



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *HR v Canada Employment Insurance Commission*, 2021 SST 221

Tribunal File Number: AD-21-38

BETWEEN:

**H. R.**

Appellant

and

**Canada Employment Insurance Commission**

Respondent

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

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DECISION BY: Stephen Bergen

DATE OF DECISION: May 28, 2021

## DECISION AND REASONS

### DECISION

[1] I am allowing the appeal in part. I have made the decision that the General Division should have made. The Claimant is entitled to benefits for a period of 14 consecutive days while outside of Canada. He remains otherwise disentitled to benefits during the time that he was absent from Canada.

### OVERVIEW

[2] The Appellant, H. R. (Claimant), was laid off from his employment on March 20, 2020. On or about July 10, 2020, he learned that his employer would not be recalling him to work. The Claimant left Canada to go to another country (P) on July 16, 2020. After he had been there for some time, he applied for Employment Insurance benefits.

[3] The Respondent, the Canada Employment Insurance Commission (Commission), denied his claim, saying that the Claimant was not entitled to benefits for two reasons. It said that he was outside of Canada. It also said that the Claimant was not available for work. The Claimant asked the Commission to reconsider but it would not change its decision.

[4] The Claimant appealed to the General Division of the Social Security Tribunal, which dismissed his appeal. He is now appealing the General Division decision to the Appeal Division.

[5] I am allowing the appeal. The General Division made an important error of fact when it found that the Claimant was not outside Canada to conduct a bona fide job search. It also made an error of law in how it applied the test for availability.

[6] I have made the decision the General Division should have made and found that the Claimant was outside of Canada to conduct a bona fide job search and available for work in the period between October 11 and October 13, 2020. That means that he qualifies for those benefits available under section 55(1)(f) of the *Employment Insurance Regulations* (Regulations), less appropriate deductions for earnings.

## 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:<sup>1</sup>

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] Did the General Division make an important error of fact when it found that the Claimant was disentitled to Employment Insurance benefits because he was outside of Canada?

[9] Did the General Division ignore or misunderstand the Claimant’s evidence that he was outside Canada to conduct a bona fide job search?

[10] Did the General Division ignore or misunderstand the Claimant’s evidence of his job search, when it decided he was available for work?

[11] Did the General Division make an error of law in how it determined availability?

## ANALYSIS

[12] The *Employment Insurance Act* (EI Act) says that claimants cannot receive Employment Insurance benefits when they are outside Canada.<sup>2</sup> This rule is applied strictly, but the Regulations identify certain exceptions that can suspend the application of this rule for limited periods.<sup>3</sup>

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<sup>1</sup> 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).

<sup>2</sup> Section 37(b) of the *Employment Insurance Act* (EI Act).

<sup>3</sup> Section 55(1) of the *Employment Insurance Regulations* (Regulations)

[13] Section 55(1)(f) of the Regulations describes one of these exceptions. It states that a claimant is not disentitled to benefits for a period of 14 consecutive days for the reason that the claimant is outside Canada to conduct a bona fide job search.<sup>4</sup>

**Issue 1: Was the Claimant Disentitled to Benefits while Outside of Canada?**

[14] The Claimant argues that he should not have been disentitled to benefits while he was outside of Canada. He believes the General Division ignored or misunderstood his evidence that he was looking for work.

[15] However, there was no dispute that the Claimant left Canada on July 16, 2020, or that he was still outside of Canada at the time of the General Division hearing.

[16] Beyond the particular, narrow exceptions set out in the section 55(1) of the Regulations, the EI Act states that claimants are disentitled to benefits when they are outside of Canada. This is true generally, regardless of their availability for work.

[17] Therefore, the General Division made no error in finding that the Claimant was not entitled to benefits since July 16, 2020, excepting the possibility that he may be entitled to up to 14 days for a period in which he was conducting a bona fide job search.

**Issue 2: Was the Claimant Outside Canada to Conduct a Bona Fide Job Search?**

[18] The Claimant argued that he went to P to look for work, and that he continued to look for work while he was in P. This evidence is relevant to whether the Claimant qualified for benefits under section 55(1)(f) of the Regulations. The Claimant argued that the General Division ignored or misunderstood this evidence.

[19] The Claimant told the General Division that he went to P because the COVID lockdown made finding other work in Canada difficult. He said that he understood that his chances of employment would be better in P because the COVID restrictions were less strict.<sup>5</sup> The Claimant also testified that began looking for work as soon as he completed the 15-day quarantine period

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<sup>4</sup> Section 55(1)(f) of the Regulations.

<sup>5</sup> Audio record of General Division hearing at timestamp 00:05:50

in the country that he was visiting.<sup>6</sup> He said that he had been seeking work as a tutor, especially of English as a second language, but he was also looking for work in IT (information technology).

