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2023 FCA 169

William Page (*Applicant*)

v.

Attorney General of Canada (*Respondent*)

INDEXED AS: PAGE V. CANADA (ATTORNEY GENERAL)

Federal Court of Appeal, Gauthier, Gleason and Rivoalen JJ.A.—By videoconference, January 10; Ottawa, July 27, 2023.

Employment Insurance — Judicial review of Social Security Tribunal, Appeal Division decision overturning General Division decision finding applicant entitled to benefits for period during which he was unemployed following his lay-off — Applicant laid off from work in October 2020 due to onset of COVID-19 pandemic — Had commenced training program in September 2020 to become electrician — That program was set to continue until October 2021 — Applicant found part-time work, also returned to work with former employer in April 2021 — Had applied for employment insurance benefits shortly following his lay-off — In his application, applicant indicated that he was not then looking for alternate employment as he expected to be recalled back to work when COVID-related restrictions were eased — Canada Employment Insurance Commission (Commission) initially found applicant eligible to receive benefits — After verification, Commission concluded that applicant was ineligible for benefits because he was not available for work, within meaning of Employment Insurance Act (EIA), s. 18(1)(a), due to his status as full-time student — Applicant required to repay full amount of employment insurance benefits — General Division reversed Commission's decision, concluded that applicant entitled to employment insurance benefits — Determined that applicant successfully rebutted presumption of unavailability because of his history of working while attending school on full-time basis — Applied tripartite test established in Faucher v. Canada (Employment and Immigration Commission), determined that applicant capable of, available for work but unable to find suitable job, despite sufficient efforts to find one — Appeal Division found, inter alia, that General Division made an error of law in its interpretation of EIA, s. 18(1)(a), ignored case law concerning issue of availability for work during unauthorized training course — Whether decision of Appeal Division reasonable — Unreasonable for Appeal Division in present case to have concluded that "it is well-established case law that availability must be shown during regular hours for every working day and cannot be restricted to irregular hours resulting from a course schedule that significantly limits availability" — Tripartite test in Faucher consistently accepted by Federal Court of Appeal, Social Security Tribunal — Contrary to what Appeal Division found, General Division faithfully followed applicable law — Canada (Attorney General) v. Bertrand cannot be read as establishing bright line rule that full-time students, who must attend daytime classes, are not entitled to employment insurance benefits — Unreasonable for Appeal Division to state that Bertrand established such a rule — Four principles emerging from review of case law: test to determine

availability for suitable work within meaning of s. 18(1)(a) set out in Faucher; there is rebuttable presumption that claimants attending full-time studies that do not come within ambit of EIA, ss. 25(1)(a) or (b) not available for suitable work within meaning of s. 18 (1)(a); this presumption of unavailability may be rebutted by claimant; contextual analysis required to ascertain whether presumption is rebutted — S. 18(1)(a) requiring claimant to be available for suitable work — Where there was previous pattern of regular employment outside of school hours while attending full-time classes, not an error of law to conclude that claimant is available if they are available for employment in accordance with their previous work schedule — Allowing students to collect employment insurance benefits in circumstances like those of applicant also consistent with provisions of EIA, applicable regulations that require they pay premiums for employment insurance from their part-time wages — Case law of Social Security Tribunal, umpires not standing for proposition that full-time students always disentitled to employment insurance benefits if unavailable to work on full-time basis during daytime hours, Monday to Friday — Case law standing for entirely different propositions, mandating nuanced, contextualized consideration of claimants' circumstances — Entirely consistent with Federal Court of Appeal case law to find a student in applicant's situation to be entitled to employment insurance benefits — This determination sufficient reason for setting aside decision of Appeal Division — Appeal Division unreasonably exceeded its authority under Department of Employment and Social Development Act (DESDA), s. 58 — DESDA, s. 58(1)(c) providing Appeal Division only very limited ability to interfere with findings of fact or of mixed fact and law made by General Division — Here, open to General Division to have concluded that applicant's job search efforts were reasonable — Appeal Division therefore had no jurisdiction to interfere in General Division's findings of fact or of mixed fact and law because they were not perverse, capricious or made without regard to material that was before General Division — Decision of General Division reinstated — Application allowed.

STATUTES AND REGULATIONS CITED

Department of Employment and Social Development Act, S.C. 2005, c. 34, s. 58(1).

Employment Insurance Act, S.C. 1996, c. 23, ss. 6(1),(4), 18, 25(1)(a),(b), 27(1)(a),(b), 50(8), 112, 113, 153, 161.

Employment Insurance Regulations, SOR/96-332, ss. 9.001, 9.002, 32.

CASES CITED

NOT FOLLOWED:

Canada (Attorney General) v. Bertrand (1982), 136 D.L.R. (3d) 710, 46 N.R. 527 (F.C.A.).

APPLIED:

Faucher v. Canada (Employment and Immigration Commission) (1997), 147 D.L.R. (4th) 574, 215 N.R. 314 (F.C.A.).

DISTINGUISHED:

Canada (Attorney General) v. Rideout, 2004 FCA 304, 134 A.C.W.S. (3d) 187; *Canada (Attorney General) v. Lamonde*, 2006 FCA 44, 354 N.R. 172; *Canada (Attorney General) v. Gagnon*, 2005 FCA 321, 345 N.R. 188; *Canada (Attorney General) v. Boland*, 2004 FCA 251, 327 N.R. 236; *Canada (Attorney General) v. Loder*, 2004 FCA 18, 128 A.C.W.S. (3d) 1126; *Canada (Attorney General) v. Primard*, 2003 FCA 349, [2004] 2 F.C.R. D-24, 317 N.R. 359; *Canada (Attorney General) v. Gauthier*, 2006 FCA 40, 152 A.C.W.S. (3d) 449; *Canada (Attorney General) v. MacDonald*, [1994] F.C.J. No. 841 (QL), 48 A.C.W.S. (3d) 882 (F.C.A.).

