Citation: *GZ v Canada Employment Insurance Commission*, 2023 SST 401

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	G. Z.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	General Division decision dated December 18, 2022 (GE-22-2170)

Tribunal member:	Stephen Bergen
Type of hearing:	Teleconference
Hearing date:	March 20, 2023
Hearing participants:	Appellant Respondent's representative
Decision date:	April 8. 2023
File number:	AD-23-48

Decision

[1] I am allowing the appeal.

[2] The General Division decision decided that the Appellant, G. Z. (who I will call the "Claimant") was not entitled to benefits because of two separate sections of the law.

[3] It said that the Claimant was not entitled to benefits because he did not prove he made reasonable and customary efforts to find a suitable job.[1] It also said that he was not entitled under a section of the law that requires him to be capable of and available for work and unable to find a suitable job.[2]

[4] 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.

[5] When I considered the other General Division decision that the Claimant was not available for work, I found errors in how it reached its decision. I am returning this matter to the General Division to reconsider its decision.

Overview

[6] The Canada Employment Insurance Commission (Commission) decided that the Claimant was disentitled from receiving Employment Insurance (EI) regular benefits as of May 10, 2021. It said the Claimant was not available for work. A claimant must be available for work to get EI regular benefits.

[7] The Claimant disagreed and asked the Commission to reconsider. When the Commission refused to change its decision, the Claimant appealed to the General Division of the Social Security Tribunal (Tribunal). The General Division dismissed his appeal.

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[1] This disentitlement is described in section 50(8) of the *Employment Insurance Act* (EI Act), and in section 9.001 of the *Employment Insurance Regulations* (Regulations).
[2] This disentitlement is found in section 18 of the EI Act.

[8] I granted leave to appeal and then held a hearing of the Appeal Division. I found that the General Division made errors in how it arrived at its decision. However, there is not enough information on the file for me to make the decision that the General Division should have made. As a result, I am sending the matter back the General Division to reconsider.

Preliminary matters

New Evidence

[9] The Claimant sent the Appeal Division a document from X dated December 21, 2022.[3]

[10] When the Appeal Division hears an appeal from a decision of the General Division, its role is to decide whether the General Division made an error in how it reached its decision. The Appeal Division does not hear new evidence or reweigh the evidence.[4]

[11] Even so, the Appeal Division may receive new evidence under a few narrow exceptions.[5] In this case, the Claimant had submitted the document as proof of an issue that was in dispute. The Claimant was trying to establish that his job search had been more extensive than understood by the General Division. There is no exception that allows the Appeal Division to consider new evidence that a party submits for the purpose of proving facts in dispute.

[12] I will not be considering the new evidence from X.

Additional Submissions

[13] The Claimant sent a submission to the Appeal Division on March 20, 2023, which was the day of the hearing.[6] I was not able to access this document during the hearing.

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[3] See AD1B-13
[4] See the decision in *Parchment v Canada (Attorney General)* 2017 FC 354.
[5] See the decision in *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency* (Access Copyright), 2012 FCA 22.
[6] See AD4.

The Commission representative had not seen this document either but was able to view it before the hearing completed.

[14] I informed the Claimant that he could talk to me about anything on the submission document that I could not view. I also said that I would look at the written document before making my decision.

[15] At the close of the hearing, the Claimant asked if he could send me another submission at the close of the hearing. I agreed, and the Claimant sent a final submission on March 22, 2023.[7] The Tribunal sent a copy of the document to the Commission on the same day. On April 3, 2023, the Tribunal gave the Commission a deadline of April 5, 2023, to respond. The Commission did not respond.

[16] I have considered both the Claimant's submission received March 20, 2023, and his submission received March 22, 2023.

Issues

[17] The issues in this appeal are:

a) Did the General Division make an error of jurisdiction when it decided that the Claimant had not made reasonable and customary efforts to find a suitable job?

b) Did the General Division make an error of law in how it applied the *Faucher* test?[8]

c) Did the General Division make an error of law by failing to consider whether the Claimant limited his job applications to "suitable" jobs?

d) Did the General Division make an error of law by failing to consider whether the Claimant was available in some particular period within his benefit period?

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[7] See AD6.
[8] The test, and the three factors of the test are found in a decision called *Faucher v Canada (AG)* A-56-96.

e) Did the General Division make an important error of fact by accepting that the Claimant was not a Canadian citizen and that he had not worked in his field in Canada?

f) Did the General Division make an error of fact by excluding job search processes that started before his benefit period?

g) Did the General Division make an error of fact by failing to consider the evidence of the Claimant's job search applications for co-op summer jobs?

Analysis

[18] 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

d) The General Division based its decision on an important error of fact.[9]

Error of Jurisdiction

[19] I accept that the General Division made an error of jurisdiction when it found that the Claimant was disentitled because he had not made reasonable and customary efforts to find a suitable job.

[20] As noted in my leave to appeal reasons, the General Division can only consider the issues that arise from the reconsideration decision that the Claimant appealed.

[9] 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).