[20] The Claimant said that he expected to give moral support to his family in P, but insisted that this was not his main reason for being there.<sup>7</sup>

[21] In the Overview section of the General Division decision, the General Division said that the Claimant went to P to provide moral support to his family.<sup>8</sup> Later on in the decision, the General Division summarized the Claimant's testimony. The General Division began by stating that the Claimant testified, "the purpose of his trip was to visit relatives in P and give them moral support."<sup>9</sup> The General Division noted that the Claimant also said he had planned to look for work, but it concluded the paragraph by saying that, "[the Claimant's] testimony does not show that he travelled for any reason that would qualify him for an exception to the out-of-Canada rule."<sup>10</sup>

When must the Claimant conduct the bona fide job search to claim benefits under the exception?

[22] The General Division's use of the word "travelled" is unfortunate because it suggests that section 55(1)(f) is focused on a claimant's reason at the time that he or she leaves Canada. Section 55(1)(f) actually offers a 14-day relief from disqualification to a claimant who is outside Canada to conduct a bona fide job search. Nothing in the EI Act or Regulations states that the claimant must form the intention to seek work before he leaves the country, or that it is only possible to obtain relief from disqualification in the first days that a claimant is outside Canada.

[23] However, I find that the General Division did not mean to assess the Claimant's purpose at the point that he travelled.

[24] When I read the General Division decision as a whole, I find that the General Division actually reviewed his purpose during a later period after he applied for Employment Insurance

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<sup>6</sup> Audio record of General Division hearing at timestamp 00:31:00.

<sup>7</sup> Audio record of General Division hearing at timestamp 00:05:50; 00:24:25; and 00:25:40.

<sup>8</sup> General Division decision, para 3.

<sup>9</sup> General Division decision, para 16.

<sup>10</sup> General Division decision, para 18.

benefits. The General Division stated that it was reviewing the period that started with October 5, 2020, which it understood to be the date the Claimant applied for benefits.<sup>11</sup> The decision says that “[t]he list does not prove that he was in [P] in early October 2020, for the purpose of a bona fide job search.”<sup>12</sup> Following these statements, the General Division concluded by saying that the Claimant had not travelled for the purpose of a bona fide job search.

[25] The extent to which the Claimant’s desire to look for work influenced him to “travel” to P (at the time that he travelled to P), is beside the point. The General Division decision does not depend on the Claimant’s reason for travelling to P. Instead, the decision relies on a finding about the Claimant’s purpose for being outside of Canada at the time that he made a claim for Employment Insurance benefits.<sup>13</sup>

[26] This only makes sense. The Claimant had not applied for benefits when he first left for P in July 2020 and he did not establish a benefit period until October 2020. He would have had to establish a benefit period before he could be entitled to benefits. He would first have to be entitled to benefits to be disentitled for being outside of Canada. And he would have to be disentitled before he could possibly benefit from the temporary relief from disqualification that is offered by section 55(1)(f) of the Regulations.

[27] I accept that the General Division was required to consider whether section 55(1)(f) applied within a period that began when the Claimant applied for benefits.

[28] I also accept that the General Division did, in fact, consider how the exception applied in the period after he applied for benefits.

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<sup>11</sup> General Division decision, para 13. This seems to be a slip. The Claimant applied for benefits on October 14, 2020. His benefit period would have begun on the Sunday of that week, which would be October 11, 2020.

<sup>12</sup> General Division decision, para 13. This was a list of the addresses that the Claimant visited to offer tutoring services. The list also included some other job search activities. See GD6.

<sup>13</sup> General Division decision, paras 17 and 18.

Was the section 55(1)(f) applicable at any time within the Claimant's benefit period?

[29] The decision does not explicitly set out the basis for the General Division's finding that the Claimant did not qualify for an exception to the section 37 disentitlement. To find as it did, the General Division would have had to either reject that the Claimant was outside of Canada to conduct a job search or it would have to reject the "bona fides" (or sincerity)<sup>14</sup> of his job search. I will now consider whether the General Division could have decided as it did in one of these two ways.

The reason for the Claimant's absence from Canada

[30] The General Division acknowledged the Claimant's testimony that providing moral support was not his only reason for going to P, and that the Claimant also intended to look for work. If the General Division did not accept that the Claimant was outside of Canada to look for work, it could only have done so by rejecting his evidence, or by finding that his job search was not a sufficiently important part of the Claimant's reasons for going to P.

[31] However, the General Division decision does not suggest that the member disbelieved that the Claimant's job search in P was at least part of the reason he was outside of Canada. There was no evidence to contradict the Claimant on this point.

[32] I must presume that the General Division did not accept that the Claimant's job search in P was significant enough to justify his absence from Canada. However, section 55(1)(f) of the Regulations does not say how significant a job search must be to be a "bona fide" job search. It does not say whether it must be the main reason for being outside of Canada, or if it is enough that it was a significant reason, or just one of the reasons.

