Citation: *AD v Canada Employment Insurance Commission*, 2025 SST 404

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	A. D.
Representative:	T. D.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (653865) dated May 7, 2024 (issued by Service Canada)

Tribunal member:	Angela Ryan Bourgeois
Type of hearing:	**IN WRITING**
Decision date:	April 17, 2025
File number:	GE-25-48

Decision

[1] The appeal is allowed. The General Division agrees with the Appellant.

[2] The Appellant has shown that she was available for work within the meaning of the law.

Overview

[3] In 2021–2022, the Appellant was in high school. She also had a part-time job. In March 2021, her hours of work were reduced, and she applied for EI benefits.

[4] The Canada Employment Insurance Commission (Commission) decided that the Appellant was disentitled from receiving Employment Insurance (EI) regular benefits from March 1, 2021, to June 28, 2021, and from September 7, 2021, to February 11, 2022, because she wasn't available for work.[1]

[5] A claimant must be available for work to get EI regular benefits. Availability is an ongoing requirement. This means that a claimant must be searching for a job.

[6] The Appellant appealed the Commission's decision to the General Division of the Tribunal. The General Division agreed with the Commission.

[7] The Appellant appealed the General Division decision to the Appeal Division of the Tribunal. The Appeal Division decided that the General Division's reasons were inadequate. It returned the matter to the General Division with directions to:

- Determine if the Appellant had an interruption of earnings
- Determine what suitable employment for the Appellant is

[1] The Appellant was in high school during these periods. The Commission didn't review her availability over the summer months. See page RGD3-2.

- Determine if there were weeks when she didn't have to prove her availability because she was already working in suitable employment.[2]

[8] So, I will consider if the Appellant has proven her availability, which she must prove on a balance of probabilities. I will also consider the AD directions.

[9] The Commission says that:

- I don't have jurisdiction to consider if there was an interruption of earnings.
- The Appellant wasn't available because her job search doesn't show a willingness to work.

[10] The Appellant didn't provide any new arguments. At the Appeal Division, she said that she needed to know what counted as suitable employment and how her job search was inadequate.

Issues

[11] Did the Appellant have an interruption of earnings?

[12] Has the Appellant proven her availability for work while in school?

Analysis

Interruption of earnings

[13] To qualify for EI benefits, an insured person must have had an interruption of earnings from employment.[3] An interruption of earnings occurs when, after a period of employment, the person has a period of seven or more consecutive days during which no work is performed for that employer, and no earnings are payable.[4]

[14] The Appeal Division said that I should determine if the Appellant had an interruption of earnings.

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[2] See AD decision, para 30.
[3] See section 7(2) of the Employment Insurance Act (EI Act).
[4] See section 14 of the Employment Insurance Regulations (EI Regulations).

[15] The General Division gets its jurisdiction from the *Employment Insurance Act* (EI Act). The EI Act says that a person dissatisfied with a decision of the Commission made under section 112 of the EI Act may appeal the decision to the Social Security Tribunal.[5]

[16] So, first there must be a decision made under section 112 of the EI Act, and then an appeal must be brought to the Tribunal about that decision.

[17] Decisions made under section 112 of the EI Act are often called "reconsideration decisions." These are decisions that the Commission makes after a claimant asks the Commission to reconsider its initial decision.[6]

[18] The Commission says that it hasn't made a decision under section 112 about whether there was an interruption of earnings.[7] I accept this as fact. I see no evidence in the file that would suggest that the Commission made a decision under section 112 about the interruption of earnings. I see nothing in the reconsideration request form about the interruption of earnings. There is no reconsideration decision letter in the file about the interruption of earnings.

[19] The Appellant hasn't provided any arguments about this issue.

[20] The Commission's reconsideration decision letters are often vague. The letters briefly identify the issue that has been decided. For example, it will say the issue is "availability" or "benefit period not established."

[21] I must take a broad approach to my jurisdiction to manage appeals fairly and efficiently, within the limits of the law.[8]

[22] This means that sometimes I may have to decide matters that arise from the reconsideration decision, even if the issue isn't specifically listed in a reconsideration decision letter.[9] But I can't ignore the limits imposed on me by the EI Act.

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[5] See section 113 of the EI Act.
[6] I have paraphrased section 112 and have included only the details relevant to this decision.
[7] See page RGD3-1, para 4.
[8] See *PM* v *Minister of Employment and Social Development*, 2021 SST 92, paras 51 to 54. See also Mudie v. Canada (Attorney General), 2021 FCA 239, para 22.
[9] For example, see *AH v Canada Employment Insurance Commission*, 2024 SST 431.

