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

Citation: *TM v Canada Employment Insurance Commission*, 2021 SST 11

Tribunal File Number: AD-20-801

BETWEEN:

T. M.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Stephen Bergen

DATE OF DECISION: January 25, 2021

Canada

DECISION AND REASONS

DECISION

[1] The appeal is allowed. I am returning the matter to the General Division for a reconsideration.

OVERVIEW

[2] The Appellant, T. M. (Claimant), stopped working for his employer for medical reasons in September 2018. He received wage loss benefits through private insurance until mid-December 2018. In November 2019, he applied for Employment Insurance sickness benefits, which the Canada Employment Insurance Commission (Commission) granted for the period from December 2018 to April 2019. In January 2020, the Claimant asked the Respondent, the Commission, to convert his sickness benefits to regular benefits. He asked that this change be made effective May 1, 2019.

[3] The Commission decided that the Claimant's renewal claim could not start earlier than May 1, 2019, because he did not file his application on time or show good cause for the delay. The way this is worded, it sounds like the Commission refused to backdate his claim, but the Claimant had not asked the Commission for regular benefits for any period before May 1, 2019.

[4] At the same time, the Commission decided that the Claimant was not entitled to regular benefits after May 1, 2019. The Commission found that the Claimant was not capable of work from May 5, 2019, to the end of his benefit period in December 2019. The Claimant asked the Commission to reconsider, but the Commission did not change its decision.

[5] The Claimant appealed to the General Division of the Social Security Tribunal, which dismissed his appeal. He is now appealing to the Appeal Division. He believes the General Division made errors when it confirmed that he was available for work.

[6] The appeal is allowed. The General Division made errors of fact and law. I have returned the matter to the General Division for a reconsideration.

WHAT GROUNDS CAN I CONSIDER FOR THE APPEAL?

[7] "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.
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

[8] The issues are as follows:

Jurisdiction

1. Did the General Division go outside of its jurisdiction by considering the Claimant's availability for work?

Disentitlement Related to "Reasonable and Customary" Job Search Efforts

2. Did the General Division make an error of law by requiring that the Claimant prove that he made reasonable and customary efforts to find a suitable job?

Capability for Work

3. Did the General Division make an error of law by failing to determine whether the Claimant was capable of work?

[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* (DESD Act).

Availability: Desire to Work

4. Did the General Division make an error of fact when it found that the Claimant did not have a desire to return to work?

Availability: Adequacy of Job Search Efforts

5. Did the General Division make an error of fact when it said that the Claimant did not provide specific information about his job search?

6. Did the General Division make an error of law by failing to explain why it dismissed or discounted the Claimant's job search testimony?

7. Did the General Division make an error of law by requiring the Claimant to have kept detailed records of his job search efforts?

Availability: Setting Personal Conditions on Acceptable Work

8. Did the General Division make an error of law by failing to consider whether the Claimant set conditions that unduly limited his ability to return to work?

9. Did the General Division make an error of fact by ignoring or misunderstanding the Claimant's conditions for employment?

ANALYSIS

Jurisdiction

Issue 1: The General Division did not exceed its jurisdiction by considering the Claimant's availability for work.

[9] The first thing I must do is consider whether the General Division even had the jurisdiction, or authority, to decide whether the Claimant was available for work. The General Division's jurisdiction is limited to considering only those issues arising from the Commission's reconsideration decision.[2]

[10] Neither the Claimant nor the Commission has expressed concern that the General Division made an error of jurisdiction. Even so, a jurisdictional concern is apparent on the face of the file. The Commission's reconsideration file is not clear about what the Claimant was asking the Commission to reconsider.[3] It is also not clear on what decision or issues the Commission actually reconsidered in response to that request.

[11] In this decision, I find that the General Division did not make an error of jurisdiction. However, it is still important that I explain why I accept that the General Division properly exercised its discretion. This is because the file does not clearly support the General Division's jurisdiction to consider the Claimant's availability.

[12] I will begin by reviewing how the Commission's review process progressed over time and the decisions on the reconsideration file.

[13] The appeal to the General Division was of a reconsideration decision dated May 22, 2020. The reconsideration decision states that it is a reconsideration of a decision dated January 24, 2020, in response to the Claimant's March 13, 2020, request. It states that there will be no change to the decision on the issue of availability for work.

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[2] Reconsideration decisions are described in section 112 of the *Employment Insurance Act* (EI Act). The effect of the reconsideration decision on the General Division's ability to consider the appeal is in section 113 of the EI Act.
[3] The reconsideration file is the file labelled "GD3."