[33] The Federal Court of Appeal has confirmed that the reason given for a section 55(1) exception does not need to be the only reason he or she is outside of Canada. In the case of *Gibson*, the Court considered a claimant who was claiming a section 55(1)(e) exception. This exception is for claimants who are outside Canada to attend bona fide job interview. However,

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<sup>14</sup> Black's Legal Dictionary defines bona fide as "In or with good faith; honestly, openly, and sincerely; without deceit or fraud" accessed at <http://iservice.prv/eng/imit/nsd/index.shtml>

the claimant in *Gibson* had more than one reason to be outside of Canada.<sup>15</sup> She had decided to take a trip outside Canada to visit her son. Before she left Canada, the claimant arranged an employment interview at her destination.<sup>16</sup>

[34] Despite the fact that the claimant had more than one reason, the Federal Court of Appeal upheld the lower decisions, which had found that the claimant was entitled to the exception for being out of Canada to attend a bona fide job interview.

[35] At the Appeal Division, the Commission argued that the Claimant could not benefit from an exception because the “bona fide job search” was not his *main reason* for being outside of Canada. I asked the Commission why it took the position that the job search had to be the Claimant’s main reason, and the Commission referred to the court decisions it had provided in its written submissions. None of those decisions, except *Gibson*, considered how central the job search must be to the Claimant’s purpose in being out of Canada.

[36] However, the *Gibson* decision did not require that the section 55(1) exception be the main reason that the claimant was outside of Canada. The claimant in *Gibson* only obtained the job interview after she had decided to visit her family outside Canada. If anything, the facts in *Gibson* suggest that the exception was secondary to the claimant’s intention to visit her son.

[37] There was un-contradicted evidence that the Claimant went to P to look for work. Providing moral support to his family was obviously important to him, but his evidence was consistent. Finding work in P was at least a significant reason that he left Canada and remained in P.

The bona fides of the Claimant’s job search

[38] The evidence before the General Division was that the Claimant went to P to find work there. He also agreed that he had hoped to offer his family moral support as well as financial help. But he repeatedly told the General Division that his main reason for leaving Canada was to look for work.

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<sup>15</sup> *Canada (Attorney General) v Gibson*, 2012 FCA 166.

<sup>16</sup> This is a different exception under 55(1)(e) of the Regulations.



[39] Once in P, the Claimant apparently followed through with this intention. He looked for and obtained work as a tutor. The Claimant conducted his job search using methods that he deemed appropriate to the culture, the COVID situation, and the tools available to him in P.

[40] The Claimant said that he was able to obtain 15–20 hours of work in late August, through his efforts. The Claimant lost that work after about two months, and he began looking for work again. At his hearing, he told the General Division that he had recently secured about 10 hours per week of work in P.<sup>17</sup> (The Claimant had not returned to Canada at the time of his General Division hearing.)

[41] When the General Division assessed the Claimant's entitlement while outside of Canada, it considered whether he was in P for the purpose of a bona fide job search. It said it gave low weight to the Claimant's post-hearing job search information because it was not dated and because it did not specify whether any of the listed efforts were in the period after he lost his first clients.<sup>18</sup> Elsewhere in its decision, the General Division considered whether the Claimant's job efforts could be considered "reasonable and customary," or otherwise sufficient to show his availability for work under section 18 of the EI Act.

[42] However, the bona fides of the Claimant's job search depends on the sincerity of his intention, not the nature or adequacy of his job search efforts. If the Claimant had made only a token job search, this would likely have been relevant to the assessment of his sincerity, but that was not the case here. There was no evidence that challenged the sincerity of the Claimant's purpose or efforts.

[43] In fact, the General Division appears to have accepted the Claimant's sincerity in looking for work. In considering the Claimant's availability, it found that he showed a desire to return to the labour market as soon as possible even though he was in P.<sup>19</sup> Nothing in the decision suggests that this finding excluded the period after the Claimant applied for benefits.

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<sup>17</sup> Audio recording of the General Division hearing at timestamp at 00:27:30

<sup>18</sup> General Division decision, para 17.

<sup>19</sup> General Division decision, para 36.

Conclusion on the applicability of section 55(1)(f) of the Regulations

[44] The General Division did not say that the bona fide search must be the Claimant's *only* reason for being outside Canada. If it had, it would have made an error of law. This interpretation of section 55(1) of the Regulations would be contrary to the Federal Court of Appeal's decision in *Gibson*.

[45] Therefore, I must find that the General Division made an error of fact, because it found that the evidence did not show that the Claimant travelled (which I have taken to mean "was outside of Canada") "for any reason that would qualify him for an exception to the out-of-Canada rule."<sup>20</sup> This finding either ignored or misunderstood the Claimant's evidence of his intention to find work in P, or it reached a conclusion that did not follow from the evidence.

