Citation: *JF v Canada Employment Insurance Commission*, 2024 SST 662

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	J. F.
Representative:	K. M.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (467335) dated April 4, 2022 (issued by Service Canada)

Tribunal member:	Teresa M. Day
Type of hearing:	Teleconference
Hearing date:	June 10, 2024
Hearing participants:	Appellant Appellant's representative
Decision date:	June 12, 2024
File number:	GE-24-456

Decision

[1] The appeal is allowed.

[2] The Appellant has proven he was available for work from December 27, 2021. This means the indefinite disentitlement imposed on his claim must be rescinded.

[3] It also means the Appellant is **not** disentitled to employment insurance (EI) benefits during the 3 breaks in 2021/2022 school year, namely the December 2021 winter holiday break, March break 2022, and the summer break 2022.

Overview

[4] The Appellant works part-time as a bus driver. He was employed by X (X)[1], a company that provides school bus and local transport services.

[5] He worked driving kids to school until December 16, 2021, and then he was laid off for 2 weeks during the winter holiday break. He returned to work on January 3, 2022 and continued driving his school route until March 14, 2022, and then he was laid off for 1 week during March break. He returned to work on March 21, 2022 and continued driving his school route until June 30, 2022, and then he was laid off during the summer break. He returned to driving his school bus route on September 7, 2022.

[6] The Appellant applied for EI benefits and established a benefit period starting on December 26, 2021[2].

[7] But the Commission decided he couldn't be paid EI benefits on this claim because he was unwilling to leave his part-time job to accept a full-time position and, therefore, didn't prove he was available for work. It imposed an indefinite disentitlement on his claim starting from December 27, 2021[3].

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[1] The Appellant's representative advised that X was bought by X (which operates as X) in October 2022, at which time the Appellant transitioned to working for "X".
[2] See GD4-1.
[3] See GD3-19.

[8] This meant the Appellant was disentitled to EI benefits for the entire 52 weeks of his benefit period[4] and couldn't receive EI benefits for the periods he was laid off during the 3 breaks in the 2021/2022 school year[5].

[9] The Appellant asked the Commission to reconsider its decision. He said he wasn't looking for full-time employment because he was 68 years old and didn't want a full-time job.

[10] The Commission maintained the indefinite disentitlement on his claim. It said he didn't demonstrate he was available and "actively seeking employment with no undue restriction"[6]. The Appellant appealed that decision to the General Division of the Social Security Tribunal (Tribunal).

[11] The General Division decided the Appellant didn't prove he was available for work and upheld the indefinite disentitlement on his claim. The Appellant appealed that decision to the Tribunal's Appeal Division (the AD).

[12] The AD decided the General Division made errors and sent the appeal back to a different member of the General Division for a new hearing. The AD directed that both the Appellant and the Commission should be given an opportunity to address whether the indefinite disentitlement covered the 3 breaks during the 2021/2022 school year or whether the Appellant could prove he was available for work during the 3 breaks. If he could prove his availability, he would be entitled to EI benefits during the 3 breaks.

[13] The appeal was assigned to me. I gave the parties a chance to file information about all 3 breaks in the 2021/2022 school year[7]. Nothing further was filed by either party. The new hearing was held on June 10, 2024, and this is my decision.

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[4] Section 10(2) of the *Employment Insurance Act* (EI Act) says the length of a benefit period is 52 weeks. An **indefinite** disentitlement applies throughout a benefit period.
[5] When I refer to the 3 breaks in the 2021/2022 school year, I am specifically referring to the December 2021 winter holiday break, March break 2022, and the summer break 2022.
[6] See GD3-27.
[7] See RGD3.

Issues

[14] The Commission imposed an indefinite disentitlement on the Appellant's claim starting from December 27, 2021. But he's only requesting EI benefits for the 3 times he was laid off during 2021/2022 school year, namely during the December 2021 winter holiday break, March break 2022 and the summer break 2022. For the balance of his benefit period, he was working his usual hours and isn't asking for EI benefits.

