Citation: *AS v Canada Employment Insurance Commission*, 2023 SST 402

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	A. S.
Representative:	H. S.
Respondent:	Canada Employment Insurance Commission
Representative:	I. Thiffault

Decision under appeal:	General Division decision dated December 5, 2022 (GE-22-2571)

Tribunal member:	Stephen Bergen
Type of hearing:	Teleconference
Hearing date:	April 3, 2023
Hearing participants:	Appellant Appellant's representative Respondent's representative
Decision date:	April 10, 2023
File number:	AD-22-976

Decision

[1] I am cancelling the General Division decision to disentitle the Claimant for not having made reasonable and customary efforts. The General Division did not have jurisdiction to consider this question.

[2] I have found that the General Division made errors in how it reached its decision on the Claimant's availability. I am sending the decision on availability back to the General Division to reconsider.

Overview

[3] A. S. is the one who is appealing the General Division decision, so he is the Appellant in the appeal. However, I will refer to him as the Claimant because he made a claim for Employment Insurance (EI) benefits. When I note that the "Claimant" said or argued something in his Appeal Division hearing, I will be referring to what the Claimant's father said. The Claimant did not speak at the hearing. He allowed his father to speak on his behalf.

[4] The Claimant wanted to collect EI benefits while he was going to high school full-time. The Respondent, the Canada Employment Insurance Commission (Commission), decided that he was not entitled to benefits because he had not proven he was available for work between January 2, 2022, and June 27, 2022. The Claimant asked the Commission to reconsider but it would not change its decision.

[5] The Claimant appealed the Commission's reconsideration decision to the General Division of the Social Security Tribunal (Tribunal). After the General Division held a hearing, it dismissed the appeal.

[6] The Appeal Division gave the Claimant permission to appeal, and the Claimant appealed to the Appeal Division.

[7] I am allowing the appeal. The General Division made errors in how it reached its decision on the on the Claimant's availability for work. I am sending this matter back to

the General Division to reconsider because I do not have the evidence that I need to make the decision that the General Division should have made.

Issues

[8] The issues in this appeal are

a) Did the General Division act in a way that was unfair by

(1) Not investigating the questions raised by the Claimant's representative in the hearing?
(2) Not allowing the Claimant to provide additional evidence about his job search?
(3) Not allowing the Claimant's mother to testify?

b) Did the General Division make an error of jurisdiction by

(1) Deciding that the Claimant had not made reasonable and customary efforts?
(2) Failing to consider the false or misleading information provided to the Claimant by agents of the Commission.

c) Did the General Division make an error of law by

(1) Failing to distinguish education from training?
(2) Misapplying the *Faucher* test for availability?[1]

d) Did the General Division make an error of fact by

(1) Ignoring evidence of what agents of the Commission told the Claimant about collecting EI benefits while going to school.

[1] The test, and the three factors of the test are found in a decision called *Faucher v Canada (AG)* A-56-96, A-57-96.

(2) Ignoring or misunderstanding the Claimant's evidence that he had looked for work while he was going to school.

Analysis

[9] The Appeal Division may only consider errors that fall within one of the following grounds of appeal:

a) The General Division hearing process was not fair in some way.

b) 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 (error of jurisdiction).

c) The General Division made an error of law when making its decision

[10] The General Division based its decision on an important error of fact.[2]

Fairness of the General Division process

– **Further investigations by General Division member**

[11] The Claimant said that he raised a number of questions with the General Division, including whether the Commission should be able to treat his education in the same way as it would treat "training." He said that the General Division member said he would call him back about these questions in a week.

[12] The General Division member did not call the Claimant back between the hearing and the decision, and he argues that this was unfair.

[13] I have listened to the audio recording of the hearing. The General Division member said that, in his experience, the Commission treats students the same way under the EI Act, whether they are high school students, trade school, or university.[3] However, the General Division member said that he would do some research into

[2] 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* (DESDA).
[3] Listen to the audio recording of the General Division hearing at timestamp 0:23:00.

training versus education before he writes the decision.[4] He said that he would have a decision by the end of the following week.[5]

[14] The General Division member did not say that he would call the Claimant back or give the Claimant an answer before he wrote his decision.

