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

Citation: *L. G. v Canada Employment Insurance Commission*, 2019 SST 1374

Tribunal File Number: AD-19-556

BETWEEN:

L. G.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Stephen Bergen

DATE OF DECISION: November 22, 2019

Canada

DECISION AND REASONS

DECISION

[1] The appeal is allowed. The Claimant is not disentitled to benefits from January 5, 2019, to January 27, 2019.

OVERVIEW

[2] The Appellant, L. G. (Claimant), applied for Employment Insurance benefits after he was laid off. He also enrolled in a full-time scaffolding course for about three weeks. The Respondent, the Canada Employment Insurance Commission (Commission), determined that the Claimant could not receive benefits while he was taking the course. When the Claimant asked the Commission to reconsider, the Commission maintained its original decision.

[3] The Claimant appealed to the General Division of the Social Security Tribunal, but the General Division dismissed his appeal. The General Division found that the Claimant could not receive benefits because he did not make enough effort to find work while he was taking the scaffolding course. It also said that the Claimant was too busy with his course to have accepted a job. The Claimant is now appealing to the Appeal Division.

[4] The appeal is allowed. The General Division made a mistake when it found that the Claimant's full-time training meant that he could not have worked during that time. It also incorrectly applied the legal test to determine that he was not available for work. Finally, the General Division was mistaken when it considered that two separate and independent disentitlements should both apply.

[5] I have made the decision the General Division should have made. I find that the Claimant was capable and available for work from January 5, 2019, to January 27, 2019, and that he is not disentitled to benefits for that period.

WHAT GROUNDS MAY I CONSIDER?

[6] 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 s.58(1) of the *Department of Employment and Social Development* Act (DESD Act).

[7] "Grounds of appeal," means reasons for appealing. I am only allowed to consider whether he General Division made one of these types of errors:

a) The General Division did not follow procedural fairness.

b) The General Division did not decide an issue that it should have decided. Or, it decided something that it did not have the power to decide.

c) The General Division made an error of law when making its decision.

d) The General Division based its decision on an important error of fact.

ISSUES IN THIS CASE

[8] Did the General Division make an error of law by failing to evaluate the Claimant's availability for suitable employment under section 6(4) and 6(5) of the *Employment Insurance Act?*

[9] Did the General Division make an important error of fact when it found that the Claimant had not shown that he could have worked because he was in full-time training?

[10] Did the General Division make an error of law in how it found that the Claimant had unduly limited his chances of returning to the labour market?

[11] Did the General Division make an error of law when it considered that the Claimant was disentitled because he did not prove that he made reasonable and customary efforts to find work?[1]

[1] Section 50(8) of the *Employment Insurance Act*

ANALYSIS

Issue 1: Availability for suitable employment under section 6(4) and 6(5) of the EI Act

[12] The main issue that the General Division needed to decide was whether the Claimant was available for work while he was taking the training. The EI Act says that a claimant must be available for work and unable to find suitable employment.[2] The Claimant argued his efforts to find "suitable" work were appropriate. He argued that his efforts were consistent with section 6(4) and section 6(5) of the EI Act, and that the General Division erred in law by failing to apply these sections.

[13] Section 6(4) states that employment is not "suitable" if its pay, or its other conditions of employment, are less favourable than would be normal for a claimant's usual occupation. Section 6(5) of the EI Act states that suitable employment may include work that pays less or is on less favourable conditions than a claimant's usual occupation, but only after a "reasonable interval".

[14] The Claimant argues that he was within that "reasonable interval" at the time that he took the training course. The Claimant is a unionized scaffolding apprentice and he believes that the way that he looked for work was the best way to find work as a unionized scaffolding apprentice. According to the Claimant, this was the only employment that should have been considered suitable. Anything else would be at a lower rate of earnings or on less favourable terms.

[15] However, at the General Division, the Claimant did not argue that he could not have found any other work that would have maintained his usual earnings and benefits. There was no evidence before the General Division of what kind of alternate employment might have been available to the Claimant, if he could not work as a unionized scaffolding apprentice. There was also no evidence to show that he would have had reduced earnings, more limited benefits, or less favourable working conditions in alternative jobs.

[16] In other words, there was nothing to suggest to the General Division that sections 6(4) and 6(5) of the EI Act should be applied to the Claimant's circumstances. Therefore, there was

---

[2] Section 18(1) of the EI Act

no reason for the General Division to have analyzed the circumstances under these sections. It was not an error of law for the General Division to find that the Claimant was not available for work without considering sections 6(4) and 6(5) of the EI Act.

