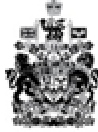

Citation: *Canada Employment Insurance Commission v NO*, 2021 SST 355

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	Canada Employment Insurance Commission
Respondent:	N. O.

Decision under appeal:	General Division decision dated March 31, 2021 GE-20-1401 and GE-20-1402

Tribunal member:	Pierre Lafontaine
Type of hearing:	Teleconference
Hearing date:	July 13, 2021
Hearing participants:	Rachel Paquette, Appellant's representative N. O., Respondent
Decision date:	July 16, 2021
File number:	AD-21-125 and AD-21-137

Decision

[1] The appeal is allowed on the issue of availability.

OVERVIEW

[2] The Respondent (Claimant) had a knee injury. He applied for and received employment insurance (EI) sickness benefits until July 20, 2019. His doctor cleared him to return to work. After a medical assessment, the employer offered the Claimant a modified work placement other than his previous maintenance position. The Claimant accepted it. He returned to work, but did not work the full day. The Claimant felt that working in the new position stressed his knee. He did not return to work.

[3] On August 9, 2019, the Claimant applied to convert his sickness benefits to regular benefits with an effective date of July 21, 2019. On August 12, 2019, the Claimant's employer considered that he had quit his job.

[4] The Appellant, the Canada Employment Insurance Commission (Commission), denied the Claimant's application for benefits. It determined that he voluntarily left his job without just cause. They also determined that he had not proven his availability for work from July 22, 2019, to August 14, 2019. The Claimant appealed the Commission decision to the General Division.

[5] The General Division concluded that the Claimant had not shown just cause to leave his job when he did. It found that he had alternatives to leaving. The General Division also concluded that, although the Claimant stated that he was not available from July 22, 2019 to August 14, 2019, he should only be disentitled from the date the employer considered that he had quit his employment.

[6] The Commission was granted leave to appeal on the issue of availability. It submits that the General Division erred in law in its interpretation of section 18(1) (a) of the *Employment Insurance Act* (EI Act).

[7] I must decide whether the General Division made an error in law in its interpretation of section 18(1) (a) of the EI Act when it concluded that the Claimant should only be disentitled from the date the employer considered that he had quit his employment.

[8] I am allowing the Commission's appeal.

ISSUE

[9] Did the General Division make an error in law in its interpretation of section 18(1) (a) of the EI Act when it concluded that the Claimant should only be disentitled from the date the employer considered that he had quit his employment?

ANALYSIS

Appeal Division's mandate

[10] The Federal Court of Appeal has determined that when the Appeal Division hears appeals pursuant to section 58(1) of the *Department of Employment and Social Development Act*, the mandate of the Appeal Division is conferred to it by sections 55 to 69 of that Act.[1]

[11] The Appeal Division acts as an administrative appeal tribunal for decisions rendered by the General Division and does not exercise a superintending power similar to that exercised by a higher court.[2]

[12] Therefore, unless the General Division failed to observe a principle of natural justice, erred in law, 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, I must dismiss the appeal.

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[1] *Canada (Attorney General) v Jean*, 2015 FCA 242; *Maunder v Canada (Attorney General)*, 2015 FCA 274.
[2] *Idem*.

Did the General Division make an error in law in its interpretation of section 18(1) (a) of the EI Act when it concluded that the Claimant should only be disentitled from the date the employer considered that he had quit his employment?

[13] The evidence shows that the Claimant received sickness benefits until July 20, 2019. The Claimant requested to have his claim converted from sick benefits to regular benefits with an effective date of July 21, 2019. He declared to the Commission that he was not available for work before August 15, 2019, because still employed by his former employer. For this reason, the Commission determined that he had not proven his availability for work from July 22, 2019 to August 14, 2019.

[14] Although the Claimant declared that he was not available for work before August 15, 2019, the General Division concluded that because his employer considered that he had quit on August 12, 2019, the Claimant had not proven his availability from August 13, 2019 to August 14, 2019.

[15] The Commission submits that the General Division erred in law when it ignored the Claimant's statutory requirement under section 18(1) (a) of the EI Act to prove his capability, his availability for work and is inability to obtain suitable employment from July 22, 2019 to August 14, 2019.

[16] To be considered available for work, a claimant must show that he is capable of, and available for work and unable to obtain suitable employment.[3]

[17] There being no precise definition in the EI Act, the Federal Court of Appeal has held on many occasions that availability must be determined by analyzing three factors:

(1) the desire to return to the labour market as soon as a suitable job is offered,

[3] Section 18(1) (a) of the EI Act.

(2) the expression of that desire through efforts to find a suitable job,

(3) not setting personal conditions that might unduly limit the chances of returning to the labour market.[4]

[18] Furthermore, availability is determined for each working day in a benefit period for which the claimant can prove that on that day he was capable of and available for work, and unable to obtain suitable employment.[5]

[19] Before the General Division, the Claimant testified that the reason he was not available from July 22 to August 14, 2019, is that he was still employed with his former employer. He was hoping to return to his previous job in maintenance with his employer. At the end of the hearing, the Claimant confirmed that he had not looked for work before August 15, 2019.

[20] The Federal Court of Appeal has established that maintaining the employment tie and remaining part of the work force does not necessarily make a person available for work.[6]

[21] A claimant cannot merely wait to be called back to work and must look for employment to be entitled to benefits. The EI Act clearly states that to be entitled to benefits, a claimant must establish their availability for work, and to do this, they must look for work.[7]

[22] Given the Claimant's admission that he was not looking for work from July 22 to August 14, 2019, I find that the General Division erred in law when it concluded that because the Claimant's employer considered that he had quit on

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[4] *Faucher v Canada (Employment and Immigration Commission)*, A-56-96.
[5] *Canada (Attorney General) v Cloutier*, 2005 FCA 73.
[6] *Canada (Attorney General) v Gagnon*, 2005 FCA 321.
[7] *Canada Employment Insurance Commission v GS*, 2020 SST 1076; *D. B. v Canada Employment Insurance Commission*, 2019 SST 1277; *Canada (Attorney General) v Cornelissen-O'Neill*, A-652-93; *Faucher v Canada (Employment and Immigration Commission)*, A-56-96; *Canada (Attorney General) v Cloutier*, 2005 FCA 73; *De Lamirande v Canada (Attorney General)*, 2004 FCA 311.

August 12, 2019, he had not proven his availability from August 13, 2019 to August 14, 2019.

REMEDY

[23] Considering that both parties had the opportunity to present their case before the General Division, I will render the decision that should have been given by the General Division pursuant to section 59(1) of the DESD Act.

[24] The Claimant admitted that he was not looking for work from July 22, 2019, to August 14, 2019.[8]

[25] Pursuant to section 18(1) (a) of the EI Act, and in applying the *Faucher* test, I find that the Claimant was not available and unable to obtain suitable employment from July 22, 2019, to August 14, 2019.

CONCLUSION

[26] The appeal is allowed on the issue of availability.

Pierre Lafontaine
Member, Appeal Division

[8] See GD3-14, GD3-22.