



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *P. C. v Canada Employment Insurance Commission*, 2019 SST 691

Tribunal File Number: AD-19-278

BETWEEN:

**P. C.**

Appellant

and

**Canada Employment Insurance Commission**

Respondent

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**SOCIAL SECURITY TRIBUNAL DECISION**  
**Appeal Division**

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DECISION BY: Stephen Bergen

DATE OF DECISION: July 31, 2019

## **DECISION AND REASONS**

### **DECISION**

The appeal is allowed in part. The Claimant is not disentitled to benefits under section 18(1)(a) of the Act after June 22, 2016.

### **OVERVIEW**

[1] The Appellant, P. C., (Claimant), was receiving Employment Insurance benefits when he learned that his mother was seriously ill and possibly near death. He was significantly affected by this news and had difficulty pursuing employment opportunities, even delaying his acceptance of one job offer until it was no longer available. However, the Claimant was employed at a part-time job that he had held continuously since the time before his benefits started, and he continued to report that he was available for and capable of work. The Respondent, the Canada Employment Commission (Respondent) eventually determined that the Claimant was not available for work and declared an overpayment of benefits.

[2] The Claimant requested a reconsideration but the Commission maintained its decision. The Claimant appealed the reconsideration to the General Division of the Social Security Tribunal, which dismissed his appeal. He now appeals to the Appeal Division.

[3] The appeal is allowed in part. The General Division erred by not properly applying the law and by misunderstanding or ignoring the Claimant's testimony regarding his job search efforts.

### **PRELIMINARY MATTERS**

[4] This appeal was originally scheduled to proceed by way of teleconference. Subsequently, the Commission informed the Appeal Division that it would not be appearing. The Claimant informed the Appeal Division that he did not wish to appear as well, but that he wanted the appeal to proceed based on the materials already on the record.

[5] Accordingly, this appeal is conducted on the record.

## ISSUES

[6] Did the General Division err in law by not properly applying the legal test for availability for work?

[7] Did the General Division find that the Claimant was not available for work without consideration of his testimony regarding his job search efforts?

## ANALYSIS

[8] The Appeal Division may intervene in a decision of the General Division, only if it can find that the General Division has made one of the types of errors described by the “grounds of appeal” in section 58(1) of *Department of Employment and Social Development Act* (DESD Act).

[9] The only grounds of appeal are as follows:

- 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.

### **Issue 1: Did the General Division err in law by not properly applying the legal test for availability for work?**

[10] Section 18(1)(a) of the Employment Insurance Act (EI Act), states that a claimant is not entitled to be paid for benefits for a working day in a benefit period 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.

[11] According to the Federal Court of Appeal in *Faucher v. Canada (Attorney General)*,<sup>1</sup> three factors **must** be analyzed to determine availability for work under section 18(1) of the EI Act. Those three factors are:

- a) a desire to return to the labour market as soon as suitable employment 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.

[12] The General Division did not refer to the *Faucher* decision by name but it appeared to apply the *Faucher* test in part. It determined that the Claimant, “set personal conditions that unduly limited his chances of returning to the labour market”, and that he had “not shown that his efforts to obtain suitable employment were reasonable and customary.”

[13] While the General Division is entitled to weigh the three *Faucher* factors as appropriate, it failed to assess one of the factors at all: The General Division did not assess whether the Claimant had a desire to return to the labour market as soon as a suitable job was offered. This could be viewed as contrary to the guidance in *Faucher* and an error of law under section 58(1)(b) of the DESD Act.

[14] Furthermore, the General Division’s decision misapplied the *Faucher* requirement that the Claimant express his desire to return to work by efforts to find a suitable job. The General Division states that the onus is on the Claimant to conduct a sustained and directed job search and it finds that he did not prove that he has made reasonable and customary job search efforts.<sup>2</sup> The decision concludes by saying that the Claimant “has not proven his availability for work or that he made reasonable and customary efforts to find suitable employment.”<sup>3</sup>

[15] The requirement that a job search be both sustained and directed is derived from section 9.001 of the *Employment Insurance Regulations* (Regulations). Section 9.001 also defines “reasonable and customary efforts” for the purpose of section 50(8) of the EI Act.

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<sup>1</sup> *Faucher v. Canada (Attorney General)*, A-56-96.

<sup>2</sup> General Division decision, para. 14

<sup>3</sup> General Division decision, para. 15

Section 50(8) says that the Commission *may* require that a claimant prove that he or she is making reasonable and customary efforts to obtain suitable employment (presumably when the Commission is skeptical of a claimant's declaration of availability on his or her claim report card).

