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

Citation: *B. W. v Canada Employment Insurance Commission*, 2020 SST 12

Tribunal File Number: AD-19-530

BETWEEN:

B. W.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Stephen Bergen

DATE OF DECISION: January 10, 2020

Canada

DECISION AND REASONS

DECISION

[1] The appeal is dismissed. The General Division made an error in how it reached its decision. I have made the decision that the General Division should have made, but I have reached the same conclusion as the General Division.

OVERVIEW

[2] The Appellant, B. W. (Claimant), left her job because the stress of her work was affecting her health. She returned to school to retrain. The Respondent, the Canada Employment Commission (Commission), determined that she had voluntarily left her employment without just cause, which meant that she was disqualified from receiving benefits. It also found that she was not available for work because she was attending school on a full-time basis. The effect of the finding that the Claimant was not available for work was that the Claimant remained disentitled to benefits.

[3] When the Claimant asked the Commission to reconsider, it maintained its decision on both of these issues. The Claimant appealed to the General Division of the Social Security Tribunal. The General Division found that the Claimant had just cause for leaving her employment but it still upheld the Commission decision that the Claimant was not available for work. In consequence, the General Division dismissed the Claimant's appeal. The Claimant is now appealing to the Appeal Division.

[4] The appeal is dismissed. The General Division erred in law but I have corrected the error. I must still reach the same decision as the General Division.

WHAT GROUNDS CAN I CONSIDER FOR THE APPEAL?

[5] To allow the appeal, I must find that that the General Division made one of the types of errors described in the grounds of appeal. The "grounds of appeal" are outlined below:[1]

---

[1] This is a plain-language version of the three grounds. The full text is in section 58(1) of the *Department of Employment and Social Development Act.*

1. The General Division hearing process was not fair in some way.
2. The General Division did not decide an issue that it should have decided. Or, it decided something it did not have the power to decide.
3. The General Division based its decision on an important error of fact.
4. The General Division made an error of law when making its decision.

ISSUES

[6] Did the General Division err in law by:

a) basing its decision solely on the limits the Claimant placed on her chances of returning to the labour market, or;
b) by failing to provide reasons for giving no weight to her desire to return to work or the adequacy of her job search?

[7] Did the General Division make an important error of fact when it found that the Claimant was not available for work because she was attending school full time?

ANALYSIS

Presumption of non-availability

[8] The *Employment Insurance Act* (EI Act) says that claimants are not entitled to benefits unless they can prove that they are capable of and available for work and unable to obtain suitable employment.[2]

[9] According to *Faucher v. Canada (Attorney General),*[3] an important case from the Federal Court of Appeal, availability for work must be determined by analyzing three factors:

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.

---

[2] Section 18(1)(a) of the EI Act
[3] *Faucher v. Canada (Attorney General),* A-56-96.

[10] In addition, an earlier Federal Court of Appeal decision, *Landry v. Canada (Attorney General),*[4] held that a full-time student should be presumed to be unavailable for work, unless there are exceptional circumstances. The General Division found that the Claimant had not rebutted the *Landry* presumption by establishing exceptional circumstances. Then it turned to consider whether the Claimant was "available" by reviewing all three of the *Faucher* factors.

[11] By applying both the *Landry* presumption and a *Faucher* analysis, the General Division must have understood the *Landry* presumption to be a presumption that a full-time student "unduly limits" his or her chances or re-entry to the labour market–rather than a presumption that the student is not available under section 18(1)(a) of the EI Act. I say this because there would have been no purpose to any further consideration of the *Faucher* factors, if the Claimant the Claimant's failure to rebut the presumption meant that she had already been found to be unavailable under section 18(1)(a).

[12] The General Division's approach bears some similarity to the analysis in *Canada (Attorney General) v. Rideout.*[5] *Rideout* had also concerned a full-time student and, like the General Division, the Federal Court of Appeal applied the *Landry* presumption and also considered the *Faucher* factors. The Court found that it was an error for the Umpire[6] to have failed to consider the whether appellant's availability was too limited (the third *Faucher* factor). It justified this finding by suggesting that the *Landry* presumption had not been rebutted.

[13] In my view, the General Division's method of analysis is supported by *Rideout*, and consistent with the law.

Use of Faucher test for availability

[14] The General Division found in favour of the Claimant on the first two *Faucher* factors. It found that the Claimant had a desire to return to the labour market as soon as suitable employment was offered, and it found that the Claimant did express her desire through efforts to find a job. However, when the General Division turned to the third factor, it found that the

---

[4] *Landry v. Canada (Attorney General),* A-719-91.
[5] *Ibid.*
[6] The final decision maker in an employment insurance appeal system that predated the Social Security Tribunal.