[15] In his decision, the General Division addressed the Claimant's question. He said that he could, "find no court decision that distinguishes high school from any other form of training / schooling as it relates to the *Employment Insurance Act* and *Regulations*."[6]

[16] The General Division did not breach its duty of fairness by not discussing its research with the Claimant before making its decision.

– **Failure to request additional evidence**

[17] The General Division said that there was, "no evidence before [the General Division member] hat the Appellant, in good faith, contacted prospective employers over the period involved with the goal of obtaining full time employment."

[18] The Claimant said that he did apply for jobs between January 2, 2022, and June 27, 2022, and that he had evidence to prove those job applications. He argues that the General Division should have asked him to submit that evidence.

[19] The Claimant said that he applied to "so many places," that there were "so many places that he took his resume."[7] He agreed that this was in the period from January to June, in other words while he was in school.

[20] The General Division is not an inquiry. It has no general duty to investigate. In an appeal to the General Division, the claimant is responsible to bring forward whatever evidence they believe to be relevant to the appeal. At the same time, there may be

[4] Listen to the audio recording of the General Division hearing at timestamp 0:26:20
[5] Listen to the audio recording of the General Division hearing at timestamp 0:35.35.
[6] See General Division decision at para 34.
[7] Listen to the audio recording of the General Division hearing at timestamp 0:17:52.

circumstances in which it would be unfair to expect that a Claimant understand what is relevant, without legal representation.

[21] In this case, the General Division did not act unfairly by not requesting the Claimant to elaborate on his many job applications. The Claimant knew that the issue was whether he was available for work while he was going to school, and he knew, or should have known, that evidence of his job search efforts would be important to prove his availability.

[22] The General Division did not probe for more details of the part-time search, but it also did not accept that such a search could establish his availability. It found that the Claimant was not available for full-time employment,[8] which was supported by the evidence: The Claimant questioned whether it made sense to quit school to take a full-time job (because he had been told this by the Commission).[9] The General Division asked him if he was not looking for full-time work, and he said that full-time work while he was going to school was "quite impossible."[10]

[23] It was not unfair of the General Division that it did not ask for more detailed evidence of the Claimant's search for part-time jobs.

– **Not permitting an additional witness**

[24] The Claimant said that his mother could have corroborated some of his testimony. He believes it was unfair that she was not called to testify.

[25] The Claimant did not tell the General Division that his mother was standing by to testify and did not ask the General Division if she could testify.

[26] The General Division did not act unfairly by failing to ask the Claimant if his mother would like to testify.

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[8] See the General Division decision at paras 16, 21, and 35.
[9] Listen to the audio recording of the General Division hearing at timestamp 0:18:35.
[10] Listen to the audio recording of the General Division hearing at timestamp 0:17:50.

Jurisdiction

– Considering whether the Claimant made reasonable and customary efforts

[27] The Commission disentitled the Claimant from receiving benefits under a section of the law that says he must be available and capable of work for each working day in his benefit period.[11] The Claimant's availability was the issued identified in the reconsideration decision.

[28] The General Division considered the Claimant's appeal of this issue, as it was required to do.

[29] However, the General Division also considered whether the Claimant should be disentitled because he had not made "reasonable and customary" efforts to find a job. "Reasonable and customary efforts" are defined for the purpose of a different disentitlement, which is identified in a different part of the law.[12]

[30] For the Commission to disentitle a claimant in this way, it would have had to first require the claimant to prove that he had made efforts that were "reasonable and customary," and then it would have to show that he failed to comply with that request.

[31] Nothing on the file suggests that any of this happened. More to the point, neither the reconsideration decision nor the original decision (that was upheld by the reconsideration decision), spoke about this kind of disentitlement.

[32] Therefore, the issue of the Claimants disentitlement for not having proven that he made reasonable and customary efforts was not in front of the General Division. When the General Division identified the issues, it said that one issue was whether the Clamant was making reasonable and customary efforts to obtain work.[13] The General Division incorporated this issue into its analysis.[14]

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[11] See section 18(1) of the *Employment Insurance Act* (EI Act).
[12] Reasonable and customary is defined in section 9.001 of the *Employment Insurance Regulations* (Regulations) for the purpose of section 50(8) of the EI Act.
[13] See para 3 of the General Division decision.
[14] See paras 14 to 23 of the General Division decision.