[15] This means I must decide if he has proven he was available for work and entitled to EI benefits during:

a) the December 2021 winter holiday break;

b) March break 2022; and

c) the summer break 2022.

Analysis

[16] To be considered available for work for purposes of regular EI benefits, the Appellant must show he is capable of and available for work and unable to obtain suitable employment[8] .

[17] There is no question that the Appellant was ***capable*** of work during this time[9]. So I will proceed directly to the availability analysis to assess his entitlement to regular EI benefits for each of the 3 breaks in the 2021/2022 school year.

[18] The Federal Court of Appeal has said that availability must be determined by analyzing 3 factors:

a) the desire to return to the labour market as soon as a suitable job is offered;

b) the expression of that desire through efforts to find a suitable job; and

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[8] Section 18(1)(a) of the *Employment Insurance Act* (EI Act).
[9] There is no indication the Claimant was medically unable or otherwise prevented from working during any of the 3 breaks in the 2021/2022 school year.

c) not setting personal conditions that might unduly limit the chances of returning to the labour market[10] .

These 3 factors are commonly referred to as the "*Faucher* factors", after the case in which they were first laid out by the court.

[19] When I consider each of these factors, I have to look at the Appellant's attitude and conduct[11].

Issue 1: Was the Appellant available for work during the December 2021 winter holiday break?

Short answer:

[20] Yes, he was. The Appellant has satisfied all 3 *Faucher* factors to prove his availability during this period.

The evidence:

[21] Regarding his desire to return to work as soon as a suitable job is offered, the Appellant testified that:

- He's been working as a school bus driver for the past 10 years and "never missed a day of work".
- He only stops working when he's laid off during the annual school breaks for Christmas, March break and the summer.
- He always knows his return-to-work date when he's laid off, and always reports for work as soon as the kids are back in school after each break.
- He needs this part-time job because his retirement income from CPP and OAS isn't enough to meet his expenses. His wife has a part-time job, too – for the

[10] See *Faucher v. Canada (Employment and Immigration Commission)*, A-56-96.
[11] See *Canada (Attorney General) v. Wiffen*, A-1472-92.

same reason. In March 2023, he took a second part-time job because they need the money to survive.

- He's 70 years old and still has to work part-time. He provides security at the local "jail" on weekends and drives his school bus route during the week.

[22] Regarding his job search efforts during the December 2021 winter holiday break, the Appellant testified that:

- His last day of work was Friday, December 17, 2021.
- He knew schools were going to be closed for the next 2 weeks for the Christmas holiday break.
- When he finished work on December 17, 2021, the employer said there would be no work driving his school route over the next 2 weeks and asked him to report to work again on January 3, 2022. He confirmed he would do so.
- He believed his best and quickest chance of getting back to work was to report to work on his pre-determined and confirmed recall date.
- He also put his name forward "for charters" by telling the employer he was available to drive if there was any other work over the Christmas holidays, such as driving for daycares, sports teams, wedding parties or airport runs.

[23] Regarding any personal conditions that might have unduly limited his chances of returning to the labour market, the Appellant testified that:

- He was restricting himself to his regular and usual part-time employment as a bus driver because that's what he had been working at prior to being laid off and that's what he can manage at his age.
- He works 20 to 24 hours per week driving his regular school route, Monday to Friday.

- He occasionally gets a few additional hours driving “charters” or doing an airport run.

- This is what he can handle at his age (he was 68 at the time)

- He was also restricting himself to working for this employer because he knew he was only going to be laid off for 2 weeks and would then return to his regular job and usual hours of employment.

- He believed his best shot at returning to work as quickly as possible.

[24] I accept the Appellant’s evidence as credible in its entirety. He made an affirmation to tell the truth, and he was forthright and direct when he answered my questions. With the benefit of active adjudication during his testimony, the Appellant was able to provide important details and context about his employment history, how the employer communicated with him about lay-offs and returning to work, and the opportunities to drive “charters” in addition to his regular school route. His statements made sense in the circumstances and were consistent with the evidence and submissions on his appeal to the AD.