[23] I find that I don't have jurisdiction to determine if the Appellant had an interruption of earnings.

[24] First, I would be exceeding my jurisdiction if I considered the interruption of earnings matter because the Commission hasn't reconsidered it.

[25] Next, I note that the Appellant hasn't raised any issue with the interruption of earnings in her appeal to the Tribunal.

[26] Lastly, whether the Appellant had an interruption of earnings goes directly to whether she qualified for benefits. It isn't related to the disentitlement for availability. The interruption of earnings isn't something I have to decide to determine if she has proven her availability for work.

[27] For these reasons, I can't decide whether the Appellant had an interruption of earnings – even if the Appeal Division thinks I should do so.

[28] Now, I will consider the Appellant's availability for work. There is no dispute about my jurisdiction to determine this issue.

Availability for work

[29] The EI Act says that a claimant must prove that they are "capable of and available for work" but aren't able to find a suitable job.[10] Case law gives three things a claimant must prove to show that they are "available" in this sense.[11] I will look at those factors below.

[30] Also, the Federal Court of Appeal has said that claimants who are in school full-time are presumed to be unavailable for work.[12] This is called the "presumption of non-availability." It means we can suppose that students aren't available for work when the evidence shows that they're in school full-time.

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[10] See section 18(1)(a) of the EI Act.
[11] See *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96.
[12] See *Canada (Attorney General) v Cyrenne*, 2010 FCA 349.

[31] I will start by looking at whether I can presume that the Appellant wasn't available for work. Then, I will look at whether she has proven that she was available for work and unable to find a suitable job.

Presuming full-time students aren't available for work

[32] The Appellant agrees that she was a full-time student, and I see no evidence that shows otherwise. So, I accept that the Appellant was in school full-time.

[33] This means that the presumption applies to the Appellant.

[34] But the presumption that full-time students aren't available for work can be rebutted (that is, shown to not apply). The Federal Court of Appeal says that I have to do a contextual analysis when deciding whether the Appellant has rebutted the presumption of non-availability.[13]

[35] The Appellant reported that she would have changed her course schedule to accept a job.[14]

[36] The Commission says that the Appellant hasn't rebutted the presumption because her job search efforts weren't those of a person who was seeking to secure employment as soon as possible. It says that she wasn't willing to leave her course for employment but wanted only to work after school and weekends.[15]

[37] I find that the Appellant has rebutted the presumption. She claims that she could have worked around her school schedule as she did before her employer reduced her hours.[16] The Appellant was working part-time before her employer reduced her hours, and she qualified for EI benefits from the part-time employment. This shows that she had a previous pattern of regular employment outside of school hours while attending full-time classes.[17] This is enough to rebut the presumption and to require further

[13] See *Page* v *Canada (Attorney General)*, 2023 FCA 169.
[14] See her response on the training questionnaire on page GD3-20 and GD6-29.
[15] See page GD4-9, fifth paragraph.
[16] See pages GD2-9 to GD2-10.
[17] See *Page* v *Canada (Attorney General)*, 2023 FCA 169, para 70.

analysis of whether the Appellant was capable of, available for, and unable to find a suitable job.

[38] Now I will consider if she has proven her availability for employment.

Capable of and available for work

[39] The Appellant must prove the following three things to show that she was capable of and available for work but unable to find a suitable job:[18]

a) She wanted to go back to work as soon as a suitable job was available.

b) She made efforts to find a suitable job.

c) She didn't set personal conditions that might have unduly (in other words, overly) limited her chances of going back to work.

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

[41] I also must determine what is suitable work for the Appellant. I can't assess her efforts to find suitable employment until I know what that employment is. So that is where I will start.

– Suitable employment

[42] The Appeal Division directed that I determine what would have been suitable employment for the Appellant. It said that it couldn't reasonably decide what counted as suitable employment because of the lack of relevant evidence in the file.[20]

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[18] See section 18(1)(a) of the EI Act. These three factors appear in *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57–96. This decision paraphrases those three factors for plain language.
[19] 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.
[20] See Appeal Division decision, para 23.

[43] The Commission provided additional arguments about what it considered suitable employment for the Appellant. It also provided an additional record of employment.

[44] The Appellant didn't provide any additional arguments or evidence about what suitable employment is. She chose to continue the appeal in writing, despite the Appeal Division's urging that she select an oral hearing. Without an oral hearing, I couldn't ask her about the gaps in the evidence. The Appellant could have submitted additional evidence and written arguments. She didn't.

