Citation: *NM v Canada Employment Insurance Commission*, 2022 SST 1375

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	N. M.
Representative:	G. A.
Respondent:	Canada Employment Insurance Commission
Representative:	Gilles-Luc Bélanger

Decision under appeal:	General Division decision dated August 15, 2022 (GE-22-1900)

Tribunal member:	Pierre Lafontaine
Type of hearing:	Teleconference
Hearing date:	November 17, 2022
Hearing participants:	Appellant Appellant's representative Respondent's representative
Decision date:	November 23, 2022
File number:	AD-22-491

Decision

[1] The appeal is dismissed.

Overview

[2] The Respondent, the Canada Employment Insurance Commission (Commission), decided that the Appellant (Claimant) was disentitled from receiving Employment Insurance (EI) regular benefits from January 3, 2021, to April 10, 2021, because he was taking a training course on his own initiative, and had not proven that he was available for work. Upon reconsideration, the Commission maintained its initial decision. The Claimant appealed the reconsideration decision to the General Division.

[3] The General Division found that the Claimant did not demonstrate that he wanted to go back to work and that he did enough efforts to find a suitable job. The General Division found that the Claimant's choice of waiting to go back to the job he lost, or looking for another job in retail, limited his chances of finding work. It concluded that the Claimant was not available for work under the law.

[4] The Appeal Division granted the Claimant leave to appeal of the General Division's decision. He submits that the General Division made several assumptions not based on the evidence presented before it in order to evaluate the *Faucher* factors.

[5] The Claimant submits that the General Division erred when it determined that he was waiting for a call back by his regular employer and that he was limiting his search to the retail sector. He submits that the General Division did not consider his job search outside the disqualification period that supports he was willing to work full-time during his entire academic year. The Claimant submits that the Commission considered him available for work while in school starting from September 2021 based on the same evidence.

[6] I am dismissing the Claimant's appeal.

Issue

[7] Did the General Division make an error when it concluded that the Claimant was not available for work while attending full-time school?

Analysis

Appeal Division's mandate

[8] 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]

[9] 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]

[10] 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.

Did the General Division make an error when it concluded that the Claimant was not available for work while attending full-time school?

[11] The Claimant submits that the General Division made several assumptions not based on evidence in order to evaluate the *Faucher* factors.[3]

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[1] *Canada (Attorney general) v Jean*, 2015 FCA 242; *Maunder v Canada (Attorney general)*, 2015 FCA 274.
[2] *Idem*.
[3] See *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96.

[12] The Claimant submits that he testified that he looked for jobs online and networked with friends as well as drop resumes with various employers in both the retail outlet mail and in X. Hence, the General Division's assumption that he was in no hurry to return to work is false and not supported by evidence. The Claimant submits that his testimony and evidence demonstrate that he was actively looking for work but could not find a job during the pandemic.

[13] The Claimant submits that, without any supporting evidence, the General Division asserted that he was relying at least in part on returning to the job he lost, or another job in retail. He explained to the General Division that due to the strict COVID-19 lockdown, he had no option but to look for jobs online daily and since no job materialized from the searches, he had no choice but to return to his current work when his employer called him back. He submits that to determine that he was just waiting to go to his current employer is very misleading and does not take into account his job search effort during that lockdown period.

[14] The Claimant further submits that the General Division erred when it did not consider his job search outside the disentitlement period that supports he was willing to work full-time during his entire academic year. He submits that his job search cannot be separated in three different periods. The Claimant puts forward that the Commission considered him available for school during parts of the academic year based on the same evidence.

[15] Full-time students are presumed to be unavailable for work. This is called the "presumption of unavailability." It means that we can assume students are not available for work when the evidence shows that they are in school full time.

[16] There are two ways a claimant who is attending full-time school can rebut this presumption. A claimant can show that they have a history of working while also in school full-time or that there are exceptional circumstances in their case.

[17] The General Division found that neither of the above situations applied to the Claimant. He had volunteer experience but only held a part-time job for a few months while taking his full-time course. It found that the Claimant reported no exceptional circumstances. The General Division concluded that he did not rebut the presumption of unavailability.

[18] I must reiterate that rebutting the presumption only means that the claimant is not presumed to be unavailable. If rebutted, the Claimant still needs to meet the requirements of the law and demonstrate that he was in fact available for work.

[19] To be considered available for work, a claimant must show that they are capable of, and available for work and unable to obtain suitable employment.[4]

[20] 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,

(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.

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

[22] Therefore, the burden of proof is on the Claimant.

[23] The General Division found that the Claimant did not demonstrate that he wanted to go back to work and that he did enough efforts to find a suitable job.