[14] The Claimant did request a reconsideration on March 13, 2020, as noted. However, the Claimant's request did not refer to the January 24, 2020, decision. The Claimant asked the Commission to reconsider a decision that it communicated to him verbally on January 17, 2020.

[15] There is no record of a January 17 conversation between the Commission and the Claimant. However, the Claimant did call the Commission on January 21, 2020. In the Commission's notes of the conversation, a Commission agent wrote that the purpose of the conversation was to "[obtain] info for the antedate and the conversion."[4]

[16] A written decision followed on January 24, 2020. The decision letter actually involved two decisions. The first decision is about the antedate of the Claimant's conversion request. The decision reads like a refusal, since it says that the Claimant's claim cannot start earlier than May 1, 2019, and that he "did not show good cause for being late." However, it is more likely that it was just an awkward acceptance of the antedate request. The Claimant asked for his conversion to be antedated to (made effective) May 1, 2019, and the Commission seems to have given him an antedate to May 1, 2019.[5]

[17] The General Division did not consider the antedate issue, but this does not concern me. The Claimant asked for an antedate to May 1, 2019, and the decision implies that he had good cause as early as May 1, 2019. No one asked the General Division to revisit the date of antedate or raised it as an issue before the Appeal Division. The Claimant did not challenge the effective date of antedate in his reconsideration request, and the Commission's reconsideration decision did not address the antedate issue.

[18] However, I still have to consider whether the General Division exceeded its jurisdiction when it considered the Claimant's availability for work. The second decision in the January 24 letter denied the Claimant benefits. However, the Commission stated that the Claimant had not proven that he was "able to work"[6] because he had not provided medical evidence of his recovery. The Commission made its January 24 decision on the basis of the Claimant's capability of work. It did not consider his availability for work.

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[4] GD3-21.
[5] GD3-22.
[6] GD3-23.

[19] The Claimant provided the Commission with additional medical notes on January 13, 2020, and February 10, 2020, and a medical certificate on March 17, 2020. The Commission wrote to the Claimant on March 18, 2020, by which time the Claimant had already asked the Commission to reconsider its decision. In its March 18, 2020, letter, the Commission stated that it could not pay the Claimant benefits because he was not "ready, willing, capable of and actively looking for suitable employment." The Commission stated that the Claimant had not proven his availability for work.[7] The Claimant did not ask for a reconsideration of the March 18, 2020, decision.

[20] The Claimant did not receive a reconsideration decision from the Commission until May 22. The reconsideration decision stated that the Commission received the Claimant's request for reconsideration of the "decision(s) dated January 24, 2020." The Claimant could not have anticipated that the Commission would reconsider the January 24 decision: He had asked the Commission to reconsider a January 17 verbal decision that he was "not ready, willing, and able to work." According to his request, he was asking for the reconsideration because he had been ready, willing, and able to work.

[21] My concern is that the General Division may have considered the issue of availability even though that issue may not have been properly before it. The Claimant sought a reconsideration of a verbal decision that seems to have dealt with both capability and availability, but there is no record of such a decision. The Commission accepted his request as a request to reconsider the written decision of January 24. That decision dealt only with the Claimant's capability. Despite the fact that the Commission said it was reconsidering the January 24 decision, its reconsideration decision identifies the issue as one of "availability." Following the lead of the reconsideration decision, the General Division also considered the issue of availability.

[22] In my view, the best way to sort out the issues that were on appeal to the General Division is by looking at the intention and the understanding of the parties.

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[7] GD3-28.

[23] The Claimant did not actually ask for a reconsideration of the January 24 decision about his ability to work. He asked the Commission to reconsider a January 17 verbal decision. He stated that he disagreed with the decision that he was "not ready, willing, and able to work."[8]

[24] I cannot find any record of a January 17 discussion, or any discussion in which the Commission told him he was "not ready, willing, and able to work." Nevertheless, the Claimant apparently believed that the Commission made such a decision when he asked for the reconsideration. He used language in his request that was similar to the language that eventually appeared in the March 18 decision. I think it is likely that the Claimant was aware of the decision before the Commission sent him the March 18 decision, and before he asked for the reconsideration. I accept that he intended for the Commission to reconsider a decision about his availability.

[25] I accept that the Commission intended for its reconsideration to be understood in the same way that the Claimant understood it. The Commission meant to confirm a decision that the Claimant was not available—in a broader sense than would be explained by medical incapacity alone. The only description of the issue in the reconsideration decision is in the issue heading, "Availability for work." Availability is described in section 18(1)(a) of the *Employment Insurance Act* (EI Act).[9] This section says that a claimant must be "capable of **and** available for work" (emphasis added). Capability is not the same thing as availability.