CONSIDERED:

Canada (Attorney General) v. Cyrenne, 2010 FCA 349, 2011 C.L.L.C. 240-003; *Canada*

(Attorney General) v. Wang, 2008 FCA 112, 377 N.R. 237; *Landry v. Canada (Deputy Attorney General)* (1992), 152 N.R. 164, 37 A.C.W.S. (3d) 1309 (F.C.A.); *J.D. v. Canada Employment Insurance Commission*, 2019 SST 438 (A.D.); *Y.A. v. Canada Employment Insurance Commission*, 2020 SST 238 (G.D.); *Quadir v. Canada (Attorney General)*, 2018 FCA 21, 287 A.C.W.S. (3d) 294; *S.S. v. Canada Employment Insurance Commission*, 2022 SST 749 (A.D.); *Vezina v. Canada (Attorney General)*, 2003 FCA 198, 124 A.C.W.S. (3d) 609; *Duquet v. Canada (Employment and Immigration Commission)*, 2008 FCA 313, 175 A.C.W.S. (3d) 445; *Walls v. Canada (Attorney General)*, 2022 FCA 47, 2022 D.T.C. 5038.

REFERRED TO:

Re N.Q., C.U.B. 74252A; *Re Michaud*, C.U.B. 68818; *Re Tremblay*, C.U.B. 37951; *Re Stocola*, C.U.B. 38251; *Re Kuronen*, C.U.B. 25041; *Bose v. Canada (Attorney General)*, 2018 FCA 220, 299 A.C.W.S. (3d) 104; *Stavropoulos v. Canada (Attorney General)*, 2020 FCA 109, [2020] F.C.J. No. 738 (QL); *Re White*, C.U.B. 59766; *Re Crane*, C.U.B 59738; *A.L. v. Canada Employment Insurance Commission*, 2021 SST 250 (G.D.); *E.M. v. Canada Employment Insurance Commission*, 2021 SST 498 (G.D.); *B.N. v. Canada Employment Insurance Commission*, 2022 SST 69 (G.D.); *H.S. v. Canada Employment Insurance Commission*, 2022 SST 92 (A.D.); *D.B. v. Canada Employment Insurance Commission*, 2019 SST 1277 (A.D.); *Canada Employment Insurance Commission v. G.S.*, 2020 SST 1076 (A.D.); *Canada Employment Insurance Commission v. A.P.*, 2021 SST 295 (A.D.); *M.T. v. Canada Employment Insurance Commission*, 2022 SST 646 (A.D.); *Re Dufort*, C.U.B. 21724; *Re Watrich*, C.U.B. 16505.

APPLICATION for judicial review of the decision by the Appeal Division (2021 SST 802) of the Social Security Tribunal overturning the decision by the General Division (2021 SST 803) finding that the applicant was entitled to benefits for the period during which he was unemployed following his lay-off. Application allowed.

APPEARANCES

Frédérick-Alexandre Yao for applicant.

Marcus Dirnberger for respondent.

SOLICITORS OF RECORD

Lacoursière Avocats, Québec, for applicant.

Deputy Attorney General of Canada for respondent.

The following are the reasons for judgment rendered in English by

GLEASON J.A.:

[1] The applicant, William Page, worked at a local hotel while he attended courses as a full-time student. Due to the COVID-19 pandemic, he was laid off in October 2020. He applied for employment insurance benefits, and, in its decision in *W.P. v. Canada Employment Insurance Commission*, 2021 SST 803 (G.D. decision), the General Division of the Social Security Tribunal found that Mr. Page was entitled to benefits for the period during which he was unemployed following his lay-off.

[2] The Canada Employment Insurance Commission (the Commission) appealed the decision of the General Division to the Tribunal's Appeal Division, and, in a decision reported as *Canada Employment Insurance Commission v. W.P.*, 2021 SST 802 (A.D. decision), the Appeal Division overturned the decision of the General Division.

[3] Mr. Page has filed an application for judicial review to this Court, seeking to have us set aside the decision of the Appeal Division.

[4] During the hearing before this Court, it became apparent that there were conflicting decisions from the Social Security Tribunal regarding the entitlement of students to employment insurance benefits, but that neither party had referred to all the relevant case law in their submissions. The panel therefore asked the parties for supplementary submissions, containing, among other things, a complete list of the relevant decisions dealing with claims by students for employment insurance benefits and the legislative history of the relevant provisions in the *Employment Insurance Act*, S.C. 1996, c. 23 (the EIA).

[5] Having reviewed the materials provided subsequent to the hearing, as well as the materials originally filed and the parties' oral submissions, I am of the view that this application should be allowed and that the decision of the Appeal Division should be set aside. This, in turn, would mean that the decision of the General Division would be reinstated, which would result in Mr. Page being entitled to employment insurance benefits for the period at issue.

I. Relevant Legislative and Regulatory Provisions

[6] It is useful to first set out the applicable provisions in the EIA, the *Employment Insurance Regulations*, SOR/96-332 (the EI Regulations), and the *Department of Employment and Social Development Act*, S.C. 2005, c. 34 (the DESDA), that were in force at the times relevant to this application, all of which remain in force.

[7] I turn first to the EIA, which contains provisions governing both disentitlement and disqualification to benefits. The two terms are defined in subsection 6(1) as follows:

> **Definitions**
>
> **6 (1)** In this Part,
>
> ***disentitled*** means not entitled under section […] 18 […] or 50 or under the regulations; (*inadmissible*)
>
> ***disqualified*** means disqualified under section 27 […]; (*exclu du bénéfice des prestations*)
>
> …

[8] Paragraph 18(1)(a), the key provision at issue in this application, deals with disentitlement and provides that:

> **Availability for work, etc.**
>
> **18 (1)** 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
>
> **(a)** capable of and available for work and unable to obtain suitable employment;
>
> …

[9] Subsection 50(8) of the EIA allows the Commission to require that a claimant provide evidence of their job search to establish that they are making reasonable and customary efforts to find suitable employment. The subsection states:

Entitlement to benefits

50 …

Proof of efforts to obtain employment

(8) For the purpose of proving that a claimant is available for work and unable to obtain suitable employment, the Commission may require the claimant to prove that the claimant is making reasonable and customary efforts to obtain suitable employment.