[46] Alternatively, the General Division made an error of law by giving inadequate reasons for its decision. The General Division did not explain in a transparent and intelligible manner how it interpreted "bona fide" under section 55(1)(f), or how it applied its interpretation to the facts. It did not explain how it understood the Claimant's testimony, or how it weighed the Claimant's evidence against other evidence that was before it.

[47] The Federal Court has stated that a reviewing court must be able to "understand why the tribunal made its decision and [reasons must permit it to] determine whether the conclusion is within the range of acceptable outcomes."<sup>21</sup> The General Division reasons do not permit such a determination.

**Issue 3: Did the Claimant show his Availability for Work through his Job Search?**

[48] The Claimant argues that the General Division made an important error of fact when it found that he was not available for work. He submitted that the General Division misunderstood the nature of his job search in P.

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<sup>20</sup> General Division decision, para 18.

<sup>21</sup> *Canada (Attorney General) v Thériault*, 2017 FC 405; this was actually reasons for the purpose of judicial review, but the same principle applies here.

The General Division said that the Claimant's job search was mainly random cold calls

[49] When the General Division assessed the Claimant's availability for work, it characterized the Claimant's job search as "mainly limited to random cold calls to try to get private teaching work." The Claimant disputes this characterization.

[50] I do not agree that the General Division made an error of fact in how it characterized the Claimant's evidence.

[51] According to the Claimant's testimony, his principal method of finding work while he was in P was "going on foot, knocking door to door to door" offering his services as a tutor. He also printed some promotional handbill-type materials.

[52] The Claimant said that he had also registered on two job search sites but these were for jobs in Canada—not P. He said that he continued to check on these.<sup>22</sup> He registered with the Government of Canada job board, and he kept in contact with his two former employers in Canada, in case the work demand picked up and they could take him back.<sup>23</sup> However, the Claimant also testified that he did not actually apply for any jobs in Canada. He said that he saw jobs posted but that he had previous experience with applying on job sites, and did not expect he would hear back even if he applied.<sup>24</sup>

[53] After the hearing, the Claimant submitted job search information at the invitation of the General Division.<sup>25</sup> This information included a list of houses that he visited in Precinct 2 of the particular town or suburb in which he was looking. All of the houses were on Road 1, or Streets 6–10. Most of the house numbers are consecutive. He confirmed 11 students from about 220 visits. He also noted that he had an interview for a school principal position.

[54] The Claimant later told the Appeal Division that he had targeted his job search to those houses or neighbourhoods in which the residents were likely to have children home from school

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<sup>22</sup> Audio recording of the General Division hearing at timestamp at 00:12:35.

<sup>23</sup> Audio recording of the General Division hearing at timestamp at 00:17:40.

<sup>24</sup> Audio recording of the General Division hearing at timestamp at 00:35:50.

<sup>25</sup> GD5.

because of COVID. However, he had not explained this to the General Division so it is new evidence that I cannot consider.

[55] I accept that the Claimant's main method of looking for work was to seek students by door-to-door house calls. His search for students may not have been "random" in one sense. He appears to have gone up and down streets systematically. However, his search was random in another sense. There was no evidence before the General Division that the Claimant did any market research or targeted his search to houses or areas in which the residents were seeking, or likely to be seeking, a home tutor.

The General Division said the Claimant did not apply to any businesses

[56] The Claimant also asserted that the General Division made a mistake in saying that that his job search list did not include the name of any "businesses". The only job prospect named in the Claimant's evidence, beyond the houses that he visited, is a job for a school principal at an "International School." Schools may be businesses in P, but they are not normally considered as such in Canada.

[57] The General Division specifically noted that the Claimant applied to a "university job." "University job" may not be an accurate description of the International School. However, it seems clear that the General Division understood that the Claimant applied to the International School, as well as seeking out private tutoring clients.

[58] If there is an error in how the General Division described this job, it is a small one. The ground of appeal that concerns an error of fact requires the General Division to have "based its decision on an erroneous finding of fact." The General Division's findings did not depend on whether this prospect was a private business, school, or university. It did not base its decision on the nature of the employer or the job title for that one employment prospect.<sup>26</sup>

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<sup>26</sup> The ground of appeal for an error of fact is defined in Section 58(1)(c). It is a ground of appeal when, "the General Division based its decision on an erroneous finding of fact that it made in a perverse capricious manner or without regard of the material before it"

#### **Issue 4: The Legal Test for Availability**

[59] The Claimant did not argue that the General Division made any errors of law, but I cannot ignore obvious errors of law.

[60] The General Division stated that the Claimant had to show that he was available under two sections of the law.<sup>27</sup> The first section was section 50(8) of the EI Act. This section concerns the Commission's ability to require a claimant to prove their availability through reasonable and customary efforts to find work. "Reasonable and customary" efforts are itemized in section 9.001 of the Regulations.