Claimant unduly limited her chances of returning to work by going to school full time. On the basis of this third factor, it determined that the Claimant was not available for work.

[15] Leave to appeal was granted based on the possibility that the General Division did not disclose why it relied on the third *Faucher* factor alone and that it apparently gave no weight to the other two factors. In *Faucher*, the Court stated that availability must be determined by analyzing all three factors.

[16] In response to my reasons for granting leave to appeal, the Commission took the position that a claimant is not available if the claimant does not meet any *one* of the criteria.[7] I disagree. In my view, the Commission position is inconsistent with the law.

[17] *Faucher* stated that the Federal Court of Appeal, "has held on many occasions that availability **must** be determined by analyzing (the) three factors." Furthermore, the decision in *Faucher* actually *depends* on its finding that one factor cannot be considered to the exclusion of the others. The Court in *Faucher* was concerned that both the appellant's established desire to return to work and that his comprehensive job search had been given no weight. It disapproved of how the other factors were "eclipsed" by the finding that the appellant placed limits on his availability. The Court held that the Umpire erred in law in confirming the Board of Referee[8] decision. It went even further to state that, on the facts found by the former Board of Referees, the Board of Referees could not have found the appellant to be unavailable.

[18] Some court decisions since *Faucher* have referred to the *Faucher* factors as "criteria. These include the Federal Court of Appeal decision in C*anada (Attorney General) v. Bois*,[9] referenced by the Commission. However, the use of the term "criteria" does not mean necessarily meant that **all** the criteria must be met. According to the Merriam-Webster dictionary online,[10] the term criteria means "a standard on which a judgment or decision may be based." Furthermore, "criteria" is not synonymous with "requirement" in common usage. The

[7] AD3-4
[8] The first level of appeal in the former system
[9] in C*anada (Attorney General) v. Bois*, 2001 FCA 175
[10] https://www.merriam-webster.com/dictionary/criteria

Commission has not pointed me to any decision in which the Court has stated that claimants must meet **all** the "criteria" to be found available.

[19] *Faucher* did not lay down a principle that a claimant may *never* be found unavailable because based on a single negative finding on one of the three factors. In fact, *Rideout* said that the final factor must be considered, even though two of the factors were found in the claimant's favour. This implies that Rideout accepted that the Claimant may be found not to be available based on the single remaining factor.

[20] However, the case law does **not** rule out the possibility that a claimant can still be found available despite an adverse finding on one or more of the factors (as was determined in the *Faucher* decision). The Federal Court of Appeal continues to cite and to rely on *Faucher*, and *Faucher* is still good law.

[21] This General Division decision is similar to the decisions of the Umpire and Board of Referees that were rejected by the Court in *Faucher*. Like those decisions, the General Division has found that the Claimant satisfied two of the factors, but apparently made its decision on the final factor. The General Division did not explain why the final factor made all the difference, or why it apparently gave no weight to the other two factors.

[22] If the General Division understood that it could only find the Claimant to be available if the Claimant satisfied all three *Faucher* factors, then it misread *Faucher* and made an error of law. However, I cannot be certain how the General Division interpreted *Faucher*, because it did not explain why it based its decision on the third factor alone.

[23] Therefore, I find that the General Division erred in law because it failed to provide adequate reasons.

Availability while attending school

[24] The Claimant acknowledged that she had attended school full time, but she argued that she was still available. She said that she could have worked all day on Friday, Saturday and Sunday, as well as after her classes ended at 4:30 pm on Monday to Thursday.

[25] The General Division found that the Claimant unduly limited her chances of returning to the labour market by seeking only those jobs that would fit around her school schedule. It followed *Landry*,[11] which said that a full-time student is presumed to be not available for work and can only rebut this presumption by proof of exceptional circumstances.

[26] The General Division did not accept that the Claimant had established that she would have been available for full-time work despite attending school full-time. It relied on the Claimant's statements that she would not have left her training to accept full-time work, and it noted that the Claimant had not demonstrated a history of working while studying full-time.

[27] I have reviewed the appeal record and there is no evidence that the General Division ignored or misunderstood evidence that might have established exceptional circumstances. Therefore, I accept that the General Division made no error in applying the presumption. That means that I accept the General Division made no error in finding that the Claimant unduly limited her chances of returning to work.

Summary of error

[28] I have found that the General Division made an error of law by failing to explain why it relied on the third *Faucher* factor alone. Therefore, I must consider what the appropriate remedy should be.