[16] The Commission ordinarily relies on a claimant's declarations in weekly claim reports to determine availability. It also has the ability to require proof of job search efforts in accordance with section 9.001 of the Regulations but this is clearly discretionary. The evidence before the General Division did not suggest that the Commission exercised its discretion to require specific proof beyond the Claimant's declarations during the period in which the Claimant was submitting his 2016 claim reports, or at any time. The Commission did not even investigate the Claimant's claim reports until 2018 and at that time, it questioned the Claimant about his 2016 job search in general terms only.<sup>4</sup>

[17] I accept that the General Division must weigh the evidence to determine whether a claimant has expressed his desire to return to the labour market through efforts to find a suitable job. I also accept that the General Division may take into account the presence or absence of any of the job search activities listed in section 9.001 of the Regulations.

[18] However, in this case, the General Division required the Claimant to prove the sufficiency of his job search to the General Division according to the criteria in section 9.001, effectively imposing those criteria as a legal standard or test. In so doing, the General Division erred in its interpretation and application of the *Faucher* factor that concerns a claimant's job search efforts. Either this is an error of law or it is an extricable error of law in the application of *Faucher* to the facts.

[19] The General Division failed to consider whether the Claimant had the desire to return to the labour market as soon as suitable employment was offered (the first *Faucher* factor) and it misinterpreted the second *Faucher* factor concerned with the expression of the desire to return to work through efforts to find a suitable job.

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<sup>4</sup> GD3-35

[20] Therefore, I find that the General Division erred in law under section 58(1)(b) of the DESD Act.

**Issue 2: Did the General Division find that the Claimant was not available for work without consideration of his testimony regarding his job search efforts?**

[21] The General Division stated that the Claimant told the Commission that, "...because of his mother's condition he was not "mentally capable" of starting a new position and decided to stay working with his part-time employer only."

[22] Where the General Division mentioned the Claimant's statement that he was not "mentally capable", it was referring to the Claimant's response to one of the questions in a questionnaire. The questionnaire related to the Claimant's refusal to accept a particular offer of employment.<sup>5</sup> In his testimony, the Claimant confirmed that he was "not mentally fit to take on anything". However, this statement follows that portion of his testimony in which he explained why he put off the employer who had offered him a job, and occurs just before he asserted that he did start looking for work.<sup>6</sup>

[23] The General Division also stated that the Claimant, "would not have taken any other jobs or any full time employment from the end of May until September 2016", and that he, "was not actively looking for work during this time." The General Division took this from the Claimant's earlier statements to the Commission.<sup>7</sup> Specifically, the Commission's notes of June 13, 2018 record that the Claimant told the Commission that he was not looking for work in the period from May to September and that he would not have taken any other jobs or full time jobs.<sup>8</sup>

[24] The Claimant's testimony contradicted his June 2018 statement. The Claimant testified that he did start looking for work and that it was not accurate that he was not available.<sup>9</sup> He stated that he had provided an email record that proved that he had applied for work at least once.<sup>10</sup> He

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<sup>5</sup> GD3-17, 19

<sup>6</sup> *Ibid.* at 31:25

<sup>7</sup> GD3-22

<sup>8</sup> GD3-22

<sup>9</sup> Audio recording of General Division hearing at timestamp 31:25

<sup>10</sup> Audio recording of General Division hearing at timestamp at 18:20

also said that he must have made calls and reviewed newspaper and online ads.<sup>11</sup> He said that he had contacted an employment agency,<sup>12</sup> and that he had registered his resume with an online job search site.<sup>13</sup> He emphasized that he did “try to put himself back on the market”.<sup>14</sup>

[25] The General Division did not ask the Claimant about the apparent contradiction between his statement to the Commission and his testimony, or express concern about the contradiction. Nor did it find in its decision that the Claimant’s testimony was not reliable or believable. In fact, the General Division did not refer to the Claimant’s testimony at all. If it preferred the Claimant’s earlier statements to the Commission to his testimony, the General Division did not say why.

[26] As the Commission put it, in submissions that support this appeal, “it is not clear whether the [General Division] considered, misunderstood or simply ignored testimony provided by the Claimant at the hearing”.

[27] I find that the General Division erred under section 58(1)(c) of the DESD Act by basing its decision on a finding that the Claimant was not available for work after May 26, 2016, without regard for the Claimant’s testimony to the contrary.

[28] The Claimant has established grounds for appeal under sections 58(1)(b) and 58(1)(c) of the DESD Act.