[61] The only reason that the General Division needed to consider the Claimant's availability for work at all, was to assess whether he qualified for a specific exception to that disqualification. There was no dispute that the Claimant was outside of Canada. The law is clear that claimants are disqualified to benefits under section 37 of the EI Act when they are outside of Canada, except for the limited set of circumstances described in section 55(1) of the Regulations.

[62] Therefore, I am reviewing the General Division's findings of disqualification in terms of how they affect the finding that the Claimant was not entitled to benefits under section 55(1) of the Regulations.

#### Reasonable and customary efforts

[63] The General Division made an error of law when it considered that the Claimant should be disqualified from benefits under the exception because he did not satisfy the "reasonable and customary" criteria.<sup>28</sup>

[64] Section 55(1) of Regulations outlines the exceptions to disqualification. The exceptions are for limited periods and for specific reasons. One of the exceptions provides that a claimant's absence from Canada does not disqualify him or her "for a period of not more than 14

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<sup>27</sup> General Division decision, para 19.

<sup>28</sup> General Division decision, para. 19, 20 and 33.

consecutive days to conduct a bona fide job search.” The Claimant asserted that he was outside of Canada to conduct a bona fide job search.

[65] However, the Claimant must still prove he or she is available for work to be entitled to benefits, even if he was outside of Canada to conduct a bona fide job search. All of the exceptions in section 55(1) including the bona fide job search exception are said to be, “subject to section 18 of the Act.” That means that a claimant who qualifies for a section 55 exception may still be disentitled if he or she does not satisfy the requirements of section 18.

[66] I do not see that the Commission ever asked the Claimant to prove that he was making “reasonable and customary” efforts while he was outside of Canada, or that it disentitled him because he failed to provide evidence of such efforts.<sup>29</sup> The Claimant was disentitled under section 37 of the EI Act, subject to the particular exceptions of section 55(1).

[67] The law does not presume that claimants will be able to show reasonable and customary job search efforts during the period in which they would otherwise be entitled to benefits under one of the section 55(1) exceptions. The section 55(1) exceptions are made “subject to” section 18 of the EI Act. They are not said to be subject to the section 50(1) or section 50(8) of the EI Act.<sup>30</sup>

[68] Furthermore, it would be unreasonable to apply the same job search standard to a claimant who is outside of Canada for one of the purposes described in the exceptions, for the limited period of the exception.<sup>31</sup> The exceptions offer a week or two of benefits so that claimants who are outside of Canada can explore work opportunities, attend a funeral, visit seriously ill family members, or accompanying them to the hospital.

[69] Therefore, the General Division made an error of law when it applied the criteria detailed in section 9.001 of the Regulations, using the authority of section 50(8) of the EI Act. The

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<sup>29</sup> Section 50(8) of the EI Act says that the Commission may require a claimant to show their availability by proving that they are making reasonable and customary efforts to obtain suitable employment.

<sup>30</sup> Section 50(1) of the EI Act says that a Claimant is disentitled to benefits if he does not comply with the Commission’s request to prove that he or she has made reasonable and customary efforts.

<sup>31</sup> Efforts considered “reasonable and customary” are itemized in Section 9.001 of the Regulations.

Claimant is not disentitled for the reason that he did not prove that he made reasonable and customary job search efforts.

Availability for work

[70] The General Division also said that the Claimant was disentitled because he did not show he was available for work under section 18(1) of the EI Act.

[71] The General Division made an error of law because it failed to define “availability” using case law that is directly relevant to claimants for benefits under the section 55(1) exceptions.

[72] The General Division found that the Claimant was not available for work within the meaning of the EI Act during the period that he was absent from Canada. It analyzed the Claimant’s availability under section 18(1), using a test expressed in a Federal Court of Appeal decision called *Faucher*.<sup>32</sup>

[73] The General Division decision described the three factors of the *Faucher* test,<sup>33</sup> but I will repeat them here. For a claimant to show he or she is available for work, the claimant must

- a) Show a desire to return to the labour market as soon as a suitable job is available,
- b) Express that desire through efforts to find a suitable job, and
- c) Not set personal conditions that might unduly limit his or her chances of returning to the labour market.

[74] The General Division found that the Claimant was not available for work because he did not meet two of the *Faucher* factors. It said that his job search was not adequate and that he had set personal conditions that unduly restricted his ability to return to work.<sup>34</sup>

[75] However, the General Division did not consider *Elyoumni*, another decision of the Federal Court of Appeal.<sup>35</sup> *Elyoumni* addresses the circumstances of this case directly.

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<sup>32</sup> *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96.

<sup>33</sup> General Division decision, para 34.

<sup>34</sup> General Division decision, para 43.