REMEDY

[29] I have the authority to change the General Division decision or make the decision that the General Division should have made.[12] I could also the matter back to the General Division to reconsider its decision.

[30] 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.

---

[11] *Landry v. Canada (Attorney General),* A-719-91.
[12] See section 59 of the DESD Act.

[31] The *Faucher* decision does not require a claimant to desire to return to any job as soon as it is offered. Only to "suitable jobs". *Faucher* also does not require a claimant to conduct a job search which includes any possible job. Again, the claimant only needs to seek suitable jobs. It is clear that a claimant may place some sort of reasonable limits on what type of job he or she is willing to accept.

[32] In this case, the Claimant testified to the General Division that she was not looking for "full-time" work while she was going to school.[13] The General Division found that the Claimant was unwilling to accept any job that interfered with her full-time school schedule.

[33] Since her General Division hearing, the Claimant has changed her position. She argued that she could still have worked full-time in those hours that she was not at school. She also argued that she would now be willing to give up her school for full-time work, although she had not been willing to do so at the time she testified to the General Division.

[34] Based on the information before it, the General Division found that the Claimant had unduly limited her chances of return to the labour market.[14] In other words, the Claimant unreasonably limited her employment prospects to those jobs that would never require her to work between 8:30 a.m. and 4:30 p.m. from Monday to Thursday. As I noted, I have not found any basis for interfering with this finding.

[35] Similar to the present situation, the appellant in the *Faucher* case was also found to have a desire to return to work and to have conducted a sufficient job search. However, the appellant was denied because he had placed restrictions on his availability. The Federal Court of Appeal in *Faucher* found that the appellant should not have been denied based only on the final factor. However, the *Faucher* decision depended on its particular facts. According to the Court, a conclusion that the appellant was not available had "no real connection to the situation". In Faucher, the condition that limited the appellant's chances of re-employment was that he was seeking contracts to become self-employed during a season when there was little demand for the appellant's regular trade, and within a period that was shortly after he had become unemployed.

---

[13] Audio recording of General Division hearing at timestamp 00:22:35
[14] General Division decision, para 29

[36] The Claimant's situation is not like that of the appellant in *Faucher*. The Claimant was not going to school to increase her chances of returning to any suitable work as soon as possible. In fact, she admitted that she had not intended to leave her studies for a full-time job. The Claimant was only willing to return to a suitable job that would also fit around her full-time schedule. I do not accept that a 'suitable job" is defined as one which accommodates a claimant's other commitments or priorities.

[37] I do not accept that the Claimant was "available for work" during the time that she attended school full-time. The General Division found that she unduly limited her chances, and I agree. The Claimant provided no evidence on which the General Division might have found that the manner in which the Claimant limited her availability for work would not have significantly affected the number of suitable job opportunities that she could accept. I agree with the General Division that the Claimant has not established exceptional circumstances and that the Claimant's full-time studies unduly limited her chances of rejoining the labour market.

[38] I understand that the Claimant was in a difficult place and that she returned to school with a view to improving herself and her family's situation. I believe that the Claimant would have preferred to have had at least part-time employment while she went to school. I also accept that she was diligently looking for and would have accepted any offer of suitable employment that would not interfere with her schedule. However, at the time of her General Division hearing, the Claimant maintained that she continued to prioritize her studies over obtaining suitable employment. Her studies took up most of a regular working day on four out of five of the days of a working week.

[39] Despite her apparent desire to return to work and her expression of that desire through her job search, I must give greater weight to the limitations that she placed on the type of work she would accept. The Claimant unduly limited her chances of return to the labour market per the third *Faucher* factor. In my view, this effectively modifies the General Division's findings on the other two factors. The manner in which the Claimant maintained limits on her availability means that her desire to return to work was only a desire to return to work within a certain schedule. It means that her job search for suitable employment was actually limited to those jobs that could offer her shifts that would not interfere with her full-time school schedule.

CONCLUSION

[40] The appeal is dismissed. Although I have found that the General Division erred in how it reached its conclusion, I have corrected that error and I still reach the same decision. Unfortunately for the Claimant, I have also concluded that the Claimant was not available during the period that she was attending school full-time.

[41] If the Claimant has not returned to work and is still within her benefit period, she could still be eligible for benefits if she could prove that was available for work at some later date. However, this would be a matter for the Commission to decide.

Stephen Bergen
Member, Appeal Division

HEARD ON:	December 3, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	B. W., Appellant J. Lachance, Representative for the Respondent