[TRANSLATION]

Citation: *Canada Employment Insurance Commission v PS*, 2022 SST 180

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	Canada Employment Insurance Commission
Representative:	Marcus Dirnberger
Respondent:	P. S.

Decision under appeal:	General Division decision dated October 22, 2021 (GE-21-1599)

Tribunal member:	Pierre Lafontaine
Type of hearing:	Teleconference
Hearing date:	March 10, 2022
Hearing participants:	Appellant's representative Respondent
Decision date:	March 14, 2022
File number:	AD-21-386

Decision

[1] The appeal is allowed.

Overview

[2] The Respondent (Claimant) was a driving instructor. On March 23, 2021, the Claimant provided a medical certificate dated January 21, 2021, saying that he had to practise social distancing because of his health problems.

[3] The Appellant, the Canada Employment Insurance Commission (Commission), decided that the Respondent (Claimant) was not entitled to Employment Insurance regular benefits from January 10, 2021, because he had not shown that he was available for work. After reconsideration, the Commission upheld its initial decision. The Claimant appealed the Commission's reconsideration decision.

[4] The General Division found that the Claimant wanted to go back to work and that he had made enough efforts to find a job. It also found that the Claimant was not limiting his chances of finding a job. The General Division decided that the Claimant was available for work from January 10 to March 20, 2021.

[5] The Appeal Division granted the Commission leave to appeal the General Division decision. The Commission argues that the General Division based its decision on a finding of fact that it made in a perverse or capricious manner or without regard for the material before it. The Commission also argues that the General Division failed to exercise its jurisdiction by not deciding the Claimant's availability after March 20, 2021.

[6] I have to decide whether the General Division based its decision on a finding of fact that it made in a perverse or capricious manner or without regard for the material before it and failed to exercise its jurisdiction.

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

Issue

[8] Did the General Division base its decision on a finding of fact that it made in a perverse or capricious manner or without regard for the material before it, and did it fail to exercise its jurisdiction by not deciding the Claimant's availability after March 20, 2021?

Analysis

Appeal Division's mandate

[9] The Federal Court of Appeal has established that the Appeal Division's mandate is conferred to it by sections 55 to 69 of the *Department of Employment and Social Development Act*.[1]

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

[11] So, unless the General Division failed to observe a principle of natural justice, made an error of law, or 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.

Did the General Division base its decision on a finding of fact that it made in a perverse or capricious manner or without regard for the material before it, and did it fail to exercise its jurisdiction by not deciding the Claimant's availability after March 20, 2021?

[12] In support of its appeal, the Commission argues that the General Division based its decision on a finding of fact that it made in a perverse or capricious manner or without regard for the material before it when considering the second factor of the

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

Faucher test.[2] It also argues that the General Division failed to exercise its jurisdiction by not deciding the Claimant's availability after March 20, 2021.

[13] The Commission argues that the General Division could not find, based on the evidence, that the Claimant had expressed the desire to go back to work through consistent efforts to find a suitable job.

[14] The General Division found that the Claimant had made enough efforts to find a job because he had looked at websites, he had signed up for job alerts, and he had kept in touch with his employer.

[15] The Claimant was a driving instructor. On March 23, 2021, the Claimant provided the Commission with a medical certificate dated January 21, 2021, saying that medical conditions put him at high risk of complications if he were to contract COVID-19 and that he should always practise social distancing. This meant that he could not perform his regular job. However, he said that he was prepared to work elsewhere.[3]

[16] To be considered available for work, a claimant has to prove that they are capable of and available for work and unable to find a suitable job.[4]

[17] Availability must be determined by analyzing three factors:

a) wanting to go back to work as soon as a suitable job is available

b) expressing that desire through efforts to find a suitable job

c) not setting personal conditions that might unduly limit the chances of going back to work[5]

[18] In addition, availability is determined for each working day in a benefit period for which the claimant can prove that, on that day, they were capable of and available for work and unable to find a suitable job.[6]

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[2] *Faucher*, A-56-96.
[3] See GD3-15.
[4] See section 18(1)(a) of the *Employment Insurance Act*.
[5] *Faucher*, above.
[6] *Canada (Attorney General) v Cloutier*, 2005 FCA 73.

[19] No matter how little chance of success a claimant may feel a job search would have, the *Employment Insurance Act* (EI Act) is designed so that only those who are genuinely unemployed and actively seeking work will receive benefits.[7]

[20] The evidence shows that the Claimant limited his job search to browsing the web. He signed up for job alerts without really identifying the type of job he was looking for. He did not meet with a job search advisor given his condition, he did not apply for a job, and he did not contact employers.[8]

[21] On August 24, 2021, the Claimant told the Commission that he had a job with his usual employer and did not see the point of finding another job given that he was now vaccinated and that his driving school was about to take him back. He mentioned that he had become a driving instructor because the occupation suited him and gave him extra income in retirement.[9]

[22] The evidence before the General Division shows that the Claimant intended to go back to work for his usual employer. Even if I had to consider that he was looking for work outside his usual employer, his search was very limited, which undermines his availability.

[23] I see that the General Division also viewed keeping in touch with his usual employer as a type of effort to find a job.

[24] It seems the General Division relied on case law to the effect that a claimant who is waiting for their employer to call them back is exempt, at least for a reasonable period, from having to show an active job search.

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[7] *Canada (Attorney General) v Cornelissen-O'Neill*, A-652-93.
[8] It is open to the Tribunal to consider the criteria established by section 9.001 of the *Employment Insurance Regulations* to assess a claimant's availability under *Faucher*.
[9] See GD3-17.

[25] But, there is more recent case law that establishes that a claimant cannot just wait to be called back to work and has to actively look for a job to be entitled to benefits.[10]

[26] For these reasons, I find that the General Division made [*sic*] based its decision on a finding of fact that it made in a perverse or capricious manner or without regard for the material before it. It also made an error of law in its interpretation of section 18(1)(a) of the EI Act and, more importantly, in its interpretation of the second factor of the *Faucher* test.

[27] I also find that the General Division failed to exercise its jurisdiction. The Commission imposed an indefinite disentitlement from January 10, 2021, because the Claimant had not shown that he was available for work. So, the General Division had to consider and decide the Claimant's availability not only for the period from January 10 to March 20, 2021, but also after that.

[28] This means that I am justified in intervening.

Remedy

[29] Considering that both parties had the opportunity to present their case before the General Division on the issue of availability, I will give the decision that the General Division should have given.[11]

[30] In accordance with section 18(1)(a) of the EI Act, and in applying the *Faucher* factors, I find that the Claimant was not available and unable to find a suitable job from January 10, 2021.

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[10] *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; *Canada (Attorney General) v Cornelissen-O'Neill*, A-652-93; *Canada Employment Insurance Commission v GS*, 2020 SST 1076; *DB v Canada Employment Insurance Commission*, 2019 SST 1277; CUB 76450; CUB 69221; CUB 64656; CUB 52936; and CUB 35563.

[11] In accordance with my powers under section 59(1) of the *Department of Employment and Social Development Act*.

Conclusion

[31] The appeal is allowed.

[32] The Claimant was not available and unable to find a suitable job from January 10, 2021.

Pierre Lafontaine
Member, Appeal Division