[10] The exceptions to subsection 50(8) that are contained in paragraphs 25(1)(a) and (b) of the EIA are inapplicable to the instant case.

[11] Another provision regarding verification by the Commission is contained in section 153.161, which provides:

Course, program of instruction or non-referred training

153.161 (1) For the purposes of applying paragraph 18(1)(a), a claimant who attends a course, program of instruction or training to which the claimant is not referred under paragraphs 25(1)(a) or (b) is not entitled to be paid benefits for any working day in a benefit period for which the claimant is unable to prove that on that day they were capable of and available for work.

Verification

(2) The Commission may, at any point after benefits are paid to a claimant, verify that the claimant referred to in subsection (1) is entitled to those benefits by requiring proof that they were capable of and available for work on any working day of their benefit period.

[12] Provisions on disqualification are set out in many sections of the EIA. The ones relevant for our purposes appear in paragraphs 27(1)(a) and (b), which provide:

Disqualification — general

27 (1) A claimant is disqualified from receiving benefits under this Part if, without good cause since the interruption of earnings giving rise to the claim, the claimant

(a) has not applied for a suitable employment that is vacant after becoming aware that it is vacant or becoming vacant, or has failed to accept the employment after it has been offered to the claimant;

(b) has not taken advantage of an opportunity for suitable employment;

…

[13] There are provisions in both the EIA and the EI Regulations that define what is meant by suitable employment. Subsection 6(4) of the EIA provides:

Definitions

6 …

Employment not suitable

(4) For the purposes of paragraphs 18(1)(a) and 27(1)(a) to (c) and subsection 50(8), employment is not suitable employment for a claimant if

(a) it arises in consequence of a work stoppage attributable to a labour dispute;

(b) it is in the claimant's usual occupation and is either at a lower rate of earnings or on conditions less favourable than those observed by agreement between employers and employees or, in the absence of any such agreement, than those recognized by good employers; or

(c) it is not in the claimant's usual occupation and is either at a lower rate of earnings or on conditions less favourable than those that the claimant might reasonably expect to obtain, having regard to the conditions that the claimant usually obtained in their usual occupation, or would have obtained if they had continued to be so employed.

[14] Sections 9.001 and 9.002 of the EI Regulations deal with "reasonable and customary" efforts to find suitable employment, within the meaning of subsection 50(8) of the EIA, and with criteria for "suitable employment". They provide:

Reasonable and Customary Efforts

9.001 For the purposes of subsection 50(8) of the Act, the criteria for determining whether the efforts that the claimant is making to obtain suitable employment constitute reasonable and customary efforts are the following:

(a) the claimant's efforts are sustained;

(b) the claimant's efforts consist of

(i) assessing employment opportunities,

(ii) preparing a resumé or cover letter,

(iii) registering for job search tools or with electronic job banks or employment agencies,

(iv) attending job search workshops or job fairs,

(v) networking,

(vi) contacting prospective employers,

(vii) submitting job applications,

(viii) attending interviews, and

(ix) undergoing evaluations of competencies; and

(c) the claimant's efforts are directed toward obtaining suitable employment.

Suitable Employment

9.002 (1) For the purposes of paragraphs 18(1)(a) and 27(1)(a) to (c) and subsection 50(8) of the Act, the criteria for determining what constitutes suitable employment are the following:

(a) the claimant's health and physical capabilities allow them to commute to the place of work and to perform the work;

(b) the hours of work are not incompatible with the claimant's family obligations or

religious beliefs; and

(c) the nature of the work is not contrary to the claimant's moral convictions or religious beliefs.

[15] Working day, for purposes of section 18 (and another unrelated provision) in the EIA, is defined in section 32 of the EI Regulations as meaning "any day of the week except Saturday or Sunday".

[16] In terms of administration, the EIA provides for initial decisions by the Commission, an internal reconsideration by the Commission (section 112 of the EIA), and an appeal to the Social Security Tribunal (section 113 of the EIA).

[17] The Social Security Tribunal is established under the DESDA. It consists of a General Division, which is subdivided into an Income Security Section and an Employment Insurance Section, and an Appeal Division. Under section 54 of the DESDA, the General Division may dismiss an appeal; confirm, rescind or vary a decision of the Commission, in whole or in part; or may give any decision that the Commission or Minister should have given. The General Division therefore conducts a *de novo* inquiry into a matter and may (and often does) hold hearings during which evidence, including oral testimony, may be tendered.

[18] Subsection 58(1) of the DESDA provides for a limited right of appeal of General Division decisions in employment insurance matters to the Appeal Division and provides as follows:

Grounds of appeal — Employment Insurance Section

58 (1) The only grounds of appeal of a decision made by the Employment Insurance Section are that the Section

(a) failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;

(b) erred in law in making its decision, whether or not the error appears on the face of the record; or

(c) based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

[19] The limited authority of the Appeal Division to review factual determinations of the General Division in employment insurance matters is of central importance to this application, as will become apparent from the discussion that follows.

II. Relevant Factual Background

[20] I turn next to discuss the facts pertinent to Mr. Page's claim that were before the Social Security Tribunal in the present case.

[21] While a student, Mr. Page worked as a bellhop at the Manoir du Lac Delage (the Manoir) in Quebec City. He commenced his employment in February 2018 and attended a full-time adult education program between August 26, 2019, and March 9, 2020. Pay stubs he submitted for this period indicate that he often worked up to 30 hours per week at the Manoir before the onset of the COVID-19 pandemic.

[22] After the onset of the pandemic, Mr. Page was laid off on October 4, 2020, when the Manoir closed due to the pandemic. It remained closed until March 31, 2021, with the expected reopening date being postponed more than once during the period between October 2020 and March 2021.

