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

Citation: *G. L. v Canada Employment Insurance Commission*, 2020 SST 422

Tribunal File Number: AD-20-116

BETWEEN:

G. L.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Stephen Bergen

DATE OF DECISION: May 19, 2020

Canada

DECISION AND REASONS

DECISION

[1] The appeal is dismissed. The General Division made errors in how it reached its decision. I have corrected these errors but I must still find that the Claimant did not prove that he was available for work.

OVERVIEW

[2] The Appellant, G. L. (Claimant), failed to report either his employment or his employment earnings to the Respondent, the Canada Employment Insurance Commission (Commission), during a period in which he was collecting benefits. The Commission investigated and determined that the Claimant had made false statements in connection with both the income he earned and his availability for work. It imposed a monetary penalty, and a “very serious” notice of violation.

[3] The Commission also found that the Claimant should not be entitled to benefits for the period from July 2, 2018, to July 13, 2018, because he was not available for work, and it declared an overpayment. When the Claimant asked the Commission to reconsider, it reduced the penalty from $1969.00 to $943.00 but it maintained its other decisions.

[4] The Claimant appealed to the General Division of the Social Security Tribunal. The General Division dismissed his appeal with modification. It found that the General Division did not exercise its discretion properly when it assessed the amount of his penalty and the violation. As a result, the General Division reduced the penalty to $471.00. It also found that the Claimant should have been issued a serious violation. The General Division confirmed that the Claimant was not entitled to benefits from July 2, 2018, to July 13, 2018, because he was not available for work. The Claimant now appeals to the Appeal Division.

[5] The Claimant’s appeal is dismissed. The General Division made an important error of fact when it found that the Claimant chose not to attend work and it made an error of law by not applying the correct legal test. I have corrected for those errors but I still confirm that the

General Division reached the right result. The Claimant was available for work from July 2 to July 13, 2018.

PRELIMINARY MATTERS

[6] The Claimant's application for leave identified two errors that the Claimant believed the General Division made. The first error had to do with the General Division's finding that the Claimant did not make an effort to find work. I understand the Claimant to be challenging the General Division's finding that he was unavailable for work from July 2-July 13, 2018, and therefore not entitled to benefits during that period.

[7] The other issue that the Claimant raised in his notice of appeal was that he had more than enough hours of insurable employment to qualify for benefits in his region. This was not an issue in the reconsideration decision or relevant to an issue in the reconsideration decision. It was not before the General Division, not considered by the General Division, and I will likewise not be considering it.

[8] The General Division decision also addressed other issues of penalty and notice of violation that have to do with the Claimant having made a false statement about his earnings. The Claimant did not indicate that he wished to aspect of the General Division in his notice of appeal, but I considered whether he had an arguable case in my leave to appeal decision. I was unable to discover an arguable case that the General Division made an error when it reduced his penalty but maintained the notice of violation. I will not be considering this issue further.

WHAT GROUNDS CAN I CONSIDER FOR THE APPEAL?

[9] "Grounds of appeal" are the reasons for the appeal. To allow the appeal, I must find that the General Division made one of these types of errors:[1]

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.

[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.*

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

[10] Did the General Division make an important error of fact when it found that the Claimant chose not to attend work?

[11] Did the General Division make an error of law by failing to apply the correct legal test to determine the Claimant's availability for work?

ANALYSIS

Did the General Division make an important error of fact when it found that the Claimant choose not to attend work?

[12] The General Division decision that the Claimant was not available for work from July 2 to July 13, 2018, was based on two findings. It found that the Claimant was employed during that period, and it found that he chose not to go into work.[2]

[13] There is no dispute that the Claimant was employed between July 2 and July 13, 2018, and that he did not actually go into work in that time. However, the evidence does not support a conclusion that the Claimant "chose" not to go into work because the evidence does not confirm that the employer had work available for him for each and every workday of that period.

