Social Security Tribunal of Canada | Tribunal de la sécurité sociale du Canada

Citation: *Canada Employment Insurance Commission v. M. P.*, 2017 SSTADEI 216

Tribunal File Number: AD-16-363

BETWEEN:

Canada Employment Insurance Commission

Appellant

and

M. P.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Shu-Tai Cheng

DATE OF DECISION: May 30, 2017

REASONS AND DECISION

PERSONS IN ATTENDANCE

Appellant's representative	Elena Kitova
Respondent	M. P.

INTRODUCTION

[1] On February 8, 2016, the General Division of the Social Security Tribunal of Canada (Tribunal) allowed the Respondent's appeal where the Canada Employment Insurance Commission (Appellant) had determined that the Respondent was not available for work pursuant to paragraph 18(*a*) of the *Employment Insurance Act* (EI Act). The Respondent attended the teleconference hearing held by the General Division on January 6, 2016. No one attended on behalf of the Appellant.

[2] An application for leave to appeal the General Division decision was filed with the Appeal Division on February 26, 2016. Leave to appeal was granted on April 21, 2016.

[3] This appeal proceeded by teleconference for the following reasons:

a) The complexity of the issues under appeal;

b) The information in the file, including the need for additional information; and

c) The requirement under the *Social Security Tribunal Regulations* to proceed as informally and quickly as circumstances, fairness and natural justice permit.

[4] The following facts are in the record before the Tribunal:

a) The Respondent filed a claim for Employment Insurance (EI) regular benefits effective August 3, 2014;

b) He failed to attend a Claimant Information Session (CIS) and to submit a Job Search form (JSF), on September 17, 2014, despite having received direction and a form from the Appellant;

c) He reported attending on-the-job training (as a school bus driver) from October 14 to 17, 2014;

d) On November 14, 2014, he explained that he failed to attend an October 7, 2014, CIS because he was in a training course; he also indicated that he did not need to look for work as he was employed part-time and planned to stay with his employer;

e) The employer confirmed by letter that the Respondent was hired on October 22, 2014, on a permanent, part-time basis and worked an average of 4.5 hours per day during the school week. In the letter attaching the employer's letter, the Respondent stated: "As you can see, I was not looking for work, because I have a job now."

f) During a telephone call with one of the Appellant's representatives, on November 26, 2014, the Respondent reiterated that he had found work and had stopped looking for another job as of October 22, 2014; also, he was not willing to leave his job and was looking for a second part-time job but was not keeping a record of his job search;

g) On December 12, 2014, the Respondent advised the Appellant that he was searching for a second part-time job but was not keeping a record of his job search;

h) The Respondent was asked to provide a JSF in September 2014, November 2014, December 2014 and February 2015; he did not return a completed JSF in response to any of these requests;

i) By decision letter, dated December 12, 2014, the Appellant advised the Respondent of the following:

    1. The Respondent has not proven his availability for work within the meaning of the EI Act;

    2. An indefinite disentitlement would be imposed as of October 22, 2014.

j) The Respondent requested a reconsideration;

k) By letter dated July 19, 2015, the Appellant issued a reconsideration decision maintaining its initial decision;

l) The Respondent appealed the reconsideration decision to the General Division, arguing that he had filed his reports by phone and found it confusing, that he was given training to be a school bus driver, that he was hired after he completed the training and that he was still working; and

m) The Respondent testified at the General Division hearing that after he was hired as a part- time school bus driver, he had stopped seeking full-time employment; he was unwilling to leave that part-time employment for full-time employment; and he had made efforts to find a second, part-time job to supplement the hours he was already working.

[5] The General Division found that the Respondent was available for work during the relevant period and was unable to obtain additional, suitable employment. Therefore, he had proven he was capable of and available for work. It ordered that the Respondent receive EI benefits from October 22, 2014, until the end of his entitlement.

ISSUES

[6] Did the General Division err in law in making its decision, whether or not the error appears on the face of the record?

[7] Did the General Division base its decision on an error of mixed fact and law?

[8] Should the Appeal Division dismiss the appeal, give the decision that the General Division should have given, refer the matter to the General Division for reconsideration, or confirm, rescind or vary the General Division decision?

THE LAW

[9] According to subsection 58(1) of the *Department of Employment and Social Development Act* (DESD Act) the following are the only grounds of appeal:

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

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

c) the General Division 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.