[23] Mr. Page commenced a training program to become an electrician on September 28, 2020, in a program that was set to continue until October 2021. Except for breaks in the school calendar, he was expected to attend classes from 7:30 a.m. to 3:30 p.m., Monday to Friday.

[24] Mr. Page commenced searching for alternate employment in February or March 2021, and he found other part-time work at a grocery store and the Société des alcools du Québec (the SAQ). He also returned to work at the Manoir in April 2021, when he was recalled to do work other than his usual tasks.

[25] Mr. Page applied for employment insurance benefits shortly following his lay-off. In his application, he indicated that he was not then looking for alternate employment as he expected to be recalled to the Manoir when COVID-related restrictions were eased. He also stated that he was available to work up to 40 hours per week in the evenings and on weekends.

[26] The Commission initially found him eligible to receive benefits, and Mr. Page received employment insurance benefits for the period following his lay-off until February 2021.

[27] In March 2021, the Commission verified Mr. Page's entitlement to benefits pursuant to section 153.161 of the EIA. Following investigation, the Commission concluded that Mr. Page was ineligible for benefits because it determined that he was not available for work, within the meaning of paragraph 18(1)(a) of the EIA, due to his status as a full-time student. This resulted in an overpayment of benefits, requiring Mr. Page to repay the Receiver General of Canada the amount of $9,943.00, the amount of the employment insurance benefits that had been paid to him.

[28] The Commission maintained its decision following an application for an internal review made by Mr. Page. Mr. Page thereafter appealed the disentitlement decision to the Social Security Tribunal.

III. Decision of General Division of the Social Security Tribunal

[29] As noted, the General Division of the Social Security Tribunal reversed the Commission's decision and concluded that Mr. Page was entitled to employment insurance benefits.

[30] On the issue of Mr. Page's availability for suitable employment, the General Division noted that the case law of this Court and of the Social Security Tribunal establishes that there is a presumption that full-time students are not available for work within the meaning of paragraph 18(1)(a) of the EIA.

[31] The General Division continued by noting that this presumption could be rebutted by demonstrating that a claimant either had a history of working while taking training (citing the decision of this Court in *Canada (Attorney General) v. Rideout*, 2004 FCA

304, 134 A.C.W.S. (3d) 187 (*Rideout*)) or by establishing that there were exceptional circumstances (citing the decision of this Court in *Canada (Attorney General) v. Cyrenne*, 2010 FCA 349, 2011 C.L.L.C. 240-003 (*Cyrenne*)).

[32] Citing to the decisions of this Court in *Canada (Attorney General) v. Lamonde*, 2006 FCA 44, 354 N.R. 172 (*Lamonde*); *Cyrenne*; *Canada (Attorney General) v. Wang*, 2008 FCA 112, 377 N.R. 237 (*Wang*); *Canada (Attorney General) v. Gagnon*, 2005 FCA 321, 345 N.R. 188 (*Gagnon*); *Rideout*; *Canada (Attorney General) v. Boland*, 2004 FCA 251, 327 N.R. 236 (*Boland*); *Canada (Attorney General) v. Loder*, 2004 FCA 18, 128 A.C.W.S. (3d) 1126 (*Loder*); *Canada (Attorney General) v. Primard*, 2003 FCA 349, [2004] 2 F.C.R. D-24, 317 N.R. 359 (*Primard*); and *Landry v. Canada (Deputy Attorney General)* (1992), 152 N.R. 164, 37 A.C.W.S. (3d) 1309 (F.C.A.) (*Landry*), the General Division stated that the following factors are relevant to determine if there are sufficient exceptional circumstances to rebut the presumption of unavailability:

- the attendance requirements of the course;
- the claimant's willingness to give up their studies to accept employment;
- whether the claimant has a history of being employed at irregular hours; and
- the existence of exceptional circumstances that would allow the claimant to be employed while taking their course.

[33] The General Division determined that Mr. Page successfully rebutted the presumption of unavailability because he had a history of working while he attended school on a full-time basis and that his record of working part-time hours (typically of up to 30 hours per week) while attending school was sufficient to rebut the presumption. The General Division noted that there were decisions from the Social Security Tribunal in *J.D. v. Canada Employment Insurance Commission*, 2019 SST 438 (A.D.) (*J.D. v. C.E.I.C.*), and *Y.A. v. Canada Employment Insurance Commission*, 2020 SST 238 (G.D.) (*Y.A. v. C.E.I.C.*), where a similar pattern of part-time employment was held to be sufficient to rebut the presumption of unavailability flowing from full-time student status.

[34] Having found the presumption to have been successfully rebutted, the General Division next considered whether Mr. Page was capable of and available for work but unable to find a suitable job, within the meaning of paragraph 18(1)(a) of the EIA, and whether he made reasonable and customary efforts to find a suitable job, within the meaning of subsection 50(8) of the EIA.

[35] The General Division noted that the decision of this Court in *Faucher v. Canada (Employment and Immigration Commission)* (1997), 147 D.L.R. (4th) 574, 215 N.R. 314 (F.C.A.) (*Faucher*), requires a claimant establish the following to demonstrate they are capable of and available for work but unable to find a suitable job within the meaning of paragraph 18(1)(a) of the EIA:

- they wanted to go back to work as soon as a suitable job was available;
- they made efforts to find a suitable job; and

- they did not set personal conditions that might have unduly limited their chances of going back to work.

[36] The General Division concluded that Mr. Page established he met each of the foregoing criteria.

[37] As concerns his wanting to return to work, the General Division found Mr. Page had shown he wanted to go back to work as soon as a suitable job was available in that "he stopped working because of the government-imposed closure of non-essential businesses due to the pandemic. He was supposed to go back to work as soon as businesses reopened, but the reopening [timeline] was extended" (G.D. decision, at paragraph 41). The General Division continued by noting that, when he was recalled, Mr. Page returned to work at the Manoir to perform duties other than his regular ones, and that he also found a job at the SAQ and at a grocery store. It thus held that even though Mr. Page "chose to take training full-time, this situation didn't affect his desire to go back to work as soon as a suitable job was available" (G.D. decision, at paragraph 44).

