



Citation: *Canada Employment Insurance Commission v SS*, 2024 SST 1378

## **Social Security Tribunal of Canada Appeal Division**

# **Decision**

**Appellant:** Canada Employment Insurance Commission  
**Representative:** Julie Duggan

**Respondent:** S. S.

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**Decision under appeal:** General Division decision dated August 13, 2024  
(GE-24-2142)

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**Tribunal member:** Janet Lew

**Type of hearing:** Videoconference

**Hearing date:** November 6, 2024

**Hearing participants:** Appellant's representative  
Respondent

**Decision date:** November 8, 2024

**File number:** AD-24-576

## Decision

[1] The appeal is allowed.

[2] The General Division made an error about the Claimant's availability between February 1, 2024, and April 26, 2024, when he was in school. The Claimant was unavailable for work, for the purposes of the *Employment Insurance Act*. He was not entitled to Employment Insurance benefits in respect of this timeframe.

[3] The parties agree that the Claimant was available for work between December 24, 2023, and January 31, 2024, and after he finished schooling on April 26, 2024, to September 2024.

## Overview

[4] The Appellant, the Canada Employment Insurance Commission (Commission) is appealing the General Division decision regarding the Claimant's availability for work.

[5] There are three periods: (1) December 24, 2023, to January 31, 2024, (2) February 1, 2024, to April 26, 2024, and (3) April 27, 2024, to September 2024. The parties agree that the Claimant was available for work during the first and last periods. There is some disagreement over whether the Claimant was available for work between February 1, 2024, and April 30, 2024. The Claimant was in school full-time and worked part-time.

[6] The General Division found that the Claimant had shown that he was available for work while in school between February 2024 and April 2024. So, the General Division found that the Claimant was not disentitled from receiving Employment Insurance benefits. The Commission argues that the evidence does not support the General Division's findings that the Claimant was available.

[7] The Claimant states that, although he was in school full-time and working part-time between February 2024 and April 2024, he was still looking for other work. He states that he could have worked full-time hours while attending school. He argues that

he was available for other work (on top of his part-time work) and therefore should not be disentitled from receiving benefits.

[8] At the same time, the Claimant is not vigorously pursuing benefits for the February 1, 2024, to April 26, 2024, timeframe. His focus is from April 27, 2024, onwards, after he had finished school and was looking for work.

## **The parties largely agree on the outcome of the appeal**

[9] The parties agree that the Claimant was available for work between December 24, 2023, and January 31, 2024, and from April 27, 2024, to September 2024. (The Claimant will be letting the Commission know when he started work in September 2024. The parties may also need to verify the specific dates when the Claimant started working in February 2024. He testified at the General Division that he started the part-time job during the first week of February.)

[10] There is some mixed messaging from the Claimant about whether he was available for work between February 1, 2024, and April 26, 2024. His focus is on his entitlement to Employment Insurance benefits after April 2024. Yet, he insists that he was available for work when he was going to school.

## **Issues**

[11] The outstanding issues are about the Claimant's availability between February 2024 and April 2024, as follows:

- a) whether the General Division failed to apply the "*Faucher*" test,<sup>1</sup> and
- b) whether the General Division overlooked any of the evidence regarding the Claimant's availability for work between February 2024 and April 2024.

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<sup>1</sup> See paragraph 15 below.

## Analysis

[12] The Appeal Division may intervene in General Division decisions if the General Division made any jurisdictional, procedural, legal, or certain types of factual errors.<sup>2</sup>

[13] For these types of factual errors, the General Division had to have based its decision on that error and had to have made the error in a perverse or capricious manner, or without regard for the evidence before it.<sup>3</sup>

### **February 2024 to April 2024: The Claimant had to be available for work**

[14] A claimant is not entitled to be paid benefits for a working day in a benefit period for which the claimant fails to prove on that day the claimant was capable of and available for work and unable to obtain suitable employment.<sup>4</sup> In other words, a claimant has to be available for work.

[15] In a case called *Faucher*,<sup>5</sup> the Federal Court of Appeal wrote that a claimant's availability is determined by examining three factors:

- i) the desire to return to the labour market as soon as a suitable job is offered,
- ii) the expression of that desire through efforts to find a suitable job, and
- iii) not setting personal conditions that might unduly limit the chances of returning to the labour market.

#### **– The General Division found that the Claimant was available for work**

[16] The General Division found that the Claimant met these three factors. It found that he had made enough efforts to find a suitable job between February 2024 and April 2024. The General Division found that the Claimant was available because he had

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<sup>2</sup> See section 58(1) of the *Department of Employment and Social Development (DESD) Act*.

<sup>3</sup> See section 58(1)(c) of the DESD Act.

<sup>4</sup> See section 18(1) of the *Employment Insurance Act*.