[10] Leave to appeal was granted on the basis that the Appellant had set out reasons that fell within the enumerated grounds of appeal and that at least one of the reasons had a reasonable chance of success, specifically under paragraphs 58(1)(*b*) and (*c*) of the DESD Act.

[11] Subsection 59(1) of the DESD Act sets out the powers of the Appeal Division.

[12] Relevant provisions of the EI Act include subsection 18(1):

> 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
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> (a) capable of and available for work and unable to obtain suitable employment;
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> (b) unable to work because of a prescribed illness, injury or quarantine, and that the claimant would otherwise be available for work; or
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> (c) engaged in jury service.

SUBMISSIONS

[13] The Appellant made the following submissions:

a) The General Division erred in law when it allowed the Respondent's appeal on the issue of availability;

b) The General Division did not apply the three criteria set out in *Faucher v. Canada (Employment and Immigration Commission)*, A-56-96;

c) The Respondent failed to satisfy any of the three *Faucher* criteria:

    1. Desire to return to the job market: he reported that he had stopped looking for other work;

    2. Expression of that desire through efforts to find a suitable job: he did not submit a JSF, despite having been asked multiple times;

    3. Not setting personal conditions that might unduly limit the chances of returning to the labour market: he unduly limited his chances by setting the personal condition of part-time work that would fit around his part-time position as a school bus driver.

d) Although the Respondent may think that it was reasonable for him to stop job searching because he was working part-time, this does not meet the test for availability; and

e) The JSF that the Respondent submitted to Service Canada in January 2016 does not change the Appellant's position. The form was provided after the General Division hearing, and it relates to one job application made in August 2015.

[14] The Respondent did not file written submissions, but made the following oral submissions at the appeal hearing:

a) He was available to work at a full-time job, but he made errors in his reporting;

b) He was not familiar with the EI process, he did not know how to report properly and he was new to Canada;

c) He sent a JSF to Service Canada in January 2016, after the General Division member asked him to fill it out;

d) He made a mistake in reporting that he was not available because he had part-time work; he was available and was looking for a full-time job; and

e) The General Division made the right decision, and he did not have anything else to add.

ANALYSIS

[15] The Tribunal's Appeal Decision granted leave to appeal on the issue of whether the General Division erred in law or erred in fact and law in making its decision.

[16] The leave to appeal decision stated:

> [14] The GD's explanation was that it preferred the evidence and submissions of the claimant over those of the Commission. It is certainly within the purview of the GD to prefer some evidence over other evidence; the GD is the trier of fact and its role includes the weighing of evidence and making findings based on its review of that evidence. However, findings of fact must take into consideration the material before the GD and not be made in a perverse or capricious manner.
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> [15] In *Oberde Bellefleur OP Clinique dentaire v. Canada (Attorney General)*, 2008 FCA 13, the Federal Court of Appeal cautioned that if a Board of Referees decides that contradictory evidence should be dismissed or assigned little or no weight at all, it must explain the reasons for the decision, failing which there is a risk that its decision will be marred by an error of law or be qualified as capricious.
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> [16] Whether the GD sufficiently explained the reasons for its conclusion in paragraph [21] of its decision warrants review.

[17] Paragraph 21 of the General Division decision stated:

> [21] The Member considered the submissions and evidence. Those of the Commission were concise and consistent with the law. Those of the Appellant were that he was working and were also consistent. The Member prefers the evidence and submissions, based on the balance of probabilities, of the Appellant.

Standard of Review

[18] The Appellant submits that for questions of law, the Appeal Division does not owe any deference to the conclusions of the General Division. However, for questions of mixed fact and law, the Appeal Division must show deference to the General Division and can only intervene if the General Division 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 Federal Court of Appeal has determined, in *Canada (A.G.) v. Jewett*, 2013 FCA 243, *Chaulk v. Canada (A.G.)*, 2012 FCA 190, and other cases, that the standard of review for questions of law and jurisdiction in EI appeals from the Board of Referees is that of correctness, while the standard of review for questions of fact and mixed fact and law is reasonableness.

[20] Until recently, the Appeal Decision had been considering a decision of the General Division a reviewable decision by the same standard as that of a decision of the Board.