[26] I see no prejudice to either the Commission or the Claimant resulting from the fact that the General Division took jurisdiction over this issue. Both the Commission and the Claimant made submissions to the General Division on the Claimant's availability, and there was evidence before the General Division on which it could decide the issue.

[27] On the other hand, the Claimant could be prejudiced if I were to find that the General Division should not have considered the Claimant's availability. Potentially, this would mean that he would have to seek a new reconsideration of the March 18, 2020, decision, which the Commission might deny because it would be late.

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[8] GD3-26.
[9] The Commission found that the Claimant was disentitled because he was not available within the meaning of section 18(1)(a) of the EI Act.

[28] I accept that the Commission verbally communicated to the Claimant—but did not document—a decision that it was denying him regular benefits because he was not capable of work or otherwise available for work. I accept that the Commission intended for its reconsideration decision to confirm that decision. I further accept that the Claimant asked for a reconsideration of the Commission's decision on his capability and availability and that the Commission's reconsideration decision was fully responsive to that request.

[29] The General Division did not exceed its jurisdiction by considering the Claimant's availability generally.

[30] Now that the jurisdictional issue is out of the way, I will consider whether the General Division may have made other errors in its decision. The General Division found that the Claimant was disentitled from benefits because he was not available for work.

[31] The first section has to do with whether his job search efforts were reasonable and customary. I will first review whether the General Division made an error in finding that he did not make reasonable and customary efforts.[10] Then I will turn to the other section, which requires a claimant to be "capable of and available for work and unable to obtain suitable employment."[11]

[32] I will consider whether the General Division made any errors in finding that the Claimant was disentitled under either of these sections.

Disentitlement Related to "Reasonable and Customary" Job Search Efforts

Issue 2: The General Division should not have required the Claimant to prove that he made "reasonable and customary" efforts to find a suitable job.

[33] At the Appeal Division, the Commission supported the Claimant, arguing that the General Division made several errors in its decision. For one thing, the Commission argued that the General Division had failed to consider evidence of the Claimant's job search. The Commission raised this argument to challenge the General Division's finding that the Claimant had made "reasonable and customary efforts."

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[10] Section 50(8) of the EI Act.
[11] This is the test for availability under section 18(1)(a) of the EI Act.

[34] It raised the same argument to challenge the General Division's finding that the Claimant's job search had not been adequate for the purpose of section 18(1)(a) of the EI Act. I will consider the General Division's findings related to section 18(1)(a) later in my decision and return to the Commission's argument then.

[35] I find that the Commission made an error of law when it required the Claimant to meet the "reasonable and customary" criteria. This error is apparent on the face of the decision.

[36] "Reasonable and customary efforts" are those set out in section 9.001 of the *Employment Insurance Regulations* (Regulations). Section 9.001 states that its criteria are for the purpose of section 50(8) of the EI Act. Under section 50(8) of the EI Act, the Commission may require a claimant to prove that he or she has made reasonable and customary efforts.

[37] The way section 50(8) is worded, a claimant should be required to prove "reasonable and customary efforts" only if he or she is so directed by the Commission. If the claimant does not comply with the Commission's demand for proof, then section 50(1) of the EI Act applies. A claimant can be disentitled under section 50(1) of the EI Act for not providing proof of his or her job search information in response to a section 50(8) demand. The disentitlement ends when the claimant supplies the required information.

[38] However, before a claimant can be disentitled for not providing proof of his or her job search efforts, the Commission must first ask the claimant for the proof. The claimant must also know what kind of proof will satisfy the Commission's demand. In this case, the Commission did not inform the Claimant of the section 9.001 of the Regulations) criteria, or demand that he provide proof to satisfy those criteria.

[39] The Commission discussed the Claimant's job search efforts with him in a limited way, but it did not lay out what kind of proof would meet a "reasonable and customary" standard. After the Claimant asked for his sickness benefits to be converted, the Commission had two discussions with the Claimant touching on its expectations for a job search. In the first discussion, the Commission was focused on the Claimant's antedate request and whether the Claimant was physically capable of suitable employment. The Claimant talked about his recovery and evidence of capability. However, the Commission agent also asked the Claimant to

"name a couple [of] employer's [*sic*]." The Claimant said he would gather his information and call back.[12]