[14] According to the Commission, the employer said that the Claimant did not show up on July 9, 10 and 17, 2018.[3] It does not appear that the Claimant disputed that he did not go into work on the particular days of July 9 or 10. He did not dispute that he called his employer on July 17, 2018, to say that he was not coming in because of complications with his girlfriend's pregnancy. (And it is not clear if this was an excuse for missing past days or a warning about missing future days). However, the Commission agent did not report that the employer

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[2] General Division decision, para 19, 21.
[3] I note that GD3-58 is the only record of a conversation with the employer. This conversation was apparently restricted to the Claimant's actual earnings per payroll records. The Commission did not make notes of other calls or of any other information that the employer may have told a Commission agent.

complained of the Claimant missing any other shifts. The employer did not say that the Claimant also did not show up on July 2, 3, 4, 5 or 6, on July 11, 12, or 13, or on any weekend day that he might have been expected to work. The record contains no statement or document confirming that the Claimant missed any shifts in the week of July 2 to July 13, other than July 9 and 10.

[15] The employer's focus on the particular days of July 9, 10, and 17, could support an inference that these were the only days that the employer had expected the Claimant to come in to work. It clearly does not support the opposite inference that the Claimant must also have been expected to work on the other working days between July 2 and July 13.

[16] The employer supplied payroll information[4], which confirms the days the Claimant actually worked. The payroll information does not identify the days that the Claimant had been scheduled to work or establish any kind of work pattern. It is impossible to infer from the payroll that the Claimant might have had more work available to him between July 2 and July 13 than he actually worked. In fact, the Claimant did not work for the employer long enough that the payroll record could describe a pattern.

[17] According to the payroll, the Claimant worked 52.5 hours in the week from June 24–June 30 (including 1.5 hours "driver's pay"), zero hours in the week from July 1–7, zero hours in the week from July 8–14, and 13 hours in the week from July 16–20 (including 3 hours driver's pay). The only week in the payroll history that looks anything like a 40-hour work week is the week from June 24 to June 30. However, this does not appear to be a normal or representative week. It includes 16 hours of "orientation" over three days and an additional 35 hours of regular work over four days including the weekend days.

[18] There is only one piece of evidence that could suggest that work was available to the Claimant each working day between July 2 and July 13. This is the Commission agent's assertion that the employer told the Commission that it hired the Claimant as a full-time employee and scheduled him for more than 40 hours per week.[5] However, this still does not directly address whether the employer actually made full-time work available.

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[4] GD3-56.
[5] GD3-63.

[19] For his part, the Claimant denied that he had been employed on a full-time basis, saying that he only worked on an on-call basis. The General Division did not identify this as a relevant difference between the employer's and the Claimant's evidence, or say what evidence it preferred or why.

[20] Before the General Division could find that the Claimant chose not to go in to work, it would have had to determine that work was available to the Claimant through his employer. The General Division did not analyze whether the employer actually had work for the Claimant, or would have made work available to the Claimant, for each working day between July 2 and July 13.

[21] I find that the General Division made an important error of fact when it found that the Claimant chose not to attend his employment between July 2, 2018, and July 13, 2018. This conclusion was either perverse or capricious, or it misunderstood the evidence related to the availability of work through the Claimant's employer.

Did the General Division fail to apply the proper legal test?

[22] The law says that a claimant is not entitled to benefits for each day on which he fails to prove that he was available for work and unable to obtain suitable employment.[6] The Federal Court of Appeal has stated that three factors must be considered to determine availability (the *Faucher* test).[7] It said that a claimant must have the desire to return to suitable employment as soon as possible; must express that desire through efforts to obtain suitable employment, and; the Claimant must not set personal conditions that unduly limit his chances of returning to the labour market.

[23] The General Division chose not to employ the *Faucher* test. It decided that the test was not appropriate because the Claimant already held employment, but simply chose not to go in to work.[8]

[6] Section 18(1)(a) of the *Employment Insurance Act.*
[7] *Faucher v Canada (Attorney General),* A-56-96
[8] General Division decision, para 19.

[24] The Claimant remained employed between July 2 and July 13, but the question before the General Division was whether the Claimant was available for work during those days that he did not go into work. Therefore, the *Faucher* factors would have still been relevant to determine his availability on the days that he did not work.

[25] Whether the Claimant had the desire to go into work remains relevant. The General Division found that the Claimant chose not to go into work, but it based this finding on an assumption that work was available and that the Claimant did not take advantage of it. The General Division did not actually analyze whether the Claimant had the desire to go into work. It could not have held the Claimant's failure to show up for work against him if the Claimant reasonably believed that the employer had no work available for him.