My findings

[25] I find that suitable work for the Appellant was part-time employment as a bus driver because this was his regular and usual employment for many years prior to his lay off. He established his claim for EI benefits based on his part-time employment and isn’t required to suddenly start looking for full-time employment in order to receive EI benefits.

[26] I further find the Appellant has satisfied all 3 *Faucher* factors for the December 2021 winter holiday break:

a) The evidence shows he wanted to go back to work as soon as suitable employment was available. The Appellant is an adult and needs to work to pay his bills and survive. His multi-year history of returning to work immediately upon

recall, along with his willingness to do drive charters during the school break amply shows the Appellant wanted to get back to work as soon as possible.

b) In a recent Federal Court of Appeal decision, the Court said there is no hard-and-fast rule that a claimant must immediately engage in a job search in all circumstances. There are situations in which claimants should be given a reasonable period before starting to look for work to see if they will be recalled[12]. This means that, in certain circumstances, a claimant may – for a reasonable period of time, consider the promise of being recalled as the most likely way to get a job again, and act accordingly. I find such circumstances existed for the Appellant during the December 2021 winter holiday break.

   This is not a situation where the Appellant spent the 2 weeks of the December 2021 winter holiday break waiting and wondering if he was ever going to be recalled to his former employment. His lay off was temporary. He had already ***accepted a firm offer of recall*** that would see him return to his regular and usual employment a mere ***2 weeks later***. And he reported for work on the recall date. He believed that being recalled on a specific date was his best chance of returning to suitable employment as quickly as possible, and he accepted it immediately. This is enough to satisfy the second *Faucher* factor for this period.

c) The third *Faucher* factor doesn't mean that claimants are prohibited from setting any kind of condition on the type of work they would be willing to accept. Rather, it says claimants may not set conditions that "unduly" (or unreasonably) limit their chances of re-employment.

   I disagree with the Commission that limiting himself to his employer and accepting the recall offer unduly restricted the Appellant's chances of going back to work between December 20, 2021 and January 3, 2022. To the contrary, it facilitated his return to work as quickly as possible and allowed him to be considered for any "charters" that came up in the meantime. Maintaining this

[12] See *Page v. Canada (Attorney General)*, 2023 FCA 169.

employment relationship wasn't an impediment to finding or returning to suitable employment during the December 2021 winter holiday break.

The period I need to consider is the 2 weeks the Appellant was laid off between December 20, 2021 and January 3, 2022. I have already found that part-time employment was suitable employment for the Appellant, and that accepting the offer of recall was his best chance of returning to suitable employment as quickly as possible during this period. I see no other evidence of personal conditions that could have unduly restricted the Appellant's chances of returning to the labour market.

Conclusion:

[27] The Appellant must satisfy all 3 of the *Faucher* factors to prove availability according to the law. Based on my findings, he has satisfied all of them. I therefore find the Appellant has shown he was capable of and available for work, but unable to find a suitable job during the December 2021 winter holiday break.

[28] This means he is **not** disentitled to EI benefits for failing to prove his availability for work during the weeks of December 20, 2021 and the week of December 27, 2021.

[29] The Commission must rescind the indefinite disentitlement imposed on the Appellant's claim starting from December 27, 2021.

Issue 2: Was the Appellant available for work during March break 2022?

Short answer:

[30] Yes, he was. The Appellant has satisfied all 3 *Faucher* factors to prove his availability during this period.

The evidence:

[31] The Appellant's testimony regarding his desire to return to work as soon as a suitable job is offered is set out at paragraph 21 above.

[32] Regarding his job search efforts during March break 2022, the Appellant testified that:

- His last day of work was Friday, March 11, 2022.
- He knew schools were going to be closed for the next week for March break.
- When he finished work on March 11, 2022, the employer said there was no work driving his school route during the next week, and that he should report to work again on January 3, 2022. He confirmed he would do so.
- He believed his best and quickest chance of getting back to work was to report to work on his pre-determined and confirmed recall date.
- He also put his name forward “for charters” by telling the employer he was available to drive if there was any other work over March break, such as driving for daycares, sports teams, wedding parties or airport runs.