[40] The second discussion took place about four months after the Commission denied the Claimant's benefits, and after he had asked for a reconsideration. In this conversation, the Claimant described how his anxiety had limited the kinds of jobs that would be suitable for him, and he mentioned some of the other barriers he faced. The Commission agent asked the Claimant about his job applications and if he had a job search record. According to his notes, the Commission's agent told the Claimant that he would have to prove that he tried to "take advantage [of] and actively sought all opportunities for suitable employment."[13]

[41] There was nothing else on file to suggest that the Commission detailed the sorts of job search activities it expected the Claimant to be able to prove. I recognize that an initial application for regular benefits sets out a claimant's obligation to actively search for work. However, the Claimant did not complete an application for regular benefits. He applied for sickness benefits.[14] When the Commission denied regular benefits to the Claimant, it was in response to the Claimant's request to convert his sickness benefits claim to a claim for regular benefits. A claimant who is unavailable for work because of sickness is not required to prove that he or she is looking for work. Therefore, the application for sickness benefits did not inform the Claimant that he must make "reasonable and customary" job search efforts.

[42] Even if a list of acceptable job search activities had appeared in the application for benefits completed by the Claimant, I would not accept this as a section 50(8) demand. The usual benefit application process does not require a claimant to submit proof of his job search efforts. It only warns the claimant that the Commission may ask for that proof later.

[43] There was no evidence on which the General Division could have found that the Commission required the Claimant to prove that he had made reasonable and customary efforts according to the criteria of section 9.001.

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[12] GD3-21.
[13] GD3-30.
[14] GD3-3 to 13.

[44] There is no evidence that the Claimant failed to comply with a demand from the Commission or that the Commission disentitled him for failing to comply. According to the January 24, 2020, decision, the Claimant was disentitled because he was not capable. The March 18, 2020, letter documented that the Claimant had been disentitled because he was neither capable of, nor available for work, which I have accepted as confirmation of a prior verbal decision.

[45] The January 24 letter stated that the Commission could not pay the Claimant benefits because he had not proven he was "able to work." In other words, he had not proven his capability. The March 18 letter stated that the Claimant was not "ready, willing, capable of and actively looking for suitable employment." Both letters include the requirement of capability. "Capability" is a requirement of section 18(1)(a) of the EI Act. It is not required by section 50(1) or 50(8) of the EI Act.

[46] The exact words in which the Commission communicated its verbal decision (that the Claimant asked the Commission to reconsider) to the Claimant are unknown. However, the Claimant stated his dispute with the decision in a way that suggests that the wording of the verbal decision was similar to the March 18 letter.

[47] A claimant may not be disentitled under section 50(1) for being incapable. A claimant may be required to prove capability under section 50(5) and may be disentitled for failing to provide proof under section 50(1). However, that does not apply here. No one disputes that the Claimant supplied medical evidence.

[48] The fact that the Commission may demand a claimant to prove job search efforts under section 50(8) has nothing to do with the claimant's capability. Nor does section 9.001 of the Regulations, which sets out what kinds of activities are generally acceptable to prove a job search.

[49] I have found that it was an error to find that the Claimant was disentitled from receiving regular benefits because he did not make "reasonable and customary" efforts to find work. However, evidence (or the lack of evidence) of the kinds of job search activities described in section 9.001 of the Regulations would still be relevant to the question of whether a claimant was

available for suitable employment under section 18(1)(a) of the EI Act. The General Division could consider that evidence, but, as the General Division noted, it would not be required to apply the section 9.001 job search activities.[15]

[50] Now, I will look at whether the General Division made errors in finding that the Claimant was disentitled because he was not available for work under section 18(1)(a) of the EI Act. Under this section, a claimant must prove that they are both capable of and available for work. I will start by reviewing what the General Division had to say about the Claimant's capability.

Capability for Work

Issue 3: The General Division did not make a finding about whether the Claimant was capable of work.

[51] The General Division failed to consider whether the Claimant was capable of work. This is an error of law. The General Division was required to make a finding on whether the Claimant was capable.

[52] By the time of the General Division hearing, the Commission accepted that the Claimant had "provided medical information showing that he can accept work that is different from the type of work he has done in the past."[16] Yet the issue of the Claimant's capability was at the heart of the Commission's original refusal to convert his sickness benefits to regular benefits. His "capability" was the basis for the January 24 decision, and part of what he asked the Commission to reconsider.

[53] The General Division may have assumed that the Claimant was capable of some sort of work, but it did not make a finding that he was capable. Section 18(1)(a) requires a claimant to be both capable of and available for work. The evidence before the General Division required a clear finding on the Claimant's capability.