[26] The General Division made no finding about whether the Claimant's employment was on an on-call basis as he insisted. If the Claimant was on-call, the manner in which he confirmed the daily availability of shifts could be considered analogous to "job search efforts". The General Division could have considered the adequacy of these efforts.

[27] Finally, the General Division did not analyze whether the Claimant placed conditions on the kind of work he would accept that were *unduly* limiting. The evidence on the file suggested that the Claimant was concerned about his girlfriend's pregnancy at or about the time that he did not go into work. However, there was also some evidence that the Claimant was a single father and needed to get home for his children each night, and that he objected to the employer requiring him to stay out overnight. He told the Commission that he had accepted his employment on the express condition that he would not have to work out overnight. Applying *Faucher*, the General Division might have considered whether there was evidence that the Claimant rejected those shifts that would not allow him to come home each night. If so, it would have had to consider whether the claimant's refusal to take overnight shifts was a reasonable, or an undue, limit on his employment prospects.[9]

[28] I appreciate that the General Division gave some thought to the *Faucher* test and that it believed that the test to be inapplicable in the circumstances. However, I disagree. I find that the

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[9] GD3-62, 63

General Division made an error of law in failing to analyze the Claimant's availability for work with respect to the applicable *Faucher* factors.

[29] I have found that the General Division made an important error of fact and an error of law. That means I must consider the appropriate remedy.

REMEDY

Nature of remedy

[30] I have the authority to change the General Division decision or make the decision that the General Division should have made.[10] I could also send the matter back to the General Division to reconsider its decision.

[31] I accept that the General Division has already considered all the issues raised by this case and that I can make the decision based on the evidence that was before the General Division. I will make the decision that the General Division should have made.

New decision

[32] As I have already mentioned, the law says that a claimant is not entitled to benefits for a working day on which he fails to prove his availability. In other words, it is up to the Claimant to bring forward positive evidence that he was available for work for each working day between July 2 and July 13.

[33] The Claimant provided no evidence to the Commission or to the General Division that he was available for each day. He did not actually deny that the employer had him scheduled to work on any of the days between July 2 and July 13. And he did not say that the employer told him there was no work on any of these days.

[34] In my view, the Claimant has not demonstrated his availability under the *Faucher* factors. The Claimant has not proven that he had a desire to return to his work during July 2 to July 13. The Claimant may have prioritized the problems with his girlfriend's pregnancy over going in to work, or checking for available work, and this is understandable. However, I am not satisfied

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[10] My authority is set out in section 59 of the DESD Act.

that between July 2 and July 13, the Claimant would have taken work if it were offered to him. I do not accept that he had a real desire to work.

[35] In addition, the Claimant has not shown that he did what was reasonable in the circumstances to obtain work between July 2 and July 13. He claimed that the employer never called him to offer him shifts. However, there is no evidence that the Claimant made himself available to take the employer's calls on each, or any, of the workdays between July 2 and July 13. There is likewise no evidence that the Claimant took the initiative to call the employer. If the Claimant believed that no suitable work was actually available through his employer, he did not describe any other efforts to obtain replacement or supplemental work.

[36] Finally, I do not accept that the Claimant's unwillingness or inability to work between July 2 and July 13 had anything to do with reasonable limitations that he may have placed on the work that he would accept. The Claimant did not want to take shifts that would require him to be away from home overnight because of his children, and perhaps because of his girlfriend's pregnancy complication as well. However, there was no evidence that the employer offered the Claimant overnight shifts between July 2 and 13, or that the Claimant refused any shifts in this period because they were overnight shifts.

[37] I find that the Claimant was not available for work and unable to obtain suitable work within the meaning of the *Employment Insurance Act* between July 2 and July 13, 2018.

CONCLUSION

[38] The appeal is dismissed. The General Division made errors in how it reached its decision but I have corrected for those errors. I confirm the General Division's conclusion and result. The Claimant was not available for work between July 2 and July 13, 2018.

Stephen Bergen
Member, Appeal Division

HEARD ON:	May 6, 2020
METHOD OF PROCEEDING:	Videoconference
APPEARANCES:	G. L., Appellant J. V., Representative for the Respondent.