[33] The Appellant’s testimony regarding any personal conditions that might have unduly limited his chances of returning to the labour market is set out at paragraph 23 above.

[34] For the reasons set out in paragraph 24 above, I accept the Appellant’s testimony as credible in its entirety.

My findings:

[35] I find that suitable work for the Appellant was part-time employment as a bus driver because this was his regular and usual employment for many years prior to his lay off. He established his claim for EI benefits based on his part-time employment and isn’t required to suddenly start looking for full-time employment in order to receive EI benefits.

[36] I further find the Appellant has satisfied all 3 *Faucher* factors for March break 2022:

a) The evidence shows he wanted to go back to work as soon as suitable employment was available. The Appellant is an adult and needs to work to pay his bills and survive. His multi-year history of returning to work immediately upon recall, along with his willingness to do drive charters during the school break amply shows the Appellant wanted to get back to work as soon as possible.

b) As the Federal Court of Appeal said in the *Page* decision[13], there are circumstances when a claimant may – for a reasonable period of time, consider the promise of being recalled as the most likely way to get a job again and act accordingly. I find such circumstances existed for the Appellant during March break 2022.

   This is not a situation where the Appellant spent the 1 week of March break 2022 waiting and wondering if he was ever going to be recalled to his former employment. Once again, his lay off was temporary. He had already ***accepted a firm offer of recall*** that would see him return to his regular and usual employment ***exactly 1 week later***. And he reported for work on the recall date. He believed that being recalled on a specific date was his best chance of returning to suitable employment as quickly as possible, and he accepted it immediately. This is enough to satisfy the second *Faucher* factor for this period.

c) The Appellant didn't set personal conditions that unduly limited his chances of returning to work during March break 2022. The benefit period I need to consider is the 1 week between March 14 – 21, 2022. I have already found that part-time employment was suitable employment for the Appellant, and that accepting the offer of recall was his best chance of returning to suitable employment as quickly as possible during this period. Maintaining this employment relationship was not an impediment to finding or returning to suitable employment. And I see no other evidence of personal conditions that could have unduly restricted the Appellant's chances of returning to the labour market.

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[13] See paragraph 26(b) and footnote 12 above.

Conclusion:

[37] The Appellant must satisfy all 3 of the *Faucher* factors to prove availability according to the law. Based on my findings, he has satisfied all of them. I therefore find the Appellant has shown he was capable of and available for work, but unable to find a suitable job during March break 2022.

[38] This means he is **not** disentitled to EI benefits for failing to prove his availability for work during the week of March 14, 2022.

[39] The Commission must rescind the indefinite disentitlement imposed on the Appellant's claim starting from December 27, 2021.

Issue 3: Was the Appellant available for work during the summer break 2022?

Short answer:

[40] Yes, he was. The Appellant has satisfied all 3 *Faucher* factors to prove his availability during this period.

The evidence:

[41] The Appellant's testimony regarding his desire to return to work as soon as a suitable job is offered is set out at paragraph 21 above.

[42] Regarding his job search efforts during the summer break 2022, the Appellant testified that:

- His last day of work was Thursday, June 30, 2022.
- He knew schools were going to be closed for summer break.
- When he finished work on June 30, 2022, the employer said there was no work driving his school route during the summer, and that he should report to work again on September 7, 2022. He confirmed he would do so.

- He believed his best and quickest chance of getting back to work was to report to work on his pre-determined and confirmed recall date.

- He also put his name forward “for charters” by telling the employer he was available to drive if there was any other work over the summer break, such as driving for daycares, sports teams, wedding parties or airport runs.