<sup>35</sup> *Canada (Attorney General) v Elyoumni*, 2013 FCA 151.

[76] I forwarded a copy of the *Elyoumni* decision to both the Claimant and the Commission's representative. I asked them to comment on whether or how *Elyoumni* applies to this appeal. The Claimant responded on May 21, 2021. He argued that his circumstances were different from other cases because he could be available for work no matter where he was located. He said that the "old" employment insurance laws are outdated and that I should not apply them. The Commission told the Tribunal that it had nothing to add to its earlier submissions.

[77] *Elyoumni* looked at the availability of a claimant who was outside of Canada and seeking benefits under one of the section 55(1) exceptions. The Court did not refer to the earlier *Faucher* decision, and it did not analyze the claimant's availability using the three factors described in *Faucher*. Instead, the Court in *Elyoumni* said that a claimant's availability must be interpreted in the context of the section 55(1) exception. It stated that a claimant who is outside Canada must at least be able to show that he or she made arrangements to be reached if a job was offered.

[78] *Elyoumni* does not identify a clear standard by which a claimant's availability should be measured to access benefits under one of the exceptions. However, the decision recognizes that availability must be assessed differently for this purpose. A claimant could satisfy the "minimum" requirement of *Elyoumni*, even where he or she would not necessarily be able to satisfy all the requirements of the *Faucher* test.

[79] The General Division made an error of law in assessing the Claimant's availability without consideration of *Eloyumni*.

### **Summary**

[80] I have found that the General Division made errors of fact and law in how it assessed that the Claimant was not outside of Canada for the purpose of a bona fide job search.

[81] Because I have found an error in how the General Division reached its decision, I must consider what I should do about the error (remedy).



## **REMEDY**

### **Nature of Remedy**

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

[83] The Claimant and the Commission agree that I should make the decision.

[84] I accept that the Claimant had a fair opportunity to present his evidence to the General Division and that I have all the evidence I need to make the decision. I will make the decision that the General Division should have made.

### **My Decision**

[85] The Commission's November 27, 2020, reconsideration decision upheld its original decision that the Claimant was disentitled. It found that the Claimant was disentitled because he was outside of Canada and also because he was not available for work. From the Commission's November 26, 2020, conversation with the Claimant, it appears that the Commission informed the Claimant that he did not qualify for an exception under section 55(1) of the Regulations.<sup>37</sup>

[86] The Claimant is asking me to allow his appeal and find that he should have been entitled to benefits while he was outside of Canada. He says that he was outside of Canada to conduct a bona fide job search.

[87] The Commission says that I should find that the Claimant was disentitled to benefits while he was outside of Canada. It argues that the Claimant did not qualify for the exception that would have allowed him to receive up to 14 days of benefits. The Commission asks me to dismiss the appeal.

[88] I am allowing the appeal in part.

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<sup>36</sup> My authority is set out in sections 59(1) and 64(1) of the DESD Act.

<sup>37</sup> GD3-17.

[89] The General Division did not make an error when it found that the Claimant would be disentitled to benefits while outside Canada during any period for which an exception under section 55(1) did not apply. The law is clear on this point and there is no basis for me to interfere with that finding.

[90] However, I have found that the General Division did make errors when it found that the Claimant was not outside of Canada to conduct a bona fide job search, and in how it applied the law to find that the Claimant was not available.

[91] This means that I will now decide whether the Claimant should have obtained any of the benefits available under the exception in section 55(1)(f); that he was outside of Canada to conduct a bona fide job search.

### **The Claimant's purpose**

[92] The Claimant said that he was outside of Canada for a bona fide job search. He also said that he conducted such a search and actually found some work.

[93] I accept the Claimant's evidence that he left Canada on July 14, 2020, with the sincere intention of finding employment. In all of the evidence, including his application for benefits, the Claimant stated that he was going to P to look for work. He has stated that he had intended to offer moral support to his family as well, but there was no evidence challenging the sincerity of his intention to work. In his testimony, he was clear that the job search was his main purpose for going to P. The Claimant's evidence was consistent and the General Division did not question his credibility on any of this.

[94] Furthermore, the Claimant's stated intention is plausible because of the unusual employment market at the time. He testified that he could not find work in Canada because of how COVID was affecting Canada. The Claimant had family living in P and believed that the lockdown-type measures in P were less strict.

[95] I also accept that the Claimant maintained his intention to look for work on his arrival to P. He testified to the manner in which he searched for and recruited students. He also provided a list of the number of residences he visited in P and a copy of some promotional materials he

prepared, and noted that he had participated in a job interview for a school principal position. He testified that he tutored several students until October 2020.

[96] However, the Claimant needed to show that he was outside of Canada to conduct a bona fide job search *after October 11, 2020*, when he first established a benefit period. The Claimant submitted his application on October 14, 2020. His benefit period would have begun on the first Sunday in the week of his application, which would have been October 11, 2020. It does not matter whether the Claimant had a bona fide intention before October 11. As I discussed earlier, the Claimant could not possibly be entitled to any benefits before his benefit period began.