Issue 2: Ability to work at time of full-time training

[17] The Claimant did not dispute that he attended a full-time skills-upgrading course in scaffolding during a part of his layoff period. The Federal Court of Appeal has stated that a claimant that is going to school full-time is presumed to be unavailable for work.[3] The Claimant could have rebutted the presumption of unavailability (shown that going to school did not mean he was not available) in one of two ways: He could have shown that he had gone to school full-time in the past and still be able to work. Or, he could have shown some other exceptional circumstance.[4]

[18] The General Division found that the Claimant's circumstances did not rebut the presumption of unavailability. It stated that the Claimant did not show that he had a history of full-time study (the General Division meant to say "full-time employment") while he was attending training. It also stated that the Claimant had not presented evidence of any exceptional circumstances.

[19] The Claimant argued that the General Division made an error by failing to assess whether he was credible when he said that he had been willing to abandon his training for an offer of full-time work. However, I do not see that the General Division made any adverse finding about the Claimant's credibility.

[20] I need to clarify what appears to have been a "slip" in the General Division decision. The General Division decision stated that the Claimant "did **not** have a desire to return to the labour market as soon as suitable employment was offered as [the General Division] accept[s] his testimony he would have left the course if he had been offered a full-time position." The only way that I can make sense of this statement is to assume that the General Division did not intend to insert "not" before "have a desire".

---

[3] *Landry v Canada (Attorney General),* A-719-91
[4] *Ibid*.; also *Canada (Attorney General) v Rideout*, 2004 FCA 304

[21] I interpret the General Division decision as having found that the Claimant did have a desire to return to work as soon as suitable employment was offered. The General Division relied on evidence that would support a finding that the Claimant had such a desire. It accepted the Claimant's testimony that he would have left the course if he had been offered a full-time position. In the next sentence, the General Division also said that it accepted that the nature of the Claimant's training supported his desire to return to work, because his training was directed towards improving the Claimant's chances of getting a job.

[22] Other evidence before the General Division also supported a finding that the Claimant desired to return to work. The Claimant's scaffolding course was of relatively brief duration. He testified that it was not a required element of his apprenticeship program. The Claimant also testified that his trade union was bearing almost the entire cost of the course.

[23] The Claimant was not asked if he had ever attended full-time studies while working full-time and he did not offer this information. This is not surprising because the Claimant had said that he always intended to quit the course if he found work. He had no intention of continuing in the course and working at the same time.

[24] The General Division found as fact that the Claimant intended to quit the course for full-time employment. This fact is proof-positive that the Claimant's training would not have interfered with his ability to work, if work were offered.

[25] The Claimant repeatedly told the Commission that he was available but "not looking" for work. However, the Claimant testified at the General Division that he had asked his previous employer to recall him. He also said that an employment agency already had his resume. Before he started the course, he called the agency to let them know he was looking for work again. He said that he expected the agency would contact him if an opportunity arose, just as he had been connected with employment on a previous occasion. The Claimant also said that he checked the union board for new postings during his course. The General Division did not challenge the Claimant's evidence about his ongoing efforts to find work. Its concern was that the Claimant had not been active enough in his efforts.[5]

---

[5] General Division, para. 17

[26] Nonetheless, the General Division found that there were no exceptional circumstances[6] by which the Claimant could rebut the presumption of non-availability. It sill applied the presumption of unavailability for full-time students to find that the Claimant was not available.

[27] The General Division did not ignore or misunderstand the Claimant's evidence about his training. However, the General Division made an important error of fact when it found that the Claimant should be presumed to be unavailable while he was in training. Taking into account the Claimant's efforts to remain current on employment opportunities for apprentice scaffolders, I consider the application of a "presumption of unavailability" to be inconsistent with the General Division's finding of fact that the Claimant would leave the training course as soon as he had an offer of full-time employment.

[28] To use the language of section 58(1)(c) of the DESD Act, such a finding is "perverse or capricious".

Issue 3: Undue limits on returning to the labour market

[29] In his argument that the General Division should have applied sections 6(4) and 6(5) of the EI Act, the Claimant raised a broader concern. He argued that he was a unionized, apprenticed scaffolder and that he should only have to search for work in ways that would be likely to identify opportunities for unionized, apprenticed scaffolders.

[30] The General Division found that the Claimant unduly limited his chance returning to the labour market by "focusing on his course at the expense of *looking fo*r employment."[7] It based this on its earlier finding that the Claimant's job search did not meet the standard of "reasonable and customary efforts" as measured against the criteria in section 9.001 of the *Employment Insurance Regulations* (Regulations).[8] In addition, it had already found that the Claimant did not express his desire to return to work through efforts to find suitable employment.[9]

[31] In *Faucher v Canada (Attorney General)*,the Federal Court of Appeal said that the General Division must consider three factors when it determines that a claimant is available for

[6] General Division decision, par. 38
[7] General Division decision, para. 26
[8] General Division decision, para. 6, 16
[9] General Division decision, para. 24

work under section 18(1)(a) of the EI Act (the *Faucher* factors).[10] The first of those factors is the claimant's desire to return to work. The second *Faucher* factors is the claimant's efforts to find suitable employment. The third *Faucher* factor is that a claimant should not set personal conditions that unduly limit his or her chances of returning to the labour market.