- X was the busiest charter service in the area at the time. In the summers, it had non-school work other transportation companies didn’t do:

    - There are a lot of farms in the region and the labourers need to be moved from one location to another. The farms also charter buses for the labourers to attend social gatherings and do personal shopping.

    - There are also Canadian Armed Forces facilities in the area and they are particularly active in the summer. Members of the armed forces need to be driven to various locations as part of “army movements”.

- X owned the school bus he drove and paid for the insurance on it. He kept the bus at his residence because he lived on the school route, and this saved driving time. But he isn’t allowed to drive the bus for personal use or to “freelance” for another employer or self-employment.

- Over the summer, he continued to park the bus at his residence. He kept it clean and maintained so he could be “easily mobilized” for charters. The employer did call him to drive some charters that summer. And in between the charter runs, he cleaned the bus, filled it with gas, and kept it ready for the next call.

- He checked in with the employer regularly to see what charters or other driving work was available. He was ready to drive anytime.

- But he didn’t get enough hours driving charters to make up for the 20-24 hours per week he worked driving his school route.

- He has reported his earnings from the occasional charters on the claimant reports he filed to get EI for the summer break 2022.

[43] Regarding any personal conditions that might have unduly limited his chances of returning to the labour market, the Appellant testified that:

- He was restricting himself to his regular part-time employment as a bus driver because that's what he had been working at prior to being laid off and that's what he can manage at his age.
- This is what he can handle at his age (he was 68 at the time)
- He was also restricting himself to working for this employer. He had 2 reasons for doing so:
    - he knew he was only going to be laid off for 9 weeks and would then return to his regular job and usual hours of employment; and
    - X was the busiest charter company over the summer, and he knew that maintaining his relationship with X was his best shot at picking up charters and other driving work during this lay-off.
- He believed this was his best shot at working again as soon as possible.

My findings:

[44] Once again, I find that suitable work for the Appellant was part-time employment as a bus driver because this was his regular and usual employment for many years prior to his lay off. He established his claim for EI benefits based on his part-time employment and isn't required to suddenly start looking for full-time employment in order to receive EI benefits.

[45] I further find the Appellant has satisfied all 3 *Faucher* factors for March break 2022:

a) The evidence shows he wanted to go back to work as soon as suitable employment was available. The Appellant is an adult and needs to work to pay his bills and survive. His multi-year history of returning to work immediately upon recall, along with his willingness to do drive charters during the school break amply shows the Appellant wanted to get back to work as soon as possible.

b) As the Federal Court of Appeal said in the *Page* decision[14], there are circumstances when a claimant may – for a reasonable period of time, consider the promise of being recalled as the most likely way to get a job again and act accordingly. I find such circumstances existed for the Appellant during summer break 2022.

   This is not a situation where the Appellant spent the 9 weeks of summer break 2022 waiting and wondering if he was ever going to be recalled to his former employment. Once again, his lay off was temporary. He had already ***accepted a firm offer of recall*** that would see him return to his regular and usual employment ***9 weeks later***. And he reported for work on the recall date. He believed that being recalled on a specific date was his best chance of returning to suitable employment as quickly as possible, and he accepted it immediately. This is enough to satisfy the second *Faucher* factor for this period.

   But if I'm wrong about that and 9 weeks is not a reasonable period, then I find the Appellant was doing enough to find work over the summer break 2022. His job search efforts included regularly checking in with the employer for charter and other driving work, maintaining his bus in a state of on-call readiness, driving charters when called upon, and picking up other additional hours of work whenever it was offered. He has satisfied the second *Faucher* factor for this period.

c) The Appellant didn't set personal conditions that limited his chances of returning to work during the summer break 2022. The benefit period I need to consider is

[14] See paragraph 26(b) and footnote 12 above.

> the 9 weeks between July 4, 2022 and September 5, 2022. I have already found that part-time employment was suitable employment for the Appellant, and that accepting the offer of recall was his best chance of returning to suitable employment as quickly as possible during this period. It not only facilitated his return to work as quickly as possible, but it allowed him to earn money driving "charters" during the summer season. Maintaining his employment relationship with X was not an impediment to finding or returning to suitable employment. And I see no other evidence of personal conditions that could have unduly restricted the Appellant's chances of returning to the labour market.