[38] Insofar as concerns the factor of making efforts to find a suitable job, the General Division considered the criteria set out in the EIA and the EI Regulations regarding job search efforts and concluded that Mr. Page "made enough effort to find a suitable job" (G.D. decision, at paragraph 45).

[39] The General Division held that, in assessing the reasonableness of such efforts, consideration had to be given to the fact that Mr. Page's usual employment was on a part-time basis while attending school. The General Division stated [at paragraphs 53–54] that:

> [b]ased on the characteristics set out in the [EIA] to describe what constitutes a job that isn't suitable, I am of the view that a suitable job is, among other things, a job that is in the claimant's usual occupation (for example, same nature, earnings, and working conditions).
>
> With this in mind, I find that working part-time in the hotel business for several years while in school full-time amounts to employment in the Claimant's usual occupation, since it is his usual employment. [Footnote omitted].

[40] The General Division also held that Mr. Page was entitled to some time after he was laid off from his job at the Manoir before commencing a search for employment elsewhere because he expected "week after week" that the Manoir would reopen (G.D. decision, at paragraph 51). It noted that, after the government-imposed closures were extended, Mr. Page made efforts to find alternate work and succeeded in doing so. The General Division held as follows at paragraphs 60 to 62 of its decision:

> I find that the situation created by the pandemic forced the Claimant to stop working in the hotel business, the field he had worked in for several years. His chances of finding another job in another similar establishment were also non-existent because the reason for the closure applied to all of those establishments.
>
> Given this situation, I am of the view that the Claimant was entitled to a reasonable period to assess how he would be able to go back to his job before making efforts to work in another field of employment.
>
> I find that, taking into account the obstacles the Claimant faced because of COVID-19, his availability for work led to concrete and sustained efforts to find suitable employment

with prospective employers. In addition, his efforts landed him two new jobs. [Footnote omitted].

[41] The General Division accordingly concluded that Mr. Page had made sufficient efforts to find a suitable job.

[42] In respect of the third criterion from *Faucher*, namely the requirement that a claimant not unduly limit their chances of going back to work, the General Division rejected the Commission's argument that Mr. Page hadn't proved his availability for work because he was restricting his availability to a job outside his training hours. The General Division found that Mr. Page had worked at irregular hours for several years. It continued, stating at paragraph 67 of its decision, that the EIA "doesn't say anything about working only at 'regular,' daytime hours. This would have the effect of excluding many types of jobs that offer hours based on irregular schedules".

[43] The General Division accordingly concluded that Mr. Page had not set personal conditions that unduly limited his chances of returning to work.

[44] In result, the General Division determined Mr. Page was not disentitled under either paragraph 18(1)(a) or subsection 50(8) of the EIA and thus overturned the decision of the Commission.

IV. Decision of the Appeal Division of the Social Security Tribunal

[45] As noted, the Appeal Division overturned the decision of the General Division. It found that the General Division made an error of law in its interpretation of paragraph 18(1)(a) of the EIA "and ignored the case law of the Federal Court of Appeal concerning the issue of availability for work during an unauthorized training course" (A.D. decision, at paragraph 32). In this regard, the Appeal Division stated that "it is well-established case law that availability must be shown during regular hours for every working day and cannot be restricted to irregular hours resulting from a course schedule that significantly limits availability" [footnote omitted] (A.D. decision, at paragraph 30, citing to *Canada (Attorney General) v. Bertrand* (1982), 136 D.L.R. (3d) 710, 46 N.R. 527 (F.C.A.) (*Bertrand*); *Re N.Q.*, C.U.B. 74252A; *Re Michaud*, C.U.B. 68818; *Re Tremblay*, C.U.B. 37951; *Re Stocola*, C.U.B. 38251; and *Re Kuronen*, C.U.B. 25041). Since Mr. Page was not available during the hours he needed to attend classes, the Appeal Division found that the General Division erred in law in finding he was available for work and unable to obtain suitable employment within the meaning of paragraph 18(1)(a) of the EIA.

[46] The Appeal Division further indicated that the General Division erred in affording Mr. Page a reasonable period to start his job search. It noted at paragraphs 26 to 28 of its decision that:

> … the case law the General Division relied on supports the position that a claimant who is waiting for their employer to call them back is exempt, at least for a reasonable period, from having to show an active job search.
>
> But, there is more recent case law than what the General Division relied on that establishes that a claimant cannot just wait to be called back to work and has to look for a job to be entitled to benefits. This means that the Employment Insurance program is designed so that only those who are genuinely unemployed and actively looking for work will get benefits [citing to *Faucher*; *Canada (Attorney General) v. Cloutier*, 2005 FCA 73, 339 N.R. 104; *De Lamirande v. Canada (Attorney General)*, 2004 FCA 311, 136 A.C.W.S.

(3d) 850; *Canada (Attorney General) v. Cornelissen-O'Neill* (1994), 174 N.R. 78, 48 A.C.W.S. (3d) 1495 (F.C.A.); *Canada Employment Insurance Commission v. G.S.*, 2020 SST 1076; *D.B. v. Canada Employment Insurance Commission*, 2019 SST 1277; *Re G.T.*, CUB 76450; *Re Kumar*, CUB 69221*; Re Tremblay*, C.U.B. 64656; *Re Desroches*, C.U.B. 52936; and *Re Huber*, C.U.B. 35563].

> The evidence before the General Division clearly shows that the Claimant intended to wait to go back to working part-time for his usual employer during his studies. Even if I had to consider that he was looking for work outside his usual employer, his search did not start until March 2021 and was very limited, which is inconsistent with his availability.

[47] The Appeal Division therefore overturned the decision of the General Division.