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[4] Section 18(1) (a) of the EI Act.
[5] *Canada (Attorney General) v Cloutier*, 2005 FCA 73.

[24] The General Division further found that the Claimant's choice of waiting to go back to the job he lost, or looking for another job in retail, limited his chances of finding work. It concluded that the Claimant was not available for work under the law.

– **Wanting to return to work**

[25] The General Division found that the Claimant did not show through his job search evidence that he wanted to return to work as soon as he could between January 3, 2021, and April 10, 2021. It determined that he did not meet the first *Faucher* factor.

[26] The evidence shows that the Claimant started working in September 2020 when he started school. He had to commit to a minimum of three shift per week. The Claimant had advised his new employer that he was willing to work more hours from Monday to Friday. The employer hired him because of his willingness to work any available hours.

[27] The Claimant was laid off in December 2020. During the laid off period, he updated his resume and continued to look for work on line every day. He had registered at most online jobs search sites and was receiving daily emails of jobs postings. He went back to work for his former employer in February 2021. He expressed again a desire to work more hours. He inquired with fellow outlet employees if their store was hiring and visited various stores after his shift to see what was available.

[28] I am of the view that the General Division made an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it, when it concluded that the Claimant was not in a hurry to return to work. It therefore made an error when assessing the first factor of *Faucher*.

[29] However, I do not find that this error changes the General Division's conclusion regarding the Claimant's availability for work.

– Making efforts to find a suitable job

[30] The General Division considered that the Claimant searched for jobs by registering with online job search tools, assessing their daily job alerts, updating his resume, and networking with friends and co-workers. It took notice that he contacted prospective employers by walking around the outlet mall where his old job was located. He also went to a second mall and other places to ask for work.

[31] However, the General Division found that the Claimant did not make **enough efforts** to find a suitable job. It determined that the Claimant did not apply to any jobs during the period of from January 3, 2021, to April 10, 2021. The General Division found that the Claimant could not justify that all the positions on his list of vacancies, were unsuitable employment.[6]

[32] As stated by the General Division, a claimant must apply for jobs, even if they think they have little chance of getting them. The EI Act is designed so that only those who are genuinely unemployed and actively looking for work will receive benefits. Applying for work shows an active job search.

[33] The Claimant submits that the General Division erred when it did not consider his job search outside the disentitlement period that supports he was willing to work full-time during his entire academic year. He submits that his job search cannot be separated in three different periods. The Claimant puts forward that the Commission considered him available for school during parts of the academic year based on the same evidence.

[34] I must reiterate that 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**.

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[6] The General Division referred to section 6 of the *Employment Insurance Act* and s 9.002 of the *Employment Insurance Regulations* for more details on what is, or is not, suitable employment.

[35] Therefore, the Claimant still had to prove his availability from January 3, 2021, to April 10, 2021.

[36] Furthermore, as noted by the General Division, the evidence provided by the Claimant during the other parts of the academic year was not the same. The evidence shows that the Claimant applied for jobs during these parts of the academic year.[7]

[37] I find that the evidence supports the General Division's conclusion that the Claimant did not make enough efforts to find suitable employment from January 3, to April 10, 2021.

– **Unduly limiting chances of getting back to work**

[38] The General Division found that the Claimant set personal conditions that unduly limited his chances of finding work by showing a preference for the retail sector.

[39] The General Division determined that the Claimant's evidence showed a preference **in general** for jobs in the retail sector. It found it more likely than not that this was the type of work that the Claimant prioritized in his job search. It based its finding on the Claimant's list of vacancies that included a number of retail jobs. It also took notice that the Claimant walked through two shopping outlets asking for work. His updated résumé focuses solely on skills in retail work.

[40] The General Division further determined that the Claimant did not apply to **any** jobs outside of retail from January 3, 2021, to April 10, 2021. This demonstrated that the Claimant set personal conditions that might have unduly limited his chances to go back to work during the pandemic.

[7] See GD3-32 to GD3-34.

[41] Even if I were to conclude that the Claimant was not waiting to return to his regular employer, the preponderant evidence shows that the Claimant's research outside of the retail business was limited during the relevant period, which goes against his availability.

– Availability

[42] I find that the preponderant evidence supports the General Division's conclusion that the Claimant did not demonstrate that he was available for work but unable to find a suitable job. When considering the *Faucher* factors together, the Claimant did not show that he was capable of and available for work and unable to find suitable employment.

[43] For the above-mentioned reasons, the General Division did not err when it concluded that the Claimant was not available for work pursuant to the EI Act from January 3, 2021, to April 10, 2021.

Conclusion

[44] The appeal is dismissed.

Pierre Lafontaine
Member, Appeal Division