<sup>5</sup> See *Faucher v Canada (Employment and Immigration Commission)*, [1997] F.C.J. No. 215 (QL) at para 3.

applied for a manufacturing job in January 2024. He started this part-time position the first week of February 2024. He worked 20 hours a week through to April 2024.

[17] The General Division also found that the Claimant could not work full-time while in school as he was focused on his studies. It found that he had not been looking for full-time employment between February 2024 and April 2024.

– **The Commission argues that the Claimant was not available for work**

[18] There is no dispute before me that the Claimant was attending college on a full-time basis and that he was also working part-time between February 2024 and April 2024. The Claimant had a pattern of working on a part-time basis while schooling.<sup>6</sup> But there was no prior history of both schooling and working on a full-time basis.

[19] The Commission argues that the evidence shows that once the Claimant started working part-time in February 2024, he stopped looking for other work. The Commission argues that because the Claimant was no longer looking for work, he did not express a desire to return to the labour market through efforts to find suitable work. The Commission argues that the Claimant did not meet the second Faucher factor.

– **The Claimant says that he was available for work**

[20] The Claimant denies that he stopped looking for work after he began working part-time. He says that he had a lot of available time within his schedule and that he was looking for more work. However, he says that the Commission told him that, as a student, he did not qualify for benefits. So, he did not give the Commission a job search list to show that he had been looking for work between February and April 2024.

[21] While the Claimant may have been looking for other work between February 2024 and April 2024, the Claimant acknowledges that there is no evidence in the hearing file that shows that he had been looking for work.

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<sup>6</sup> See Supplementary Record of Claim dated January 18, 2024, at GD 3-19.

– **The Claimant wants to introduce new evidence**

[22] The Claimant says he has evidence that shows that he had been looking for work between February 2024 and April 2024.

[23] The Appeal Division generally does not accept new evidence. As the Federal Court of Appeal has held:

[13] Under the rules set by Parliament, hearings before the Appeal Division are not redos based on updated evidence of the hearing before the General Division. They are instead reviews of General Division decisions based on the same evidence.<sup>7</sup>

[24] There are some exceptions to this general rule. New evidence can be considered when it provides general background information, shows procedural defects, or exceptionally, in cases where both parties agree that an important document should be considered. Those circumstances do not exist here.

[25] New evidence is not accepted to bolster or support a party's case, particularly when that party could have produced that evidence before. The Claimant has not given me any reason that would let me accept his new evidence at this point.

– **The Claimant was not available for work between February 2024 and April 2024: The evidence shows that the Claimant was not actively looking for work**

[26] As the evidence in the hearing file shows that the Claimant was not actively looking for work between February 2024 and April 2024, he did not meet the second *Faucher* factor. The General Division based its decision on a factual error that it made in a perverse or capricious manner or without regard for the material before it, in determining that the Claimant had been looking for work when the evidence clearly showed otherwise.

[27] As I have determined that the General Division made an error under section 58(1) of the *Department of Employment and Social Development Act*, I do not

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<sup>7</sup> See *Gittens v Canada (Attorney General)*, 2019 FCA 256 at para 13.

have to address any other arguments that the Commission has raised about any errors that the General Division might have made.

## **Fixing the error**

[28] The Commission initially asked me to return the matter to the General Division. This is because there are some gaps in the evidence. For instance, it is unclear when the Claimant started his part-time work in early 2024.

[29] However, the Claimant is not vigorously contesting the February 2024 to April 2024 timeframe. His focus is on the May 2024 to September 2024 timeframe. For that reason, I am substituting my decision for the General Division decision.

[30] I find that the evidence shows the following:

- From December 23, 2023, to January 31, 2024<sup>8</sup>—the Claimant was available for work
- From February 1, 2024,<sup>9</sup> to April 26, 2024—the Claimant was not available for work
- April 27, 2024, to September 2024<sup>10</sup>—the Claimant was available for work.

[31] The Claimant is not disentitled from receiving Employment Insurance benefits for the periods when he was available for work.

[32] There is a one-week waiting period. The Claimant will have to complete claimant reports. Some of the questions in the reports will be about whether the Claimant was available for work.

[33] The Commission will phone the Claimant and help him fill out these reports. The benefits that the Claimant might get will depend upon what information he gives on the reports. For example, and as the Commission pointed out, the Claimant will not be

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<sup>8</sup> The parties may need to verify this date.

<sup>9</sup> The parties may need to verify when the Claimant started working in early 2024.

<sup>10</sup> The parties will need to verify when the Claimant started working in September 2024.

entitled to receive benefits if he was out of the country. Or, if he was sick, he would not be entitled to receive regular benefits.

## **Conclusion**

[34] The appeal is allowed. The General Division did not account for some of the evidence when it examined the Claimant's availability for work between February 1, 2024, and April 26, 2024. He was not available during this timeframe. The Claimant was otherwise available for work.

Janet Lew  
Member, Appeal Division