[21] However, in *Canada (A.G.) v. Paradis*; and *Canada (A.G.) v. Jean*, 2015 FCA 242, the Federal Court of Appeal indicated that this approach is not appropriate when the Tribunal's Appeal Division is reviewing appeals of EI decisions rendered by the General Division.

[22] The Federal Court of Appeal, in *Maunder v. Canada (A.G.)*, 2015 FCA 274, referred to *Jean*, *supra*, and stated that it was unnecessary for the Court to consider the issue of the standard of review to be applied by the Appeal Decision to decisions of the General Division. The *Maunder* case related to a claim for a disability pension under the *Canada Pension Plan*.

[23] In the matter of *Hurtubise v. Canada (A.G.)*, 2016 FCA 147, the Federal Court of Appeal considered an application for judicial review of a decision rendered by the Appeal Decision that had dismissed an appeal from a decision of the General Division. The Appeal Decision had applied the following standard of review: correctness on questions of law and reasonableness on questions of fact and law. The Appeal Division had concluded that the General Division decision was "consistent with the evidence before it and [was] a reasonable one." The Appeal Decision applied the approach that the Federal Court of Appeal in *Jean*, *supra*, suggested was not appropriate, but the Appeal Division decision was rendered before the *Jean* decision. In *Hurtubise*, the Federal Court of Appeal did not comment on the standard of review and concluded that it was "unable to find that the Appeal Division decision was unreasonable."

[24] In the recent matter of *Canada (A.G.) v. Peppard*, 2017 FCA 110, the Federal Court of Appeal noted that the Appeal Division had concluded that the General Division's determination that the claimant had just cause for leaving his employment was "reasonable" (i.e. the Appeal Division had applied the standard of review of reasonableness on a question of fact). The

Appeal Division's decision in *Peppard* was rendered after the *Jean* decision. The Federal Court of Appeal did not comment on the standard of review that the Appeal Decision should apply on decisions of the General Division but did "find the decision under review to be reasonable".

[25] There appears to be a discrepancy in relation to the approach that the Tribunal's Appeal Decision should take on reviewing appeals of EI decisions rendered by the General Division, and in particular, whether the standard of review for questions of law and jurisdiction in EI appeals from the General Division differs from the standard of review for questions of fact and mixed fact and law.

[26] I am uncertain how to reconcile this seeming discrepancy. As such, I will consider this appeal by referring to the appeal provisions of the DESD Act and without reference to "reasonableness" and "correctness" as they relate to the standard of review.

Disentitlement for Non-Availability

[27] Section 18 of the EI Act relates to a disentitlement for non-availability. A claimant is not entitled to be paid benefits for a working day for which the claimant fails to prove that on that day the claimant was capable of and available for work and unable to obtain suitable employment.

[28] The General Division referred to the *Faucher* decision and found that the Respondent was available for work "from October 22, 2014 until the end of his entitlement."

[29] In *Faucher*, the Federal Court of Appeal held that "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."

[30] The Appellant submits that the General Division misinterpreted the concept of availability and, therefore, erred in law. Moreover, the Appellant argues that there is no evidence, either prior to or at the General Division hearing, that the Respondent was available for work (other than in an unduly limited manner). Therefore, the Respondent could not satisfy the *Faucher* criteria in order to prove his availability.

[31] The Respondent submits that he was available from October 22, 2014, on and that he reported improperly because he was confused. The Respondent relied on the facts and arguments that he asserted before the General Division and sought to rely on a JSF that he filed with Service Canada in January 2016.

January 2016 Job Search Form

[32] The January 2016 Job Search form (2016 JSF) was stamped "received" by Service Canada and Human Resources and Skills Development Canada (HRSDC) as follows: HRSDC C. P. on January 14, 2016; Service Canada, Vaughn, Ontario on January 19, 2016; Service Canada, GTA North, CIS Unit on January 21, 2016; and HRSDC, C. P. on January 28, 2016. It was received by the Tribunal on February 4, 2016.

[33] This 2016 JSF was not entered into evidence at the General Division hearing on January 6, 2016; it is dated January 8, 2016, and was completed after that hearing. It is not mentioned in the General Division's decision. Therefore, it is new evidence before the Appeal Division.

[34] The first question then is whether the new evidence that the Respondent wishes to adduce— the 2016 JSF—can be received by the Appeal Division.