#### My jurisdiction

[97] I cannot decide whether the Claimant would have qualified for benefits under a section 55(1) exception based on his circumstances *after the reconsideration* decision of November 27, 2020.

[98] I have no greater jurisdiction than the General Division when I am substituting my decision for that of the General Division. The General Division only had jurisdiction to consider the reconsideration decision, which was based on the circumstances at that time.

[99] I do not know if the Claimant has returned to Canada, but he was still outside of Canada at the time of his General Division hearing. If the Claimant were seeking benefits under one of the section 55(1) exceptions based on how his circumstances changed after November 27, 2020, he would need to seek a different decision from the Commission.

#### **Bona fide job search between October 11, 2020, and November 27, 2020**

[100] The Claimant testified that he found his first students in late August and kept them for about two months. He agreed with the General Division member that he worked to the end of October and that he applied for benefits before he lost his students. He said he did this because he wanted benefits to supplement his income.

[101] Having a job is not the same thing as searching for a job, and the Claimant's evidence is not clear about whether he continued to search for other students at the same time that he was

tutoring students part-time. The Claimant did not date his list of household addresses so I do not know the particular dates that he searched for students.

[102] However, I accept that the Claimant still had a bona fide intention to find additional employment during the period that he still had students (to the end of October). According to the Claimant's list, he confirmed 11 students while he was in P and visited over 200 separate addresses, going door to door seeking individual students. From this, I infer that he likely found at least some of those students at the same time as he was already tutoring other students. In my view, this is a more likely scenario than one in which he obtained all of his students at once and then stopped searching.

[103] However, there is little evidence that the Claimant was sincerely seeking work in P between when he lost his students at the end of October and when the Commission gave him its reconsideration decision. The only evidence about the Claimant's job search efforts after October is his statement to the Commission on November 26, 2020. In that statement, the Claimant reported that he began working at a new job in P after October 2020.<sup>38</sup>

[104] However, I do not accept the Claimant's statement that he had looked for, or found work in P in November 2020. The Claimant told the Commission that he had found a job but offered no details of his continuing search or about this new job. At his General Division hearing, the Claimant argued that the work he found in P justified his entitlement to benefits while he was there. He testified that he had found work from late August until the end of October. He also testified that he just found some additional tutoring that was to start the Monday after the January 6, 2021, hearing. However, he did not say anything about other work between those dates. If the Claimant had found additional work between the end of October 2020 and January 2021, I expect he would have mentioned it to the General Division.

[105] In fact, the Claimant told the General Division that his *primary* concern in P was to be able to return to Canada. He said that he had been booked to fly back to Canada on December 1, 2020. By the time he lost all of his students at the end of October, his anticipated departure was

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<sup>38</sup> GD3-17

only a month away. I doubt that he was sincerely seeking to add additional students at that time, knowing he was leaving soon.

[106] I find that the Claimant was outside of Canada to conduct a bona fide job search until the end of October 2020.

[107] Since the Claimant's benefit period began October 11 and he was outside Canada for a bona fide job search until the end of October, the Claimant was outside of Canada to conduct a bona fide job search for the maximum 14-day period.

**Availability for work between October 11, 2020, and November 27, 2020.**

[108] For the Claimant to receive benefits within the 14-day period of this exception, he must also show that he was also available for work under section 18(1) of the EI Act.

[109] A claimant who is unable to meet the *Faucher* test is generally considered unavailable for work and is disentitled to benefits.<sup>39</sup> The *Faucher* factors may be relevant to a claimant's availability when the claimant is outside of Canada the country. However, a claimant's availability does not depend on his or her ability to meet the *Faucher* test, when benefits are claimed under one of the exceptions described in section 55(1) of the Regulations.

[110] In *Elyoumni*, the Federal Court of Appeal considered a claimant who was outside of Canada and seeking benefits under one of the section 55(1) exceptions. The Court said that the claimant's availability must be interpreted within that context, and on a case-by-case basis.<sup>40</sup> It said that the claimant in the appeal might have been able to prove his availability if he had been able to show that he had made arrangements to be reached if he was offered a job.

[111] This case is similar to *Elyoumni*. The Claimant was also outside of Canada and seeking benefits under one of the exceptions to disentitlement.

[112] However, some of the facts are different. The claimant in *Elyoumni* was outside of Canada in 2011 to attend the funeral of an immediate family member. He was not outside of

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<sup>39</sup> I explained the *Faucher* test at paragraph 71.

<sup>40</sup> *Elyoumni*, *supra*, note 43.