[33] The General Division made an error of jurisdiction by considering the issue.

– **Failing to consider false or misleading information from the Commission**

[34] The General Division does not have the authority to review the propriety or lawfulness of the Commission's actions generally. The General Division may only consider the issues arising for the reconsideration decision.

[35] The General Division did not make an error of jurisdiction by not considering the Commission's actions.

Error of Law

– **Legal difference between education and training**

[36] For the purpose of determining a claimant's availability, the Courts have not treated education any differently from training. The Claimant was no more, or less, available for work because he was going to high school full-time, instead of taking full-time apprenticeship instruction through a community college or technical institute, or going to university full-time.

[37] According to the Federal Court of Appeal, "Returning to full-time studies creates a rebuttable presumption that the person pursuing the studies is not available for work. That presumption may be rebutted by evidence of "exceptional circumstances".[15]

[38] In another case, the Court said: "The question of availability is an objective one - whether a claimant is sufficiently available for suitable employment to be entitled to unemployment insurance benefits - and it cannot depend upon the particular reasons for the restrictions on availability, however these may evoke sympathetic concern."[16]

[39] There is no exception or exemption from the requirements of availability for those students who are getting a general education in public school.

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[15] *Landry v. Canada (Attorney General) et al*. (1992), 152 N.R. 121.
[16] *Vézina v. Canada (Attorney General),* 2003 FCA 198.

– **Application of the *Faucher* test for availability**

[40] The General Division made an error of law in how it interpreted and applied the *Faucher* test for availability.

[41] In the *Faucher* decision, the Federal Court of Appeal stated that availability must be determined by analyzing three factors (the "*Faucher* factors"). It said that **all of the factors** must be analyzed:

> There being no precise definition in the Act, this Court has held on many occasions that availability must be determined by analyzing three factors " the desire to return to the labour market as soon as a suitable job is offered, the expression of that desire through efforts to find a suitable job, and not setting personal conditions that might unduly limit the chances of returning to the labour market " and that **the three factors must be considered** in reaching a conclusion (Emphasis added).[17]

[42] The fact that *Faucher says* that the General Division **must** consider all three factors separately.

[43] The General Division correctly stated that a claimant must meet the three *Faucher* factors to be found available for work.[18] However, its analysis did not consider each of the three factors, and confused the *Faucher* test for availability with the test when a claimant fails to comply with a Commission request that they prove reasonable and customary efforts.

[44] The General Division did not consider whether the Claimant had the desire to return to work as soon as a suitable job is offered.

[45] It is not clear that the General Division considered whether the Claimant expressed that desire through a job search. If it did, it evaluated the Claimant's job search using a "reasonable and customary efforts" criteria – which is not legally required by the *Faucher* "job search" factor.

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[17] *Supra* note 1.
[18] See the General Division decision at para 9.

[46] The General Division may use evidence that would establish "reasonable and customary efforts" for the purpose of **accepting** that a claimant's job search is sufficient under *Faucher,* However, it is not open to the General Division to find that a claimant does not meet the test for availability because their job search efforts do not satisfy a "reasonable and customary" test.[19]

Important Error of Fact

– **Evidence of what agents of the Commission told the Claimant about collecting EI benefits while going to school.**

[47] The General division did not make an error by misunderstanding or ignoring evidence of what the Commission told the Claimant.

[48] The Commission would have been incorrect if it told the Claimant that - as a general rule - claimants were allowed to go to school full-time and still collect benefits (without being referred by the Commission to the school program).

[49] However, even if the Claimant could establish that the Commission misled him, this would not permit the General Division to ignore the law, or to find that he was available for work when he was not.

[50] The evidence of what the Commission said to the Claimant is relevant to his own understanding of the legal meaning of "availability". However, this evidence is not relevant to whether he was actually available for work. The General Division's decision that the Claimant was not available as not based on any finding that depended on whether it properly understood or considered what the Commission told the Claimant.