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[15] General Division decision, footnote 10.
[16] GD4-2; General Division decision, para 6.

[54] The General Division considered only whether the Claimant was available for suitable employment. What kind of a job would be "suitable" may be arguable. However, a suitable job would never be one that was outside of a claimant's physical capability.

[55] The General Division analyzed the Claimant's availability according to three factors that were described in a Federal Court of appeal decision, *Faucher v Canada Employment and Immigration Commission*.[17] I will call those three factors the "*Faucher* test."

[56] The factors in the *Faucher* test are:

1. whether the claimant has a desire to return to the labour market as soon as a suitable job is offered;
2. whether the claimant expresses that desire through efforts to find a suitable job; and
3. whether the claimant has set personal conditions that unduly limit the claimant's chances of returning to the labour market.

[57] I will review how the General Division considered each *Faucher* factor in turn.

Availability: Desire to Work

Issue 4: The General Division's finding that the Claimant did not have a desire to return to work was perverse or capricious.

[58] The General Division did not accept that the Claimant had a desire to return to work. It stated:

> The Claimant has said that he wanted to go back to work, but his actions in seeking out this [December 2019 doctor's note] do not convince me of that.[18]

[59] The finding that the Claimant did not have a desire to return to work was made in a "perverse or capricious" manner.[19]

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[17] *Faucher v Canada Employment and Immigration Commission*, A-56-96.
[18] General Division decision, para 27.
[19] Section 58(1)(c) of the DESD Act says that the General Division makes an error if it has "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. The Federal Court has defined perverse as "willfully going contrary to the evidence" and defined capricious as

[60] The reason given by the General Division for finding that the Claimant did not have a desire to return to work was that the Claimant had sought out the December 2019 medical note. It drew an adverse inference from the fact that the Claimant asked his doctor to state that he was off work for medical reasons. However, the General Division did not base this inference on the evidence before it, but on underlying assumptions about the meaning of the evidence.

[61] The fact that the Claimant asked his doctor for a medical note in December could support the General Division's inference only if certain other conditions were also true. At the time he obtained the letter, the Claimant would have had to know that he was actually capable of employment during the period for which he sought the excuse. He would also have had to ask his doctor to excuse him from any employment, regardless of his capability.

[62] However, there is no evidence that the Claimant asked the doctor for a blanket excuse from employment. The Claimant never told the Commission that he obtained the medical note so that he would not have to look for a job. The December 2019 medical note did not suggest that the Claimant was unwilling to do any kind of work. It states only that the Claimant was "off work" for medical reasons and that he would continue to be off work until the doctor reassessed him.

[63] Subsequent notes from the same doctor are more specific. They state that the Claimant was not able to return to work at his **previous** employment (one note actually identifies the employer) for medical reasons, and that this had been true since May 2019.[20] The Claimant's representative argued at the Appeal Division that the supplementary notes were clarifications of the doctor's opinion on disability.

[64] The General Division understood the subsequent notes differently, saying that they were in conflict with the December 2019 note.

[65] I do not accept that the first note is necessarily in conflict with the later notes. The later notes are simply more specific. The differences between the first note and later notes should not

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"marked or guided by caprice; given to changes of interest or attitude according to whim or fancies; not guided by steady judgment or intent" Rahi v Canada (Minister of Citizenship and Immigration) 2012 FC 319.

[20] GD3-20, 24, and 25.

be presumed to mean that the doctor changed his medical opinion (of the effect of the Claimant's disability) to suit the Claimant's evidentiary needs.

[66] Whatever the General Division may have had in mind when it found the different notes to be in conflict, it could not assume that the doctor simply transcribed whatever the Claimant asked him to say. A medical note or certificate is presumptively evidence of a doctor's medical opinion. If the General Division believed that the doctor's subsequent notes did not reflect a professional opinion, it should have found this as fact and given its reasons.

[67] Furthermore, the December 2019 note did not say when the Claimant's period of disability began. The Claimant was asking for regular benefits effective May 2019, but the note only said that his disability was "continuing" as of December 10, 2019. The note did not state that the Claimant was incapable of employment since May 2019 and throughout the entire benefit period.

[68] Section 18(1)(a) of the EI Act disentitles a claimant for those **working days in a benefit period** for which the claimant cannot prove his or her capability and availability. The General Division could not infer that the Claimant had no desire to return to work **over his entire benefit period**, just because he asked his doctor for the December 2019 note.