[21] The June 10, 2022, reconsideration decision maintained the Commission's earlier March 27, 2022, decision.[10] It did not change the original decision. The original decision said that the Claimant had not proven his availability for work because he was taking a training course.[11] Neither the original decision, nor the reconsideration decision, say anything about "reasonable and customary efforts."

[22] There was no evidence that the Commission required the Claimant to prove that he had made reasonable and customary efforts to obtain suitable employment. There was no evidence that it disentitled him for refusing to comply with such a request.[12]

[23] Therefore, the issue of disentitlement for not making reasonable and customary efforts was not an issue that was in front of the General Division. The General Division made an error of jurisdiction by considering it.

[24] The Commission has conceded that the General Division made an error by finding that the Claimant was disentitled because he had not made reasonable and customary efforts. However, it maintained that the General Division made no error in how it considered the Claimant's availability for work (under section 18 of the EI Act).

Error of law

Application of *Faucher* test

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

[26] The General Division correctly identified that it had to assess the Claimant's availability for work by applying the three factors described in *Faucher*. However, its analysis did not consider all three factors.

[10] The reconsideration decision is at GD3-41. The disentitlement for a failure to prove availability for work is found at section 18(1) of the EI Act.
[11] The original Commission decision is at GD3-34.
[12] See section 50(8) of the EI Act, which explains this kind of disentitlement.

[27] In the *Faucher* decision, the Federal Court of Appeal stated 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).

[28] The fact that *Faucher says* that all three factors **must** be considered means that each factor must be distinct from the others.

[29] The Commission argued that the “desire” factor overlaps with the “job search” factor. I agree that there may be some overlap. The sincerity of a claimant’s job search efforts supports a finding that a claimant desires to return to work. Likewise, the absence or insincerity of a job search is some evidence that such desire is lacking.

[30] However, the fact that there can be overlap between the two factors does not mean that the two factors are the same. The second *Faucher* factor is concerned only with whether the claimant has **expressed** their desire through their job search efforts. This implies that a claimant may be able to establish their desire to return to work, even where that desire is not expressed through their job search efforts. The first factor may be satisfied, even where the second may not.

[31] In this case, there was evidence of desire that was unrelated to the job search. The General Division acknowledged the Claimant’s testimony that he returned to school because he could not find work in his own field. It acknowledged that his first priority was finding a suitable job. The Claimant testified that these jobs were in Nova Scotia, Vancouver, Ottawa, and other places, but that he would have moved to accept a job in his field.[13] The General Division accepted that he would have left his school program if he found work in his own field.

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[13] Listen to the audio record of the General Division hearing at time stamp: 0:59:55.

[32] The General Division said that this other evidence was not enough. It found that the Claimant did have a desire to return to work by relying instead on the "limited" nature of the Claimant's job search.[14] This was its only justification for saying that the Claimant did not satisfy the first *Faucher* factor.

[33] The General Division determined the first factor by relying exclusively on evidence of the Claimant's job search. This is precisely the evidence that is both necessary and determinative of the second *Faucher* factor. By deciding that the Claimant lacked the desire to return to work using this evidence alone, the General Division effectively considered the second *Faucher* factor twice. It failed to consider the first *Faucher* factor.

[34] The General Division made an error of law by misapplying the *Faucher* test. It did not consider each *Faucher* factor.

Meaning of suitable job

[35] The General Division made an error of law because it did not consider whether the Claimant had limited his job search to "suitable employment."

[36] The General Division found that the Claimant had made very few applications while he was at school, and that he could not have found suitable employment. It found that he had set personal conditions that unduly limited his chances of going back to work by restricted his job search to jobs in the marine and naval engineering field. The General Division *accepted* that the Claimant would have quit his school for a job in the marine and engineering field. However, it said that there were "very few job opportunities as well as other barriers to his employment in that field."

[37] The Claimant argued that he should not have to search for an unsuitable job. For him, a suitable job was a job in the marine and naval engineering field. The Claimant told the General Division that he had twenty years of experience in the marine and naval engineering field. Opportunities were limited, but he had pursued all those

[14] See the General Division decision at para 45 and 46.

opportunities that were available.[15] He provided a list of jobs in this field to which he applied (and of applications that he renewed).[16]

[38] The General Division did not say whether jobs that were outside the field of marine and naval engineering were "suitable" for the Claimant. However, it found that the Claimant did not have the desire tor return to suitable work and that his search for suitable employment was not enough because the Claimant was only applying to the "limited" opportunities within the marine and naval engineering field. So, presumably, it did not accept that only marine and naval engineering jobs were suitable.

[39] The Commission responded to the Claimant's argument by saying that the General Division was right to require the Claimant to look for work outside his field. It did not dispute that the Claimant need only look for suitable employment, but it did not agree that "suitable employment" means employment in the Claimant's field. The Commission pointed to a definition of "suitable employment" found in the *Employment Insurance Regulations* (Regulations). According to that definition, employment is suitable if

> a) the claimant's health and physical capabilities allow them to commute to the place of work and to perform the work;
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> (b) the hours of work are not incompatible with the claimant's family obligations or religious beliefs; and
>
> (c) the nature of the work is not contrary to the claimant's moral convictions or religious beliefs.