[35] Federal Court of Appeal decisions have held the following:

a) Umpires should never receive new evidence: *Canada (A.G.) v. Taylor*, [1991] F.C.J. No. 508; *Canada (A.G.) v. Hamilton*, [1995] F.C.J. No. 1230; *Brien v. Canada (EIC)*, [1997] F.C.J. No. 492; *Canada (A.G.) v. Merrigan*, 2004 FCA 253; and *Karelia v. Canada (MHRSD)*, 2012 FCA 140;

b) Umpires were allowed to receive new evidence as long as it was "new facts" under (former) section 120 of the EI Act: *Canada (MEI) v. Bartone*, [1989] F.C.J. No. 21; *Canada (A.G.) v. Wile*, [1994] F.C.J. No. 1852; *Canada (A.G.) v. Chan*, [1994] F.C.J. No. 1916;

c) Umpires could consider new evidence that was not "new facts" in relation to a breach of natural justice: *Velez v. Canada (A.G.)*, 2001 FCA 343; and

d) Umpires could, in an exceptional case, consider new evidence that was not "new facts," on the basis of (former) section 120 of the EI Act or otherwise: *Dubois v. Canada (EIC)*, [1988] F.C.J. No. 768; and *Canada (A.G.) v. Courchene*, 2007 FCA 183.

[36] In *Rodger v. Canada (A.G.)*, 2013 FCA 222, the Federal Court of Appeal was faced with an appellant who tried to adduce new evidence before the Umpire, tried to adduce the same new evidence as new facts on the basis of a rescind or amend application of the original Umpire's decision and later tried to adduce new evidence before the Federal Court of Appeal. The Federal Court of Appeal decision held:

> 26 Even if a litigant does not totally understand the process in which he is engaged, or fails to appreciate the significance of particular evidence, this Court is limited to reviewing the decisions before it on the basis of the evidentiary record before the decision-maker (*Ray v. R.*, 2003 FCA 317, [2003] 4 C.T.C. 206 (F.C.A.) at paragraph 5). This is not one of the rare situations where an exception can be made because, for example, the Court has to determine whether there was a breach of procedural fairness. The Umpire decided the appeal on the basis of the available evidentiary record which consisted of all the documents before the Board and the oral evidence referred to in the Board's decision as there was no transcript of the hearing. We must use the same record to review the Umpire's decision.
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> 27 As of the time he filed his first appeal before the Umpire, the applicant was attempting to retry his case on the merits. Unfortunately, the role of the Umpire was not to determine *de novo* his appeal from the decision of the Commission, nor as I mentioned earlier is it the role of this Court on judicial review to do so or to determine *de novo* the issues that were before the Umpire.
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> 43 As noted in *Canada (Attorney General) v. Chan* (1994), 178 N.R. 372 (Fed. C.A.) at paragraph 10 (*Chan*), reconsideration under this section of the *Act* should remain a "rare commodity", and an Umpire should be careful not to let the process be abused "by careless or ill-advised claimants". As unequivocally enunciated in *Chan*, a different or more detailed version of the facts already known to the claimant or a sudden realization of the consequences of certain facts are not new facts.

[37] Pursuant to the *Jobs, Growth and Long-Term Prosperity Act*, S.C. 2012, c. 19, subsections 266-267, the Office of the Umpire was replaced with the Tribunal's Appeal Division.

[38] To determine whether the Appeal Division can receive new evidence requires the following four-part analysis:

a) Is the Appeal Division able to rescind or amend a General Division decision?

b) Is the new evidence "new facts"?

c) If the new evidence is not "new facts," is the new evidence in relation to a breach of natural justice?

d) If the new evidence is not "new facts," are there other exceptional circumstances, such as in the *Dubois* or *Courchene* cases?

(a) Is the Appeal Division able to rescind or amend a decision of the General Division?

[39] Paragraph 66(1)(*a*) of the DESD Act states that a decision may be rescinded or amended "if new facts are presented" or if the Tribunal is satisfied that the decision was given without knowledge of, or was based on a mistake as to, some material fact.

[40] The Appeal Division may rescind or amend a decision that it made, but may not rescind or amend a decision of the General Division. An application to rescind or amend a General Division decision would need to be brought to the Tribunal's General Division.

[41] Given that there is a one-year time limit within which an application to rescind or amend must be made, it is too late for the Respondent to bring an application before the General Division. In any event, the Respondent does not seek to rescind or amend the General Division decision. It was in the Respondent's favour.

