and

[46] Listen to hearing recording at 27:53 to 28:44.
[47] Listen to hearing recording at 29:52 to 35:56.
[48] Listen to hearing recording at 35:25 to 35:56.

Fort McMurray Toyota.[49] He couldn't retrieve all of the jobs he applied for because he said that the *Indeed* website deletes them after a period of time.

[73] I agree that the Claimant made some efforts to find work, but I don't find that he made enough job applications during the relevant period.

[74] The period under review was approximately 6 months. He was disentitled to EI benefits from January 2, 2022 to June 27, 2022. However, it looks like he only applied for a few jobs during the relevant period.

[75] The Claimant testified that he applied to and interviewed at *Sport Chek* in March 2022, which was during the relevant period. But, it isn't clear whether the *Walmart* application and interview in Summer 2022 occurred before or after June 27, 2022.

[76] It is important to note that the job efforts he made outside of the period from January 2, 2022 to June 27, 2022 are not relevant, so I can't consider them.

[77] The documentation in the file shows that he applied for three jobs but it lacks some important detail.[50] For example, it does not show the dates the job applications were submitted to *Alley YMM, Supplement King,* and *Fort McMurray Toyota*. So, it isn't clear whether they were in fact submitted during the relevant period.

[78] Therefore, I find that the Claimant's efforts to find work were not sufficient for the period from January 2, 2022 to June 27, 2022. He has only established that he applied for a few jobs during the relevant period, which in my view is not enough. I acknowledge that some of his efforts included job searching, interviewing, distributing his resume and applying for jobs online and I have considered those efforts as well.

[79] This means that he has <u>not</u> met the second *Faucher* factor.

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[49] See pages RGD3-1 to RGD3-6.
[50] See pages RGD3-1 to RGD3-6.

– **The Claimant had personal conditions, but they did not unduly limit his chances of going back to work**

[80] The Claimant was a high school student who attended school during the day from Monday to Friday.

[81] I accept that school is a personal condition that he imposed, however I don't find that it unduly limits his chances of going back to work. His regular and usual employment prior to his job loss was part-time work on evenings and weekends. He was looking for similar type of work and hours. There is no evidence his school attendance unduly limited his chances of finding part-time work on evenings or weekends.

[82] This means that he has met the third *Faucher* factor.

Conclusion

[83] The appeal is dismissed. The General Division made an error of law.

[84] I have substituted with my decision and the result has not changed. The Claimant hasn't rebutted the presumption and has not met all three *Faucher* factors. For this reason, he has not proven he was available for work. He remains disentitled to EI benefits.

Solange Losier
Member, Appeal Division