V. Analysis

[48] With this background in mind, I turn next to discuss the merits of Mr. Page's judicial review application to this Court. In the application, we are called upon to determine whether the decision of the Appeal Division was reasonable, it being firmly established that the deferential reasonableness standard applies to decisions of the Appeal Division (*Quadir v. Canada (Attorney General)*, 2018 FCA 21, 287 A.C.W.S. (3d) 294 (*Quadir*), at paragraph 9; *Bose v. Canada (Attorney General)*, 2018 FCA 220, 299 A.C.W.S. (3d) 104, at paragraph 6; and *Stavropoulos v. Canada (Attorney General)*, 2020 FCA 109, [2020] F.C.J. No. 738 (QL), at paragraph 11).

[49] Despite the deferential nature of reasonableness review, I am of the opinion that the decision of the Appeal Division cannot stand. This is so for two reasons. First, the Appeal Division unreasonably interpreted the applicable precedents, which, contrary to what the Appeal Division stated, do not establish a bright line rule that full-time students are disentitled to employment insurance benefits if they are required to attend classes full time during weekday hours, Monday to Friday. Second, the Appeal Division unreasonably intervened in what were factual determinations made by the General Division, in contravention of the limits imposed by paragraph 58(1)(c) of the DESDA.

A. *No Automatic Disentitlement for Full-Time Students*

[50] Turning to the first of the foregoing errors, two of the earliest decisions of this Court that the Appeal Division and General Division referred to, namely the decisions in *Faucher* and *Bertrand*, were decided approximately 26 and 41 years ago. Neither dealt with the entitlement of students to employment insurance (then called unemployment insurance) benefits. In *Faucher*, the claimants were found to be entitled to unemployment insurance benefits, whereas in *Bertrand*, the opposite conclusion was reached.

[51] *Faucher* concerned claimants who started their own roofing business after being laid off from a roofing company. In concluding that they were nonetheless entitled to unemployment insurance benefits, this Court held that the question of availability is a question of fact if what is at issue is the application of the test for availability to a particular fact pattern. The Court also held that, in the absence of a statutory definition, availability "must be determined by analyzing three factors — the desire to return to the labour market as soon as a suitable job is offered, the expression of that desire through efforts to find a suitable job, and not setting personal conditions that might unduly limit the chances of returning to the labour market" (*Faucher*, at paragraph 3).

[52] *Faucher* thus establishes a tripartite test for availability that requires assessment of each of the foregoing factors. This test has been consistently accepted by this Court, by the Social Security Tribunal, and, before the Tribunal's creation, by umpires who performed a somewhat similar function to the Tribunal under previous iterations of the EIA. Moreover, the tripartite test from *Faucher* is precisely the test that the General Division applied in the case at bar. Thus, contrary to what the Appeal Division found, the General Division faithfully followed the applicable law.

[53] *Bertrand* involved a mother, Ms. Bertrand, who quit her full-time job as a bookkeeper to care for her young child when she could not find adequate childcare despite a diligent search. Ms. Bertrand indicated she was available and looked for evening work. She also refused an offer of a full-time position as a bookkeeper that would have required her to work during the day. In addition, Ms. Bertrand agreed with the Commission that it was unlikely that she could find work as a bookkeeper that only required her to work in the evenings. This Court held that the question of her availability at least partly involved a question of law, and that the question of availability is an objective one, which cannot depend on the particular reasons for the restrictions on availability. In result, this Court held that Ms. Bertrand's failure to find a babysitter despite strong and reasonable efforts to do so could not in law make her available for suitable employment" within the meaning of the relevant provision similar to paragraph 18(1)(a) of the EIA that was then in force (*Bertrand*, at paragraph 21).

[54] It must be underscored that *Bertrand* would not be decided the same way today due to the intervening adoption of paragraph 9.002(1)(b) of the EI Regulations, which provides that work that is incompatible with a claimant's family obligations is not suitable. Moreover, as noted by the Social Security Tribunal in *S.S. v. Canada Employment Insurance Commission*, 2022 SST 749 (A.D.) (*S.S. v. C.E.I.C.*), the nature of work in this country has changed over the past 40 years, and jobs with regular evening or unfixed working hours are now much more prevalent. Thus, while limiting a job search to evening work in the early 1980s might well have resulted in there being few or no opportunities for employment and thus led to a conclusion that a claimant was not available for suitable work, the same cannot be said today. In short, the relevant context has changed dramatically over the last four decades.

[55] In light of these changes, as well as the facts at issue in *Bertrand*, that decision cannot be read as establishing a bright-line rule that full-time students, who must attend daytime classes, are not entitled to employment insurance benefits. It was accordingly unreasonable for the Appeal Division to state that *Bertrand* established such a rule.

[56] Turning more specifically to cases involving students, subsequent decisions from this Court confirm the absence of any rule that would disentitle full-time students in all circumstances from receiving employment insurance benefits if they are unable to work during the majority of the daytime hours because they are scheduled to be in class.

[57] In *Landry*, Hugessen J.A., who delivered the reasons of this Court, confirmed that there is a rebuttable presumption that full-time students are not available for suitable work within the meaning of what is now paragraph 18(1)(a) of the EIA. The Court also held that determining whether such presumption is rebutted involves a question of fact and that it was incorrect to state that the only way to rebut the presumption was by showing a history of full-time employment while attending classes

as a full-time student. Rather, the presumption may be rebutted by proof of what this Court termed “exceptional circumstances”.

[58] The umpire in that case had held as follows [at paragraph 1]:

> An extensive and consistent line of authority has long since confirmed that a student taking full-time courses is not available for work within the meaning of the *Unemployment Insurance Act*. This rule is subject to two exceptions. The first concerns a student sent on a course by the Commission: that is not the claimant’s position. The second exception covers a student who over the years has established a record that he held full-time employment while studying: that is not this claimant’s position.