[32] The General Division found that neither the second nor the third factor were in favour of the Claimant's availability. In both cases, the finding was solely based on evidence of the sufficiency of the Claimant's job search efforts. Effectively, this means that the General Division analyzed the second *Faucher* factor twice.

[33] I find that the General Division misapplied the test for availability from *Faucher*. The Federal Court of Appeal in *Faucher* meant for three factors to be considered—not that the second factor should be given double weight. The third *Faucher* factor must be distinct from the manner and adequacy of the claimant's job search. In my view, the third factor describes personal conditions that would limit the *type of work* that a claimant would be willing to accept. By "type of work", I am thinking of characteristics of the work itself, such as its location or the scheduling of shifts, the wages or salary, or the type of employer or position.

[34] Consistent with this interpretation, the Federal Court of Appeal in *Canada (Attorney General) v Gagnon*[11] said this: "[a claimant] must not impose such restrictions on his or her availability as to unduly limit his or her chances of holding employment." *Holding* employment is different than *finding* employment. The language of *Gagnon* suggests that the Court did not understand "undue restrictions" to be restrictions in the manner of job search.

[35] I find that the General Division made an error of law under section 58(1)(b) of the DESD Act when it interpreted the limitations described by the third *Faucher* factor to be limitations on the Claimant's job search.

Issue 4: Two different disentitlements

[36] The General Division stated that the Claimant would be disentitled from receiving benefits f he could not prove that he was capable of and available for work but unable to obtain

[10] *Faucher v Canada (Attorney General),* A-57-96
[11] *Canada (Attorney General) v Gagnon,* 2005 FCA 321

suitable employment. It also stated that he would be independently disentitled if he had not made reasonable and customary efforts to find suitable employment. [12]

[37] The Commission argued that the General Division made an error by analyzing two different disentitlements. It stated that it had imposed only one disentitlement, which was that the Claimant was disentitled because he was not available for work under section 18(1)(a) of the EI Act. According to the Commission, the Claimant was not separately disentitled because he had not made reasonable and customary efforts to find suitable employment.

[38] I agree with the Commission that there was only one disentitlement in this case. In the usual course of a claim, a claimant may prove his or her availability for work by the declarations her or she makes on weekly claim reports. However, section 50(8) of the EI Act gives the Commission the ability to require that a claimant support his or her declarations with proof that the claimant has made reasonable and customary efforts to obtain suitable employment. Section 50(8) describes the legislative purpose to requiring this kind of proof. It says that this information is to determine whether a claimant is "available for work and unable to obtain suitable employment" (which is the same language used by section 18(1)(a) of the EI Act).

[39] The only question of disentitlement on these facts, arises from the Commission's finding that the Claimant was not, "available and unable to find suitable employment". To assess this, the General Division was required to consider the *Faucher* factors, including whether the Claimant expressed his desire to return to work through efforts to find a suitable job. Section 50(8) simply gives the Commission the ability to require a claimant to establish those efforts according to the criteria in section 9.001 of the Regulations.

[40] The General Division made an error of law under section 58(1)(b) of the DESD Act by stating that section 18(1)(a) and section 50(8) of the EI Act have different criteria and potentially impose distinct disentitlements, and by finding that the Claimant was disentitled under section 50(8) of the EI Act.

---

[12] General Division decision, para. 3

[41] Because I have found errors in the General Division, I will now turn to consider the appropriate remedy.

REMEDY

[42] I have the authority under section 59 of the DESD Act to change the General Division decision or make the decision that the General Division should have made. I could also the matter back to the General Division to reconsider its decision.

[43] I will give the decision that the General Division should have given because I consider that the appeal record is complete. That means that I accept that the General Division has already considered all the issues raised by this case, and that I can make a decision based on the evidence that the General Division received.

[44] I found that the General Division made a mistake in the way that it determined that the Claimant should be presumed to be unavailable because he attended a course full-time. I note that the Claimant's course was targeted to developing skills specific to his trade and that he enrolled with the support of his Union, believing that the course was pre-approved as part of his apprenticeship.[13] I also note that the Claimant "looked for work" to continue his apprenticeship at the same time that he attended the training. His efforts were similar to those that had been effective to place him an earlier position. Importantly, the Claimant was prepared to drop the course whenever he found work. I find that these facts amount to exceptional circumstances and I accept that the Claimant's attendance at the scaffolding course did not prevent him from being available for work.

[45] I also find that the General Division made an error of law when it found that the Claimant unduly limited his chances based on the nature of the Claimant's job search while he was in training. That means that I must now consider whether the Claimant unduly limited his chances of returning to work in some other way.