Conclusion:

[46] The Appellant must satisfy all 3 of the *Faucher* factors to prove availability according to the law. Based on my findings, he has satisfied all of them. I therefore find the Appellant has shown he was capable of and available for work, but unable to find a suitable job during the summer break 2022.

[47] This means he is **not** disentitled to EI benefits for failing to prove his availability for work from July 4, 2022 to September 5, 2022.

[48] The Commission must rescind the indefinite disentitlement imposed on the Appellant's claim starting from December 27, 2021.

Issue 4: What does this mean for the Appellant?

[49] The evidence shows the Appellant was available to work for his employer **at any time during his benefit period if the employer asked him**. He was either working at driving his regular school route, *or* he was laid off from that work for reasons beyond his control (during the 3 breaks in the 2021/2022 school year) ***while having accepted a firm offer of recall*** and putting himself forward to drive any "charters" that came up in the meantime.

[50] I therefore find the Appellant has proven he was available for work from December 27, 2021. This means the Commission must rescind the indefinite disentitlement imposed on his claim from December 27, 2021.

[51] The evidence also shows the Appellant considered the firm offer of recall made at the start of each lay off to be the most likely way for him to become employed again in suitable employment, and he acted accordingly. The Appellant knew his return-to-work date each time he was laid off and reported for work on the recall date. He should be given a reasonable period before being required to engage in a job search for alternative employment. For this reason, I find the Appellant has proven his availability for work during the 2 shorter school breaks, namely the 2 weeks of the December 2021 winter holiday break and the 1 week of March break 2022.

[52] This means the Appellant is **not** disentitled to EI benefits during the weeks of December 20, 2021, December 27, 2021 and March 14, 2022.

[53] Finally, the evidence shows the Appellant was available to work for his employer – and did, in fact, work and have earnings from this employer – during the summer break 2022. He had a firm offer of recall to return to his regular and usual employment and accepted it. He knew his return-to-work when he was laid off and reported for work on the recall date. I find that the *Page* decision[15] applies in the Appellant's circumstances, and he should not be expected to engage in a job search for alternative employment to prove his availability during the summer break 2022.

[54] In the alternative, I find that the Appellant has satisfied all 3 *Faucher* factors and proven he was available for work during the summer break 2022. He did enough to find work by maintaining his employment relationship with the busiest charter provider in the area and taking steps to be ready to perform other suitable work for the employer while he was laid off from driving his regular school route.

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[15] See paragraph 26(b) and footnote 12 above.

[55] For the reasons in paragraph 53 and 54 above, I therefore find the Appellant has proven his availability for work during the third school break, namely the 9 weeks of the summer break 2022.

[56] This means the Appellant is **not** disentitled to EI benefits from July 4, 2022 to September 5, 2022.

[57] The Appellant testified that he has already filed his reports to claim benefits for the weeks of December 20, 2021, December 27, 2021, March 14, 2022 and the 9 weeks from July 5, 2022 to September 5, 2022. The Commission must now process his reports and pay him the EI benefits he is entitled to.

Conclusion

[58] The appeal is allowed.

[59] The Appellant has proven he was available for work from December 27, 2021. This means the indefinite disentitlement imposed on his claim must be rescinded.

[60] It also means the Appellant is **not** disentitled to employment insurance (EI) benefits during the 3 breaks in 2021/2022 school year, namely the December 2021 winter holiday break, March break 2022, and the summer break 2022.

[61] The Appellant has already filed his reports to claim benefits for these periods (specifically, the weeks of December 20, 2021, December 27, 2021, March 14, 2022 and the 9 weeks from July 5, 2022 to September 5, 2022). The Commission must now process his reports and pay him the EI benefits he is entitled to.

Teresa M. Day

Member, General Division – Employment Insurance Section