[51] In some circumstances, the Commission may write-off an overpayment debt. If the Claimant believes his overpayment was the result of a Commission error, he may ask the Commission to write off his debt. However, that is a separate matter, which was not before the General Division and is not before me

[19] See the General Division decision at para 20.

– **Evidence that the Claimant had looked for work while he was going to school.**

[52] The General Division ignored the Claimant's evidence that he looked for work while he was going to school.

[53] The General Division said that, "there was no evidence of any job search activity from January 2, 2022, through to June 27, 2022."

[54] However, the Claimant stated that he had applied "so many places," and that that there were "so many places that he took his resume."[20] This was in the period from January 2, 2022, to June 27, 2022. The Claimant's evidence was that he was looking for part-time employment at this time.

[55] The General Division later said that the Claimant had not produced evidence that he contacted employers with," the goal of obtaining **full time** employment."[21] Even so, I do not read this as a qualification of its earlier statement that "there was no evidence."

[56] For whatever reason, the General Division appears to have ignored or misunderstood the evidence of the Claimant's search for part-time work. The Claimant did not give specifics of his job search activity while he was going to school, but he was clear that he had been looking for work.

Remedy

[57] I have found errors in how the General Division reached its decision, so I must now decide what I will do about that. I can make the decision that the General Division should have made, or I can send the matter back to the General Division for reconsideration.[22]

[58] Both the Claimant and the Commission say that I should go ahead and make the decision.

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[20] See paragraph 19 above.
[21] See the General Division decision at para 21.
[22] See section 59(1) of the DESDA.

[59] I disagree. I do not accept that I have sufficient information to make the decision.

[60] There are decisions of the Appeal Division that suggest that it might be appropriate to analyze the Claimant's availability for work in terms of his availability for part-time work, if the Claimant's benefits were based only on part-time earnings.[23] It is possible that a pattern of part-time work could be found to be an exceptional circumstance to rebut the presumption that he was not available for work because he was a full-time student.

[61] In such a case, the sufficiency of the Claimant's job search, and the reasonableness of his decision to limit his job search to part-time work, would depend in part on his pre-injury employment pattern.

[62] The Claimant's ROE from X indicates that he worked only 191 hours, working from October 31, 2021, and January 2, 2022. This is a period of nine weeks, which means that he averaged only 24 hours per week. This suggests that he was working part-time at X, but it does not establish a pre-injury pattern. It does not mean that the claimant **necessarily** had a pattern of working part-time, or that his benefits were based only on the 191 hours he earned at X.

[63] At one point, the Claimant told the Commission that he had over 500 hours of employment.[24] However, there is no evidence of where he worked any of those other hours. There is no evidence of whether the Claimant worked for another employer before X, or worked another job at the same time as he worked at X.

[64] Once the General Division learned that the Claimant was searching for only part-time employment while he was in school, it seemed satisfied that it had the evidence it required to determine the matter. However, evidence of the Claimant's past employment pattern taken together with additional evidence detailing his search for part-time jobs,

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[23] See decisions of the Appeal Division in *SS v Canada Employment Insurance Commission* 2022 SST 749, *JD v Canada Employment Insurance Commission* 2019 SST 438, *Canada Employment Insurance Commission v. KJ* 2022 SST 239, but see also *Canada Employment Insurance Commission v. AP* 2021 SST 295, *Canada Employment Insurance Commission v ET*, 2022 SSR 662

[24] See GD3-36.

might help the Claimant to rebut the presumption of unavailability that applies to full-time students.

[65] I do not have evidence to conclude that the Claimant has a part-time work history or to consider whether this is an exceptional circumstance. There is no evidence that the 191 hours the Claimant worked at X is or is not representative of the employment on which the Commission based his benefits. I do not have the evidence on which I could conclude that the Claimant's search for part-time work is an undue limit. There is no evidence that the Claimant's school schedule would have allowed him to work just as much as he was working before he lost his X job. There is no evidence of how many hours a week he was willing to accept, or of the nature and extent of his job search.

Conclusion

[66] I am allowing the appeal. The General Division made errors of jurisdiction, law, and fact.

[67] I am cancelling the decision on reasonable and customary efforts, but I am returning the matter of his availability to the General Division for reconsideration.

Stephen Bergen
Member, Appeal Division