[46] I am satisfied that Claimant looked for work while he was taking his training, but only work as an apprentice scaffolder. When he was laid off in December 2018, the Claimant was

[13] GD2-5

indentured as a first-year apprentice in the scaffolding trade. His efforts to return to work between January 5, 2019, and 27, 2019 were focused on returning to work in this particular trade. The Claimant testified at the General Division that he asked his previous employer to recall him and expected to be recalled in February 2019. At the same time, he said that he called the agency after his layoff so that he would be put on "the board" and would get a call if something came up. He said that this is how he had found work in the past. The Claimant also enrolled in a scaffolding skills-upgrading course that was supported by his Union. He said that he checked the Union job board while he was in the course, and that he called "his journeyman" after the course ended on January 27, 2019, to see if he knew of any work coming up.

[47] By limiting where and how he looked for work, the Claimant effectively placed conditions on the type of work that he was willing to take. The Claimant sought work in ways that were specific to the kind of work that the Claimant was interested. The Claimant's job search would be unlikely to identify any other type of job.

[48] However, I do not accept that the Claimant limited his chances of returning to the labour market *unduly*. I say this for three reasons:

[49] First: The Claimant believed that he would probably be recalled by his previous employer. The decision in *Canada (Attorney General) v. Macdonald*[14] upheld a decision finding that an appellant was available for work even though the appellant, "was only willing to accept work from [her employer] with which she had been employed for some time, although, at the material times, the employment was intermittent". This suggests that a claimant who expects to be recalled to his or her regular job may not be required to conduct the same kind of job search or as extensive a search—depending on the circumstances.

[50] Second: A scaffolding position may well have been his best prospect of employment. I note that there was no evidence before the General Division that the job market for scaffolding apprentices in particular was promising. But there was also no evidence that it was challenging. On the other hand, scaffolding was the Claimant's chosen career, and it was work for which he had trained and gained experience. Even the very training that the General Division understood

[14] Canada (Attorney General) v. MacDonald, A-672-93

to interfere with the Claimant's chances of returning to the labour market was directly targeted to improving his chances for re-entry to a job in the scaffolding field. The fact of his apprenticeship and his continuing training indicates both interest and commitment in the field. These factors are important to employers. In my view, the evidence supports an inference that the Claimant's best chance of reemployment was in the scaffolding field, at least in the short term.

[51] Third: The Claimant is said to have "unduly limited his chances" for only about three weeks. This is the length of his scaffolding training course. During that time, the Claimant limited his prospects to work that was within the trade in which he was indentured and had most recently been working. However, given his expectation of recall and his experience in and commitment to his own trade, it was not unreasonable for him to only search for work as an apprentice scaffolder over a period that was only about three weeks.

[52] Section 6(5) of the EI Act speaks of a reasonable interval during which a Claimant is not required to look for work that would pay less or be on less favourable terms. I have found that the General Division did not err by failing to apply section 6(5). This was because the Claimant did not even establish that looking for other jobs meant looking for jobs that necessarily paid less or had less desirable terms.

[53] However, I think that the "reasonable interval" concept is also useful to assess whether it is reasonable for a person to limit a job search to his or her area of specialty. The Claimant set aside three weeks during his training in which he focused on work that would re-engage him as an apprentice in his chosen trade. I find that it was reasonable for the Claimant to limit his search to apprentice positions within his trade, for the short period of his training course. This did not unduly limit his chances of re-entry to the workforce. I find that the third *Faucher* factor is in the Claimant's favour.

[54] Because I have found that the Claimant could limit his job search to apprentice scaffolding positions for a time, I must now revisit the question of whether the Claimant made adequate efforts to find a suitable job (the second *Faucher* factor). The Claimant's job search consisted of waiting for recall, registering with the temporary agency and, checking the Union board. The General Division considered these efforts to have been too limited. I agree that the Claimant's activities did not include many of the activities that would be viewed as "reasonable

and customary" if he had also been looking for suitable employment other than an apprentice scaffolding position.

[55] However, I find that a "suitable job" over the relatively short period of his training upgrading, is a job as an apprentice scaffolder. The Claimant expressed his desire to find *that kind* of job through a job search that was adequate for that purpose within that time frame. Therefore, I find that the Claimant also satisfied the second *Faucher* factor.

[56] Having regard to all the *Faucher* factors, I find that the Claimant was capable and available for work from January 5, 2019, to January 27, 2019, and that he is not disentitled to benefits during that period.

CONCLUSION

[57] The appeal is allowed. The Claimant is not disentitled to benefits from January 5, 2019, to January 27, 2019.

Stephen Bergen
Member, Appeal Division

HEARD ON:	November 5, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	L. G., Appellant Melanie Allen, Representative for the Respondent