Canada already working or looking for work, as was the Claimant in this case. There was no pandemic or lockdown measures in place in *Elyoumni* to affect the claimant's employment opportunities in Canada or elsewhere.

[113] The Claimant testified that two employers in Canada had laid him off at almost the same time. He said that he could not find work because of the COVID pandemic restrictions. He said that at least one employer did not fill his former position and would hire him back if it could.<sup>41</sup> He testified that he stayed in contact with both of his former employers and a former co-worker and that they knew to contact him in the event there was work.<sup>42</sup>

[114] Therefore, the Claimant made at least some sort of arrangement to be contacted in the event of a job. However, I also recognize the likelihood that any such contact would only arise out of a job prospect at one of his two former employers. I would not be able to find the Claimant to have been "available" based only on these particular arrangements.

[115] Because I am considering only whether the Claimant could have been entitled to benefits under an exception to the general disentitlement for claimants that are outside of Canada, I am adopting the case-by-case approach suggested by *Elyoumni*. In doing so, I am also assessing how the *Faucher* factors might apply *within the context of the section 55(1)(f) exception*.

#### Desire to return to work

[116] The first *Faucher* factor concerns a claimant's desire to return to work. I have found that the Claimant was in P conducting a bona fide job search to the end of October. This means that I accept that he was sincerely looking for work.

[117] I also accept that the Claimant had the desire to return to work as soon as a suitable job could be offered until the end of October 2020.

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<sup>41</sup> Audio recording of General Division hearing at timestamp 00:17:40

<sup>42</sup> Audio recording of General Division hearing at timestamp 00:35:05

Adequacy of job search efforts

[118] The second *Faucher* factor requires a claimant to express his or her desire to return to work through job search efforts. The section 55(1)(f) exception in this case could only provide benefits for a maximum of 14 days. In my view, the nature and extent of job search efforts within such a limited period must be assessed differently than efforts over a longer term. Furthermore, the adequacy of a claimant's job search in another country must be assessed according to what is reasonable in that country.

[119] I find that the manner in which the Claimant sought students by introducing himself door-to-door was appropriate. The COVID pandemic is a factor that limited and directed the Claimant's job search efforts, but this is outside of the Claimant's control. I also take notice that P is a Third World country and neither the Claimant nor his students should be presumed to have access to the same electronic tools as are in widespread use in Canada.

[120] The Claimant's written evidence of job search efforts indicated that he had one interview at a school but then the school closed down because of COVID.<sup>43</sup> The Claimant's prospective students were restricted to learning from their homes because of the pandemic and the Claimant did meet with some success in obtaining students by coming to their homes. For the same reasons that I mentioned when considering the period of the Claimant's bona fide job search, I also accept that the Claimant continued to both work and look for work from the beginning of his benefit period until the end of October.

[121] Given the circumstances, the Claimant's job search efforts were adequate for the purpose of claiming benefits under the exception.

Personal conditions that are unduly limiting

[122] The final *Faucher* factor says that a claimant who sets personal conditions that unduly limits his or her ability to return to the labour market. I accept that the Claimant was primarily looking for work in P. However, it makes no sense to say that a claimant cannot obtain benefits under the bona fide job search exception because his or her job search is limited to the country

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<sup>43</sup> GD5-4.

they are visiting. The whole point of the exception is to permit a short job search outside of Canada.

[123] The Claimant also focused his job search on finding work as a tutor and ESL teacher. However, I find this kind of work was appropriate to his skills and experience.

[124] I find that the Claimant did not set personal conditions that unduly limited his chances of returning to the market within the 14-day window of the exception.

#### Conclusion on availability

[125] For the purpose of the section 55(1)(f) exception to the out-of-Canada disenfranchisement, I find that the Claimant was available for work between October 11, 2020, and October 31, 2020.

[126] The Claimant qualifies for the exception described in section 55(1)(f) of the Regulations. Between October 11, 2020, and October 31, 2020, the Claimant was both outside of Canada for a bona fide job. He was also available for work under section 18(1) for the same period.

[127] At the same time, the Claimant apparently had earnings from tutoring students during the period that he would qualify for the exception. He has testified that he worked about 15–20 hours. The Claimant's application states that he earned \$25.00 per week but he did not disagree when the General Division member stated he earned \$25.00 per hour.<sup>44</sup> I leave it to the Commission to determine and allocate the Claimant's earnings if appropriate.

#### CONCLUSION

[128] I am allowing the appeal in part. The Claimant meets the criteria for the exemption for a bona fide job search between October 11 and October 31, 2020, and is therefore entitled to those benefits permitted under section 55(1)(f) of the Regulations.

Stephen Bergen  
Member, Appeal Division

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<sup>44</sup> Audio recording of General Division hearing at timestamp 00:26:20, 00:27:25



HEARD ON:	April 22, 2021
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	H. R., Appellant  Susan Prud'homme, Representative for the Respondent