[69] As I noted earlier, the General Division should not be dismissing evidence or assigning it little or no weight without giving reasons. The General Division was not clear about how it weighed the evidentiary value of the other medical notes of January 9, 2020; February 6, 2020; the medical certificate of February 10, 2020; or the Claimant's testimony. The other notes say that the Claimant cannot return to his previous job. The Claimant testified that he wanted to return to work that was different from his previous job.

[70] The General Division's finding that the Claimant did not have a desire to return to work does not follow rationally from the evidence. Therefore, I find that the General Division made an error of fact because its finding was perverse or capricious. Alternatively, the General Division has failed to explain how it weighed the evidence to find as it did, or how its findings follow rationally from the evidence. This is an error of law.

Availability: Adequacy of Job Search Efforts

[71] I have considered how the General Division made an error in its assessment of the first *Faucher* factor. Now, I will look at the second *Faucher* factor. This factor has to do with the adequacy of the Claimant's efforts to find a suitable job. Each of the issues I have called Issues 5, 6, and 7 are all concerned with the job search *Faucher* factor.

Issue 5: The General Division failed to consider the Claimant's testimony about his job search efforts.

[72] The Claimant argued that the General Division made a mistake when it considered the adequacy of his job search efforts. The Claimant submits that the General Division ignored or misunderstood evidence of his job search efforts.

[73] The General Division found that the Claimant's efforts were not "enough"[21] to meet the test for availability. It justified its conclusion by saying that the Claimant had not provided specific information about his job search or the jobs to which he had applied.

[74] The General Division made an error of fact when it said that the Claimant had not provided any specific information about his job search. The General Division overlooked specific evidence of his job search.

[75] The General Division acknowledged some of the Claimant's evidence. It noted that the Claimant updated his resume, signed up for job search sites, networked, talked to employers, and applied for jobs.[22] It stated:

> He says he sent out resumes, he had registered on the job website "Indeed," would go in person to job sites to see if there was work, look on "kijiji" and was networking through friends and family. He explains that he worked with a friend to update and improve his resume. He estimates that he was applying for about 5-10 jobs everyday [*sic*] and had applied with employment agencies….

[76] The Claimant said all of that. He also said that he visited construction sites in person to look for work.[23] He named one employment agency that he used and said that he went to a

[21] General Division decision, para 31.
[22] General Division decision, para 30.
[23] Audio recording of General Division hearing at timestamp 00:39:35.

manpower-type location to seek casual work.[24] He identified one specific pizza restaurant to which he applied,[25] and he described a job interview he was able to get at the employer of the wife (whom he named) of his former boss.[26] He said that he networked with family and friends.

[77] The Commission supported the Claimant at the Appeal Division by arguing that the Claimant provided specific evidence. It referred in particular to the Claimant's visits to construction sites, his application at a specific pizza restaurant, the interview he described, and his use of the manpower employment agency. The Commission acknowledged that the General Division may choose not to refer to some evidence without necessarily ignoring it. It said that the General Division does not have to refer to each and every piece of evidence on which it relies.[27] However, the Commission argued that the Claimant gave specific examples and that this was inconsistent with the General Division's conclusion. The Commission suggests that the General Division must have ignored this evidence, or failed to understand it.

[78] I agree. The adequacy of the Claimant's job search was one of the most significant issues in the decision. The General Division rejected the adequacy of the Claimant's job search because the Claimant was not "able to provide any specific information about this job search." At the same time, it did not refer to some of the specific evidence the Claimant provided.

[79] I find that the General Division ignored specific evidence of the Claimant's job search. This was an error of fact.

Issue 6: The General Division failed to explain why it disregarded the Claimant's job search evidence.

[80] Alternatively, the General Division made an error of law. Recall that the second *Faucher* factor requires a claimant to express his or her desire to return to work through efforts to find suitable employment. The General Division seems to have rejected the Claimant's evidence about his efforts to find work, but it did not explain why.

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[24] Audio recording of General Division hearing at timestamp 00:46:50.
[25] Audio recording of General Division hearing at timestamp 00:37:54.
[26] Audio recording of General Division hearing at timestamp 00:43:10.
[27] *Simpson v Canada (Attorney General)*, 2012 FCA 82.

[81] The Claimant testified about his actual job search efforts as noted above. He also said that he had not known how to keep records of his views of online job search sites, or of the jobs to which he submitted online applications.[28]

[82] The General Division failed to weigh the Claimant's evidence. While it took note of some of his job search efforts, it focused on the fact that he had not documented his job search or provided a sufficiently detailed description of specific efforts.[29] However, there is no legal requirement that reliable, credible evidence must be corroborated (supported by other evidence).