(b) Is the new evidence "new facts"?

[42] In the circumstances, it is not necessary to discuss in detail whether the new evidence is "new facts." It is sufficient to note:

a) "New facts" must have occurred after the decision was rendered or prior to the decision but could not have been ascertained by diligence: *Chan*, supra;

b) The Respondent seeks to rely on the 2016 JSF as proof that he applied for one full-time position in August 2015; and

c) While the document did not exist at the time of the General Division hearing, the Respondent, acting diligently, could have produced documentary evidence of a job application in August 2015 prior to or at the General Division hearing.

[43] The new evidence is not "new facts" within the meaning of paragraph 66(1)(*a*) of the DESD Act.

(c) Is the new evidence in relation to a breach of natural justice?

[44] Neither the Appellant nor the Respondent relies on a breach of natural justice in their arguments in this appeal.

[45] Also, the new evidence that the Respondent seeks to adduce is not in relation to a breach of natural justice. It cannot be received by the Appeal Division under the *Velez* exception.

(d) Are there other exceptional circumstances such as in the *Dubois* or *Courchene* cases?

[46] *Courchene*, *supra*, and *Canada (A.G.) v. Boulton* (1996), 208 N.R. 63 (FCA), related to documents that settled a labour or employment dispute between an EI claimant and his former employer. *Dubois*, *supra*, was affirmed in the *Courchene* case.

[47] In *Courchene*, the Umpire allowed minutes of settlement into evidence that were not before the Board, by way of an application to rescind and amend. In *Boulton*, the agreement was submitted as evidence before the Board. In *Dubois*, the Federal Court of Appeal noted that new evidence, in the form of a medical certificate, should have been allowed to be introduced before the Umpire where no rescind or amend application had been brought.

[48] Before me, the Appellant submitted that the Appeal Division could not receive the new document without reference to jurisprudence or legislative provisions.

[49] I note that the *Dubois*, *Courchene* and *Boulton* line of cases were decided within a regime that permitted an Umpire to rescind or amend a decision of the Board. As stated above, the Appeal Division cannot rescind or amend a decision of the General Division. However, the

Appeal Division had been considering a decision of the General Division a reviewable decision using the same principles as those of a decision of the Board (appealed to the Umpire).

[50] Given the decisions in *Paradis*, *supra*, *Maunder*, *supra*, and *Hurtubise*, *supra* and the differences between section 66 of the DESD Act and former section 120 of the EI Act (rescind and amend provision), I am uncertain whether this line of cases is binding on the Appeal Division considering a decision of the General Division.

[51] One reading of this line of cases is to limit their application to misconduct matters in which a settlement agreement between the claimant and the employer contradicted a finding of misconduct on the part of the claimant. However, some Appeal Division decisions have held that these cases are not limited in this manner: for example AD-14-99 (*C. B. v. Canada Employment Insurance Commission*, 2016 SSTADEI 40).

[52] The present matter does not fall within the narrow application of these cases.

[53] While there may be exceptional circumstances in which the Appeal Division can receive new evidence, this matter is not one that warrants application of an exception. The Respondent was repeatedly asked for a JSF (official document in the EI process) by the Appellant and did not provide one at the relevant times. The 2016 JSF relating to one job application made in August 2015, when the Respondent was disentitled as of October 22, 2014, is of little probative value. At the appeal hearing, the Appellant was asked whether one job search in August 2015 would have changed its decision on disentitlement, and the Appellant answered in the negative and reiterated that the Respondent was asked five times to provide a JSF, starting in September 2014.

[54] For the reasons enunciated in paragraphs 32 to 53 above, the Appeal Division cannot receive the new evidence (2016 JSF) submitted by the Respondent.

Availability and Error of the General Division

[55] The General Division found that the Respondent was available for work on the basis that it preferred the evidence and submissions of the Respondent over those of the Appellant. However, the General Division did not explain its reasons for this preference.

[56] In *Oberde Bellefleur OP Clinique dentaire v. Canada (A.G.)*, 2008 FCA 13, the Federal Court of Appeal cautioned that if a Board of Referees decides that contradictory evidence should be dismissed or assigned little or no weight at all, it must explain the reasons for the decision, failing which there is a risk that its decision will be marred by an error of law or be qualified as capricious.