[59] This Court found this statement to be inaccurate. Justice Hugessen stated as follows [at paragraphs 2–3]:

> This observation on the state of the law is too categorical. While it is true that there is a presumption that a person enrolled in a course of full-time study is generally not available for work within the meaning of the Act, at the same time it has to be admitted that this is a presumption of fact which certainly is not irrebuttable. It can be rebutted by proof of “exceptional circumstances”. The work record mentioned by the umpire is only one example of such exceptional cases, although in fact it may be the one most frequently encountered. There may certainly be others.
>
> However, having said that, it is still true that availability for work is essentially a question of fact. The applicant was not believed on this question when he stated that he was available because he would have dropped his university courses (for which he had received large subsidies in the form of scholarships and student loans) if he had been offered employment. In those circumstances, despite the error of law, it is clear that the umpire was right to dismiss his appeal. [Footnote omitted].

[60] In *Rideout*, this Court confirmed that a history of full-time work while attending school as a full-time student could rebut the presumption of unavailability (at paragraph 3). This Court also underscored that, while delineating the test for availability within the meaning of paragraph 18(1)(a) involves a question of law, its application is a question of mixed fact and law (*Rideout*, at paragraph 2).

[61] A similar conclusion was reached more recently in *Cyrenne*, where this Court held that the determination that the claimant had successfully rebutted the presumption of unavailability was a question of fact. In that case, this Court, under the reasonableness standard, upheld the umpire’s refusal to disturb the decision awarding benefits to a claimant based on the assessment that the claimant had established the existence of exceptional circumstances.

[62] In *Lamonde*, this Court underscored that “a work history showing that the claimant held regular employment while he was studying may make it possible to rebut the presumption” (at paragraph 12). Notably, in that case, this Court stated that what was required was a past history of regular employment without specifying whether the regular employment had to be full-time employment while attending school on a full-time basis.

[63] In *Wang*, this Court upheld a decision of an umpire that maintained the decision of a board of referees to afford employment insurance benefits to a claimant, who was a full-time student but who indicated she was looking for full-time work and would cease her studies if she located a full-time job. This Court held that the umpire did not err in

declining to interfere with the determination that the claimant had successfully rebutted the presumption of unavailability.

[64] There are several decisions from this Court where full-time students were found to be ineligible for unemployment or employment insurance benefits, but the facts in them are different from those in Mr. Page's case. The claimants in these other cases either had no history of previously working while attending school on a full-time basis (*e.g.*, in *Primard*; *Canada (Attorney General) v. Gauthier*, 2006 FCA 40, 152 A.C.W.S. (3d) 449 (*Gauthier*); and *Lamonde*) or, unlike Mr. Page, limited the type of work they were prepared to look for or the hours they were prepared to work to only weekends or to a very few hours per week (*e.g.*, *Canada (Attorney General) v. MacDonald*, [1994] F.C.J. No. 841 (QL), 48 A.C.W.S. (3d) 882 (F.C.A.); *Loder*; *Boland*; *Rideout*; *Gagnon*; and *Gauthier*). In addition, *Vezina v. Canada (Attorney General)*, 2003 FCA 198, 124 A.C.W.S. (3d) 609, and *Duquet v. Canada (Employment and Immigration Commission)*, 2008 FCA 313, 175 A.C.W.S. (3d) 445, are so terse that it is impossible to determine what facts were at play.

[65] From the foregoing review of the jurisprudence of this Court, the following principles emerge.

[66] First, the test to determine availability for suitable work within the meaning of paragraph 18(1)(a) of the EIA is as set out in *Faucher*, which requires consideration of whether a claimant establishes they:

- desired to return to the labour market as soon as a suitable job was offered;
- demonstrated that desire through efforts to find a suitable job; and
- did not set personal conditions that might unduly limit the chances of returning to the labour market.

[67] Second, there is a rebuttable presumption that claimants attending full-time studies that do not come within the ambit of paragraphs 25(1)(a) or (b) of the EIA are not available for suitable work within the meaning of paragraph 18(1)(a) of the EIA.

[68] Third, this presumption of unavailability may be rebutted by a claimant, and a determination of whether it is so rebutted is a factual one.

[69] Fourth, a contextual analysis is required to ascertain whether the presumption is rebutted. Fact patterns where the presumption has been successfully rebutted include circumstances where the claimant indicated 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. One can imagine other considerations that might be relevant, such as the ability of a claimant to follow classes online at a time of their choice.

[70] Such considerations under the third factor from *Faucher* are in conformity with the current statutory and regulatory provisions in the EIA and EI Regulations defining what is meant by suitable work. As noted by the General Division in the case at bar, these definitions define suitability with reference to the position held by a claimant before their job loss. Paragraph 18(1)(a) of the EIA requires a claimant to be available

for suitable work. Where there was a previous pattern of regular employment outside of school hours while attending full-time classes, it is not an error of law (or a reviewable factual determination within the meaning of paragraph 58(1)(c) of the DESDA) to conclude that a claimant is available if they are available for employment in accordance with their previous work schedule.

[71] Allowing students to collect employment insurance benefits in circumstances like those of Mr. Page also is consistent with the provisions of the EIA and applicable regulations that require they pay premiums for employment insurance from their part-time wages (EIA, sections 5, 67, 82).

[72] Before leaving this issue, it is worthwhile to briefly mention the case law of the Social Security Tribunal and umpires. Contrary to what the Appeal Division found in the present case, such case law does not stand for the proposition that full-time students are always disentitled to employment insurance benefits if they are unavailable to work on a full-time basis during daytime hours, Monday to Friday. Several decisions from umpires support the opposite conclusion (see, *e.g.*, *Re White*, C.U.B. 59766; and *Re Crane*, C.U.B 59738), as do several decisions from the Social Security Tribunal, itself (*e.g.*, *J.D. v. C.E.I.C.*; *Y.A. v. C.E.I.C.*; *A.L. v. Canada Employment Insurance Commission*, 2021 SST 250 (G.D.); *E.M. v. Canada Employment Insurance Commission*, 2021 SST 498 (G.D.); *B.N. v. Canada Employment Insurance Commission*, 2022 SST 69 (G.D.); *H.S. v. Canada Employment Insurance Commission*, 2022 SST 92 (A.D.); and *S.S. v. C.E.I.C.*).