[83] Regarding the Claimant's description of his efforts, the General Division did not explain why a description that lacks detail means that those efforts that have been identified should not be enough. It did not say that the Claimant's job search evidence was not credible or reliable or that it did not believe the Claimant. If the General Division meant to reject the Claimant's evidence or give it little weight, it should have explained why. The Federal Court of Appeal has put it this way:

> If [a decision maker] decides that the 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.[30]

Issue 7: The General Division should not have required the Claimant to prove a detailed job search.

[84] This leads me to consider a related error of law. The General Division determined that the Claimant's job search efforts were not "enough" to satisfy the second *Faucher* factor because he did not provide enough detail of his job search efforts.

[85] To explain why it found the Claimant's efforts were not enough, the General Division referred back to the reasons it gave for finding that the Claimant had not made "reasonable and customary" efforts.[31] In that part of its review, the General Division explained that the Claimant

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[28] Audio recording of General Division hearing at timestamp 00:35:30.
[29] General Division decision, paras 19 and 20.
[30] *Oberde Bellefleur OP Clinique dentaire O. Bellefleur (Employer) v Canada (Attorney General*), 2008 FCA 13.
[31] General Division decision, para 21.

"did not provide any specific details about the jobs he applied for, when he applied for them and in what field or with which company."[32]

[86] At the conclusion of its analysis of the Claimant's job search efforts for the purpose of the second *Faucher* factor, the General Division said much the same thing. It said that the Claimant's job search efforts were not enough, "because the Claimant has not been able to provide any specific information about [his] job search."[33]

[87] However, it was an error of law for the General Division to dismiss the Claimant's job search efforts because the Claimant did not provide sufficient detail. Nothing in section 18(1)(a) of the EI Act, or in the *Faucher* test, requires a claimant to explain his or her job search efforts to some particular level of detail. The *Faucher* test requires that the Claimant express his desire to return to the labour market as soon as possible through **efforts** to find a suitable job. The General Division was required to determine if the job search efforts asserted by the Claimant were adequate; not whether the Claimant had adequate records or a sufficiently detailed recollection of his efforts.

[88] Of course, a claimant may not be able to prove that he or she has made the claimed job search efforts without offering a certain level of detail. It is often true that more detailed evidence is more credible than less detailed evidence. I expect that the Claimant would have an easier time establishing that he actually engaged in those efforts if he had been able to provide more detail. However, the Claimant's imperfect recollection of many specific details does not mean that he did not engage in the job search efforts he claimed or that the efforts themselves were inadequate.

[89] The Claimant said that he made certain job search efforts. The General Division dismissed those efforts because they were not sufficiently detailed. However, it did not say that the lack of detail meant that it could not believe that the Claimant actually made the efforts he claimed. It also did not say that the Claimant's various job search efforts were inadequate.

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[32] General Division decision, para 30.
[33] General Division decision, para 31.

[90] The General Division made an error in law in one of two ways. Either it failed to consider the adequacy of the job search efforts asserted by the Claimant, or it gave inadequate reasons. The reasons for the decision do not clearly reject that the various job search efforts raised by the Claimant actually occurred, and they do not clearly explain why those efforts should be rejected.

Availability: Setting Personal Conditions on Acceptable Work

[91] I will now turn to the final *Faucher* factor. This final factor in the *Faucher* test concerns whether the Claimant set personal conditions that unduly limited his chances of returning to the labour market.

Issue 8: The General Division failed to consider whether the Claimant's personal conditions unduly restricted his job search.

[92] The Claimant disputed that he set conditions that limited his job search. He argued that he had no choice but to look for work that he could access on foot or by transit because he does not drive. He noted that some of his other conditions were necessary because his anxiety was greater while he was in recovery. He also said he could not function in a job that required him to use computers because he was "computer illiterate."

[93] The General Division made an error of law when it failed to consider whether the Claimant set conditions that **unduly** (unreasonably) limited the kind of work that he would accept.

[94] The General Division understood that the Claimant would only accept work that satisfied the following conditions:

- Less responsibility than his previous job, and less stressful
- Not a position of authority
- Work on a quiet site without yelling
- Not computer work
- Only afternoon shifts
- Accessible by transit or within walking distance

[95] The General Division rightly found that these conditions would have reduced the number of available jobs. However, everyone sets some sort of conditions on the type of work that they would be willing to accept. The question is whether the Claimant set **personal** conditions that **unduly** reduced the number of jobs available to him.