[45] Despite this, I can't ignore this issue. I must determine what was suitable employment based on the evidence before me.

[46] First, I have considered what is not suitable employment.[21] Employment is not "suitable" if its pay, or its other conditions of employment, are less favourable than would be normal for a claimant's usual occupation.[22] Suitable employment may include work that pays less or is on less favourable conditions than a claimant's usual occupation, but only after a "reasonable interval."[23]

[47] Then I considered what suitable employment is. Suitable employment is employment that is within a claimant's health and physical capabilities. This includes a claimant's health and physical capabilities to commute to the employment. Suitable employment has work hours that are compatible with the claimant's family obligations and religious beliefs. The nature of such work is not contrary to the claimant's moral convictions or religious beliefs.[24]

[48] The Appellant worked as a part-time cashier at a convenience store.[25] So, work of this type at comparable wages and under comparable conditions would be suitable work for the Appellant.

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[21] Section 6 of the EI Act describes what is not suitable employment.
[22] See section 6(4) of the EI Act.
[23] See section 6(5) of the EI Act.
[24] These criteria are set out in section 9.002 of the EI Regulations.
[25] See page Record of Employment on page RGD3-4.

[49] There is no evidence that suitable employment would be limited by her health and physical capabilities. There is no evidence that there were jobs available that were contrary to her family obligations, religious beliefs, or her moral convictions.

[50] Before the Appellant applied for EI benefits, on average she worked about 9 hours a week. Sometimes she worked a bit more or a bit less, but the average is just under 9 hours.[26] She earned $13 an hour.[27]

[51] The law where the Appellant resides prohibit employers from employing youths under the age of 16 from working:

- Between the hours of 11 p.m. and 7 a.m.,
- During normal school hours, except pursuant to a recognized vocational training or apprenticeship program,
- For more than three hours on a school day,
- For more than eight hours on a non-school day, or
- For more than 40 hours in any week.[28]

[52] There is an exception if the inspector is satisfied that the employment doesn't prejudice the youth's attendance at school or their capacity to benefit from school instruction, provided the youth has a parent's consent.[29]

[53] This law explains the employer's comment to the Commission that he wouldn't have given the Appellant full-time hours because she was still in school.[30]

[54] I find that the Appellant was 15 years old for part of the relevant period. Neither party provided her birth date. Although she didn't specify when, she wrote that she was

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[26] I did my own calculations based on the record of employment and earnings information in the file. I also considered the Appellant's calculations on page GD7-4 to GD7-6
[27] See page GD3-31.
[28] See section 6 of the *Youth Employment Act,* R.S.P.E.I.
[29] See section 6(2) of the *Youth Employment Act,* R.S.P.E.I.
[30] See page GD3-30.

15 years old.[31] So this means that the provincial law limiting her hours of work applied for at least part of the relevant period.

[55] Considering all the evidence, I find it likely that the Appellant regularly worked about 9 hours a week at an hourly rate of $13.

[56] So, suitable employment for the Appellant would be employment in retail or other basic labour positions offering about $13 hourly for about 9 hours a week.

– **Did the Appellant have suitable employment during the period in question?**

[57] The Appeal Division directed me to consider whether the Appellant had suitable employment during the period in question. It said:

> In other words, were there weeks when she didn't have to prove she was available but unable to find suitable employment under section 18(1)(a) of the EI Act?[32]

[58] The Appeal Division directed me to another Appeal Division decision issued by the same member. In that decision, *EB*, the Appeal Division found that when a claimant is working in suitable employment, they shouldn't be disentitled for not proving their availability for work.[33]

[59] Decisions from the Appeal Division are not binding on me. And, in this case, I don't find the Appeal Division's decision persuasive. For example, in the *EB* decision, the Appeal Division states that if the claimant was working in suitable employment, she didn't have to show she was available for work. It doesn't give reasons for this interpretation or cite any case law for it.

[60] Also, section 18 of the EI Act says:

> A claimant is not entitled to be paid benefits for a working day in a benefit period for which the claimant fails to prove that on that day the claimant was:

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[31] See page GD7-9.
[32] See paragraph 30 of the Appeal Division decision.
[33] See EB v Canada Employment Insurance Commission, 2024 SST 1517.

(a) Capable of and available for work and unable to obtain suitable employment;

(b) Unable to work because of a prescribed illness, injury or quarantine, and that the claimant would otherwise be available for work; or

(c) Engaged in jury service.

[61] There is nothing in section 18 that says that if you are working in suitable employment that you don't need to show that you are available for work. If a claimant is working and wants to receive EI benefits, they must show that they are available to work more than they are actually working. If they are working to their maximum availability, then they are not entitled to EI benefits. This is because they are not capable of or available to work more and have not shown that they are "unable to find suitable employment."