[57] The Appellant's documentary evidence on file before the General Division was contradictory to that of the Respondent in documents and in testimony at the General Division.

[58] The Appellant's reconsideration file includes reports made by the Respondent that state that he was not willing to change his course schedule or leave training to accept work, and that he was not seeking other work because he had part-time employment upon completion of the training. After being advised that his entitlement would be reviewed, the Respondent changed his statement and insisted that he was looking for work. However, he did not provide a JSF despite being told he was required to and being asked multiple times.

[59] At the General Division hearing, the Respondent stated that he was not looking for full-time work, because he was not willing to leave his part-time job, and instead was looking for a second part-time job to supplement the hours he was already working. This is in line with a letter he wrote on November 17, 2014, in which he stated, in reference to the weeks of October 27-31 and November 3-7, 2014: "I was not looking for work, because I have a job now."

[60] It was incumbent on the General Division to explain the reasons why it dismissed or assigned little or no weight to some evidence over other evidence, and the General Division failed to do this. As such, the General Division erred in law in making its decision.

[61] This is a reviewable error pursuant to paragraph 58(1)(*b*) of the DESD Act.

[62] Given this error, the Appeal Decision is required to conduct its own analysis and decide whether it should dismiss the appeal, give the decision that the General Division should have given, refer the matter back to the General Division, or confirm, rescind or vary the decision: subsection 59(1) of the DESD Act.

[63] Is the Appeal Division able to give the decision that the General Division should have given on this issue? I find that it is, as no further evidence is required from the parties.

Appeal Division Decision

[64] The General Division found that the Respondent was hired in October 2014 as a part-time school bus driver, that he was not looking for full-time work, and that he made efforts to find a second, part-time job to supplement the hours he was already working.

[65] At the Appeal Division hearing, the Appellant argued that the General Division misapplied the *Faucher* test in that the Respondent could not satisfy the three criteria set out in *Faucher*, namely:

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

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

[66] I note that the Respondent's submissions before the Appeal Division are different from the ones he made before the General Division. Before the Appeal Division, the Respondent asserted that he was available to work at a full-time job and was seeking a full-time job as of October 22, 2014. Before the General Division, he stated that he was not looking for full-time work and was not willing to leave his part-time job.

[67] The General Division is the trier of fact, and its role includes weighing the evidence and making findings based on its consideration of that evidence. The Appeal Division is not the trier of fact.

[68] It is not my role, as a member of the Tribunal's Appeal Division on this appeal, to review and evaluate the evidence that was before the General Division with a view to replacing the General Division's findings of fact with my own. It is my role to determine whether a reviewable error set out in subsection 58(1) of the DESD Act has been made by the General Division and, if so, to provide a remedy for that error. It is not the role of the Appeal Division

to re-hear the case. The Appeal Division does not allow a party to testify in an attempt to introduce new evidence or to change one's recounting of historical information.

[69] I accept the General Division's factual findings that the Respondent was hired in October 2014 as a part-time school bus driver and that he was not looking for full-time work thereafter. Rather, he was looking for a second part-time job to supplement his hours and was not willing to leave his part-time bus driver job.

[70] With respect to the three *Faucher* factors:

a) Desire to return to the labour market as soon as a suitable job is offered – the Respondent was not willing to leave his part-time job and he was not seeking full-time employment;

b) The expression of that desire through efforts to find a suitable job – the Respondent did not provide evidence of any job searches between September 2014 (when first asked to) and August 2015; and

c) Not setting personal conditions that might unduly limit the chances of returning to the labour market – the Respondent's conditions included not leaving his part-time school bus driver position and adding a second part-time job that would supplement the hours that he was already working.

[71] The question of the Respondent's availability for work is a question of fact: *Canada (A.G.) v. Lavita*, 2017 FCA 82. I find as a fact that the Respondent did not meet the *Faucher* factors and, therefore, was not available for work at the relevant time.

[72] Considering the submissions of the parties, and my review of the General Division's decision and the appeal file, I conclude that the General Division erred in law in making its decision, and I allow the appeal.

[73] In the circumstances, I am able to give the decision that the General Division should have given (which was the dismissal of the Respondent's appeal before the General Division).

CONCLUSION

[74] The appeal is allowed, and the General Division decision is rescinded.

Shu-Tai Cheng
Member, Appeal Division