[96] The Claimant argued at the Appeal Division that some of the conditions above relate to his lack of skills (such as his computer illiteracy) or to the effects of his medical condition or his recovery. As such, suitable employment may well have been employment subject to certain limitations, without the Claimant having deliberately set those conditions. The General Division did not analyze whether all of the listed conditions were personal conditions.

[97] Furthermore, the General Division did not analyze or find whether the effect of any of those conditions **unduly** limited his job prospects. It failed to make a required finding of fact.

[98] The General Division made an error of law in how it applied the third *Faucher* factor.

Issue 9: The General Division misunderstood the Claimant's conditions for returning to work.

[99] The General Division referred to evidence that the Claimant would work only afternoons because getting up early or staying up late causes him stress.[34] The General Division relied on this evidence when it found that the Claimant had set conditions on the kind of job he would accept.

[100] The General Division made an error of fact because it ignored evidence that he would have worked at times other than the afternoon.

[101] At the Appeal Division, the Commission argued that the General Division overlooked evidence that showed the Claimant's willingness to work at times other than the afternoon. The Commission referred to the Claimant's evidence that he had gone to construction sites to ask about work. It observed that construction jobs "are known to be" long hours. The Commission also referred to the Claimant's evidence that he went to a temporary work agency. The Claimant testified that he went to the agency at 6 a.m. to pick up work.[35] He said he went there a "couple

[34] GD3-30.
[35] *Supra*, note 17.

times." The Commission suggested that the General Division must have confused the kind of work the Claimant would have preferred with the kind of work he would be willing to accept.

[102] I agree that there was some evidence before the General Division that suggested that the Claimant was open to employment that was not in the afternoon. The General Division failed to consider or analyze that other evidence.

Summary of Errors

[103] I have found that the General Division made certain errors in how it reached its decision. This means that I must now consider what I should do about it (remedy).

REMEDY

[104] I have the authority to change the General Division decision or make the decision that the General Division should have made.[36] I could also send the matter back to the General Division for it to reconsider its decision.

[105] Both the Claimant and the Commission suggest that the General Division record is complete and that I should make the decision that the General Division should have made. The Claimant asks that I find that he was available for work from May 2019. The Commission did not take a position on what decision I should make.

[106] I know that this has been a long process for the Claimant. He is anxious to finish his appeal and hopeful that he will be successful. I would like to make a final decision. Unfortunately, the record is incomplete, and I have to return the matter to the General Division. By "incomplete," I mean that the Claimant has not had enough of an opportunity to present evidence on some of the issues.

[107] As I have noted, the General Division's focus was on the Claimant's job search efforts and his availability. It did not consider whether he was capable of work. The General Division directed the Claimant to talk about his job search and availability, and the Claimant described the

[36] My authority is set out in sections 59(1) and 64(1) of the DESD Act.

kinds of work he was looking for. This suggests that the Claimant believed he was capable of those jobs.

[108] However, the Claimant's belief in his capability is not the same as his actual capability. The Claimant did not say much about his medical condition to the General Division. He was not clear about his diagnosis and he did not state where he stood in his recovery. The Claimant did not explain the effect of his condition or of his stage of recovery on his ability to work. He did not actually state his medical limitations or itemize the kinds of tasks he could do within those limitations. The Claimant said he had been looking for physical labour jobs, landscaping, construction, warehousing,[37] and restaurant work.[38] However, he did not say how he knew that he would be capable of these kinds of jobs.

[109] There was some medical evidence that could support a finding that the Claimant was medically capable of **different** work than his previous job. However, the medical evidence does not give a diagnosis or describe his limitations.

[110] Therefore, I have no way to assess whether suitable employment would have been reasonably available, given the Claimant's limitations. To be capable of employment, a claimant must be realistically capable of employment — not just theoretically capable.

[111] I also cannot determine whether the Claimant satisfies the third *Faucher* factor, which requires that he not set conditions that unduly limit his job prospects. I cannot determine whether the Claimant chose to limit his employment prospects by the kinds of work he was willing to take, or whether the limitations that he described were medical limitations.

[112] Without this evidence, I cannot make the decision. Therefore, I must send it back to the General Division, where the Claimant and the Commission will have the opportunity to present additional evidence.

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[37] Audio recording of General Division hearing at timestamp 00:38:40.
[38] Audio recording of General Division hearing at timestamp 00:39:50.

CONCLUSION

[113] The appeal is allowed. I am returning the matter to the General Division to reconsider its decision.

Stephen Bergen
Member, Appeal Division

HEARD ON:	January 12, 2021
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	T. M., Appellant Sarah Sinton, Representative for the Appellant Josée Lachance, Representative for the Respondent