[62] As explained above, before the Appellant applied for EI benefits, on average she worked about 9 hours a week. *After* she applied for EI benefits, the average only went down slightly, to about 8.5 hours a week. The reason the average didn't change much is because she occasionally worked up to 16 or 17 hours a week. Although this drove up the average, the evidence shows that after she applied for benefits she usually worked between 4 and 8 hours a week.[34]

[63] I find that the Appellant was not working at her maximum availability. She wanted to work more than 4 to 8 hours a week. She asked her employer for more hours, and she was applying for other jobs. She was working fewer hours than she was legally permitted to work, and she had no personal conditions that would have limited her from working more than she was working.

[64] Since she wasn't working to her maximum availability, I will continue to explain my findings about the three availability factors.

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[34] I did my own calculations based on the record of employment and earnings information in the file. I also considered the Appellant's calculations on page GD7-4 to GD7-6.

– **Wanting to go back to work**

[65] The Appellant has shown that she had a desire to return to the labour market. One way she did this was by talking to her employer about getting more hours. She also looked for suitable jobs and applied for a few suitable ones.

– **Making efforts to find a suitable job**

[66] The Appellant put forward enough effort to find a suitable job.

[67] The Appellant did the following to find a job. She applied for a job at Ardene in March 2021 and at Eclipse in June 2021. She talked to her employer about getting more hours. She assessed available jobs on Job Bank and Facebook.[35]

[68] I find that her efforts show that she was actively looking for a job and wanted to work more than she was working.

[69] The Commission says that there were 17 posted jobs in the Appellant's area from February 28, 2021, to February 12, 2022.[36] Of those 17 jobs, it says that examples of jobs the Appellant might have been able to do include:

- Receptionist
- Shellfish processing labourer
- Homeless shelter worker
- Handler
- Plant worker
- Administrative assistant at a car dealership
- Cashier, customer service at a car dealership

[70] I found that suitable employment for the Appellant was employment in retail or other basic labour positions offering about $13 hourly for about 9 hours a week.

[71] The Commission's list isn't evidence that there was suitable employment that the Appellant failed to apply for. I can't determine if these were suitable jobs with only the

[35] See her job search record on page GD3-29.
[36] See page GD3-52.

job title and employer. I don't know the rate of pay or the hours of work. Also, it's unlikely that she had the skills or experience to work as a receptionist, an administrative assistant, or as a homeless shelter worker.

[72] I also note that there is no set formula about how many jobs you must apply for in a given period. It is up to the Appellant to show that she was doing enough to find a job, but she doesn't have to show that she applied for every possible job.

[73] The Appellant found two jobs to apply for between March and June 2021. These jobs were not on the Commission's list. I find that this supports her claims that she was actively looking for a suitable employment and she was doing enough to find a job. For these reasons, I find that she has met the requirements of this second factor.

– **Unduly limiting chances of going back to work**

[74] The Appellant had no personal conditions that would have unduly limited her chances of going back to work. The Appellant was attending high school during the relevant period, but her classes were available online. This meant that she could have worked at suitable employment while attending school.

[75] I considered that the Federal Court of Appeal has said that making yourself available by going against the school's attendance policy is not "availability" within the meaning of the EI Act.[37] This is binding law that I must follow. But in this case, the Appellant could have worked part-time hours (which is suitable employment) while attending school online, or even in person.

– **So, was the Appellant capable of and available for work?**

[76] Based on my findings, I find that the Appellant has shown that she was capable of and available for work but unable to find a suitable job.

– **Case law**

[77] I reviewed the cases listed and provided by both parties.

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[37] See *Horton v Canada (Attorney General)*, 2020 FC 743.

[78] I have considered and followed all relevant binding case law, including what the Federal Court of Appeal dictates in *Page* v *Canada (Attorney General)*, 2023 FCA 169.

[79] As to the Tribunal decisions mentioned, I'm not required to follow decisions made by other Tribunal members, but there is a benefit to having consistent decisions. I have reviewed the decisions submitted by the parties. I see nothing in those decisions that impact my decision.

Conclusion

[80] The Appellant has shown that she was available for work within the meaning of the law from March 1, 2021, to June 28, 2021, and from September 7, 2021, to February 11, 2022.

[81] This means that the Appellant is not disentitled from receiving EI benefits during those periods.

[82] The appeal is allowed.

Angela Ryan Bourgeois
Member, General Division – Employment Insurance Section