[73] While there are cases from the Social Security Tribunal going the other way, many of them were authored by the same Tribunal member who made the decision in Mr. Page's case (*e.g.*, *D.B. v. Canada Employment Insurance Commission*, 2019 SST 1277 (A.D.); *Canada Employment Insurance Commission v. G.S.*, 2020 SST 1076 (A.D.); *Canada Employment Insurance Commission v. A.P.*, 2021 SST 295 (A.D.); and *M.T. v. Canada Employment Insurance Commission*, 2022 SST 646 (A.D.)).

[74] Based on the foregoing, I find that it was unreasonable for the Appeal Division in the present case to have concluded that "it is well-established case law that availability must be shown during regular hours for every working day and cannot be restricted to irregular hours resulting from a course schedule that significantly limits availability" [footnote omitted] (A.D. decision, at paragraph 30). To the contrary, the case law stands for entirely different propositions and mandates a nuanced and contextualized consideration of claimants' circumstances. Moreover, it is entirely consistent with the case law of this Court to find a student in Mr. Page's situation to be entitled to employment insurance benefits.

[75] This determination is a sufficient reason for setting aside the decision of the Appeal Division.

B. Unreasonable Interference with the General Division's Factual Determinations

[76] There is an additional reason for setting aside the decision of the Appeal Division, namely, because it unreasonably exceeded its authority under section 58 of the DESDA.

[77] As noted, under paragraph 58(1)(c) of the DESDA, the Appeal Division may interfere with factual findings made by the General Division in an employment insurance case only if the General Division based its decision on them, they are erroneous, and they were made in a perverse or capricious manner or without regard for the material before the General Division. Paragraph 58(1)(c) of the DESDA therefore provides the Appeal Division only a very limited ability to interfere with findings of fact or of mixed fact and law made by the General Division.

[78] In *Quadir*, a case involving review of a decision of the Appeal Division made in respect of a claim under the EIA, this Court held that the application of settled principles to facts is a question of mixed fact and law and is not an error of law. This Court accordingly found the decision of the Appeal Division in that case unreasonable because there was no error of law made by the General Division and thus no jurisdiction under section 58 of the DESDA for the Appeal Division to have intervened.

[79] In *Walls v. Canada (Attorney General)*, 2022 FCA 47, 2022 D.T.C. 5038, another judicial review application from a decision of the Social Security Tribunal, which was made at a time where provisions identical to those now in paragraph 58(1)(c) of the DESDA applied to all decisions from the General Division, this Court detailed what is meant by findings of fact made in a perverse or capricious manner or without regard for the material before the General Division. It stated as follows at paragraph 41:

> This Court has held that a perverse or capricious finding of fact is one where the finding squarely contradicts or is unsupported by the evidence (*Garvey v. Canada (Attorney General)*, 2018 FCA 118, [2018] FCJ No 626 (QL) at para. 6). In the recent decision of *Canada (Attorney General) v. Best Buy Canada Ltd.*, 2021 FCA 161, at paragraphs 122 and 123, referring to paragraph 18.1(4)(*d*) of the *Federal Courts Act*, R.S.C. 1985, c. F-7 and to *Rohm & Haas Canada Limited v. Canada (Anti-Dumping Tribunal)* (1978), 22 N.R. 175, 91 D.L.R. (3d) 212, this Court considered the meaning of "made in a perverse or capricious manner or without regard to the material before [the decision maker]" in a similar context of determining whether there was a basis for intervention of erroneous factual findings from an administrative decision-maker. In this passage, this Court explained that the notion of "perversity" has been interpreted as "willfully going contrary to the evidence". The notion of "capriciousness" or of the factual findings being made without regard to the evidence would include "circumstances where there was no evidence to rationally support a finding or where the decision maker failed to reasonably account at all for critical evidence that ran counter to its findings."

[80] Here, as already noted, the General Division set out the appropriate test from *Faucher* and went on to apply it. Its application of the test to the facts surrounding Mr. Page's claim were determinations of mixed fact and law, reviewable only under paragraph 58(1)(c) of the DESDA.

[81] There were facts before the General Division supporting its determination that Mr. Page had a desire to return to the labour market as soon as a suitable job was offered, had demonstrated that desire through efforts to find a suitable job, and had not set personal conditions that might unduly limit the chances of returning to the labour market. The General Division was entitled to account for the unique situation created by the COVID-related business closures in the manner that it did and to determine that Mr. Page was entitled to wait a few months before commencing his job search in light of those unique circumstances.

[82] On this point, contrary to what the Appeal Division indicated, it appears that there is no hard and fast rule that a claimant must immediately engage in a job search in all circumstances, and other cases have recognized that claimants are afforded a reasonable opportunity to see if they will be recalled before being required to start looking for alternate employment (see, *e.g.*, *Re Dufort*, C.U.B. 21724, and cases cited therein; *Re Watrich*, C.U.B. 16505; and the case relied on by the General Division, *Canada (Attorney General) v. MacDonald*, [1994] F.C.J. No. 841, 48 A.C.W.S. (3d) 882 (F.C.A.)).

[83] Ultimately, consideration of whether appropriate efforts to find a suitable job were undertaken is an issue of fact or of mixed fact and law, reviewable only under paragraph 58(1)(c) of the DESDA.

[84] Here, for the reasons noted above, it was open to the General Division to have concluded that Mr. Page's job search efforts were reasonable.

[85] The Appeal Division therefore had no jurisdiction to interfere in the General Division's findings of fact or of mixed fact and law because they were not perverse, capricious or made without regard to the material that was before the General Division. Consequently, for this reason as well, the decision of the Appeal Division is unreasonable.

VI. Proposed Disposition

[86] I would accordingly grant the application, set aside the decision of the Appeal Division, and reinstate the decision of the General Division, with costs.

GAUTHIER, J.A.: I agree.

RIVOALEN, J.A.: I agree.