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<sup>11</sup> *Ibid.* at 18:55

<sup>12</sup> *Ibid.* at 33:40

<sup>13</sup> *Ibid.* at 36:15

<sup>14</sup> *Ibid.* at 39:05

## **REMEDY**

[29] I consider that the General Division record is complete. I will therefore exercise my authority under section 59 of the DESD Act, to give the decision that the General Division should have given.

[30] I appreciate that the Commission's June 2018 notes record that the Claimant told the Commission that he was not looking for work and would not have taken any other jobs or full time jobs between May and September of 2016. However, that cannot have been a complete answer. If the Claimant had no desire to return to work, he might have refused the June 2016 offer of employment. However, he did not refuse: At almost the same time he was speaking to the Commission, he was also asking his prospective employer for more time to decide to accept the job.<sup>15</sup>

[31] In addition, the Claimant gave the General Division documentary evidence that appears to confirm his attendance at a job fair, and to confirm that he made an application for employment in July 2016 as a result.<sup>16</sup> The Claimant discussed this application with the Commission in November 2018.<sup>17</sup> This evidence challenges how accurately or completely the Claimant related his circumstances to the Commission in June 2018, or how well the substance of his statement was captured in the Commission's notes.

[32] Those June 2018 notes are also contrary to the Claimant's questionnaire where, in his own hand, he responds to the question that asks if he had been looking for work since the job offer. He answers, "Yes".<sup>18</sup> As already discussed, the Claimant also testified about his job search efforts in the period from the end of May until September 2016, and that he had been available for work.<sup>19</sup> He stated that he believed there had been more job applications than the one in June but that he could no longer prove them due to the lapse of time. I note that the Commission's 2018 investigation focused on the Claimant's refusal of a particular job offer and that, even then, the Claimant was not asked to submit detailed evidence of any other job search.

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<sup>15</sup> GD3-30

<sup>16</sup> GD2-8-18

<sup>17</sup> GD3-35

<sup>18</sup> GD3-16

<sup>19</sup> Audio recording of General Division hearing at timestamp 31:25



[33] I have reviewed the audio tape of the Claimant's testimony at the General Division in full. I find his testimony to be generally credible. I find his testimony to be plausible regarding his reaction to his mother's condition, the support he relied on from his continuing part-time employment, and his later efforts to find additional work. His testimony was also internally consistent and consistent with most of the information on the Commission file. I also note that he might easily, and without fear of contradiction, have confirmed with certainty that he made calls and reviewed newspaper and online ads, but that he testified that he "must have" done those things.

[34] The Claimant's recollection as to the certain particulars of his job search was poor, which I would expect to be due, at least in part, to the significant lapse of time, although I understand that he was also in some psychological distress at the time. Therefore, I cannot rely on his belief that he must have engaged in those particular job search activities that he named.

[35] However, I am satisfied on a balance of probabilities that the Claimant does recall that he desired to look for work, that he was actively looking for work, and that he did at least some of the things that one would normally expect of a person actively searching for work.

[36] In submissions supporting this appeal, the Commission reviewed the evidence of the Claimant's job search efforts and stated that it is now satisfied that the Claimant has met the burden of proving his availability. I agree that the Claimant has proven that he desired to return to the workforce as soon as possible (the first *Faucher* factor), *after he* recovered from the initial shock of learning of his mother's condition. I also agree that he expressed that desire through efforts to find a suitable job (the second *Faucher* factor), within the same timeframe.

[37] I do not accept that the Claimant limited himself to his existing part-time employment. In addition, I do not view the Claimant's request to defer a job opportunity as one that "unduly" limited his job opportunities, when the opportunity arose at or about the time that the Claimant was dealing with his mother's condition. There is no other suggestion that the Claimant set personal conditions on his employment that unduly limited his employment (the third *Faucher* factor).

[38] The Claimant did not explain how long it took him to renew his job search after learning of his mother's condition. He clearly took some comfort his regular part-time job to "maintain his sanity".<sup>20</sup> The first evidence to corroborate that he was looking beyond his part-time job for other work is the email dated June 22, 2016, which apparently followed a job fair.<sup>21</sup> This is about a week after he had emailed the employer that made him a job offer, to ask for more time to consider. I therefore find that the Claimant was capable and available for work as of June 22, 2016, and until the end of his claim in mid -September 2016.

## CONCLUSION

[39] The appeal is allowed in part. The Claimant is not disentitled to benefits under section 18(1)(a) of the Act after June 22, 2016.

Stephen Bergen  
Member, Appeal Division

HEARD ON:	
METHOD OF PROCEEDING:	On the Record
APPEARANCES:	NO ONE APPEARING

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<sup>20</sup> GD3-35

<sup>21</sup> GD2-8