[40] Nothing in this definition of "suitable" suggests that the only suitable job for the Claimant would be a job within his field.

[41] However, the General Division member did not turn her mind to the definition of suitable employment found in section 6(4) of the EI Act. This part of the law also defines

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[15] Listen to the audio record of the General Division hearing at time stamp: 1:07:25.
[16] GD3-34, GD3-35.

suitable employment for the purpose of assessing a claimant's availability. It says that employment is not suitable if, "it is not in the claimant's usual occupation and at a lower rate or on less favourable conditions than those the claimant might reasonably be expected to obtain..."[17] The EI Act also says that such employment may only be considered unsuitable for a "reasonable interval."[18]

[42] The General Division accepted that the Claimant had worked for twenty years in a specialized field, and that he was willing to leave his training program to accept a job in that field. There was evidence before the General Division that the Claimant made several applications to jobs in his field between May 10, 2021, and July 30, 2021. (He appears to have made about seven applications, depending on how they are counted. He made perhaps eleven applications, if his application renewals are considered applications.)[19]

[43] In these circumstances, the General Division should have considered whether work within his field was the only suitable employment for any part of his benefit period. The General Division made an error of law because it failed to consider the part of the EI Act that authorizes a claimant to limit their job search to their usual occupation.

Period of disentitlement

[44] The General Division made an error of law by considering only whether the Claimant had proven his availability over the entire period from May 10, 2021, to April 2, 2022.

[45] When the Commission considers whether a person has made "reasonable and customary efforts," it must consider whether those efforts are "sustained."[20] However, the law does not require a claimant to show that they have made **sustained** job search efforts to prove their availability under section 18 of the EI Act.

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[17] See section 6(4)(c) of the EI Act.
[18] See section 6(5) of the EI Act.
[19] See GD3-34 and GD3-35.
[20]See the General Division decision at para. 31.

[46] A claimant must prove his availability, and the Commission must evaluate this proof, on a day-to-day basis. Section 18 states that a claimant may not be paid benefits "for a **working day** in a benefit period for which the claimant fails to prove" that they were capable of and available for work.[21]

[47] This means that a claimant may be able to prove availability on some days within their benefit period, even though they were not available on other days, or for the entire benefit period.

[48] The General Division decided that the Claimant was not available because his job search efforts were

e) not enough to show he had a desire to return to work,
f) not enough to express that desire, and
g) so restricted in scope that he unduly limited his chances of returning to the labour market.

[49] I cannot substitute my own idea of what is "enough" for the judgment of the General Division. However, the General Division decided that the Claimant's efforts were not enough **for the entire period** from May 10, 2021, to April 2, 2022. It did not consider whether the Claimant had proven his availability for any particular period of working days within that benefit period.

[50] Even though the Claimant's efforts may not have been enough to prove availability over the entire benefit period, they may have been enough to prove availability for the first weeks or months, or for some other period. The Claimant's applications were not evenly distributed over his benefit period. As noted earlier, the Claimant made nearly all of his applications between May 10, 2021, and July 30, 2021.[22]

[21] See section 18(1) of the EI Act.
[22] See GD3-34 and GD3-35.

[51] The Commission argued that it was "uncontested" that the Claimant was only available to work during hours that were outside his course schedule.[23] However, that is not accurate. The Claimant was only available to work outside his course schedule, **so long as he remained in school**. The General Division found as fact that the Claimant would have quit his school to take a job in his field.

[52] I have already found that the General Division should have considered the application of section 6. It might have found the Claimant to be available for work for that part of his benefit period in which his regular occupation was the only suitable employment.

[53] However, the General Division would still have had to identify the period in which it was reasonable for him to have limited his job search to that kind of job. Furthermore, the Claimant would still have had to prove his availability, even during the period in which he might reasonably limit his search to jobs in his field. He would need to prove that he had a desire to return to work as soon as a job in his field was offered, that his job search for that kind of job was adequate, and that he had not set any other personal conditions that would unduly limit his chances of finding work in his field.

Important Error of Fact

[54] An important error of fact is where the General Division decision is based on a finding that was made incorrectly because it ignored or misunderstood the evidence.[24]

Citizenship and Canadian job experience

[55] The General Division relied on two errors of fact when it found that the Claimant set conditions that unduly limited his chances of returning to work.

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[23] See AD3-6.
[24] To be precise, section 58(1)(c) of the DESDA says that the General Division will have made an error of fact if it, "based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard to the material before it."

[56] The General Division stated that the Claimant could not obtain security clearances because he was not a Canadian citizen. It also said that he had not worked in his field in Canada.[25]

[57] I cannot find any evidence that the Claimant was not a Canadian citizen. The Claimant did not tell the General Division that he is not a Canadian Citizen. He only told the General Division that he did not get the same opportunities "like a native person" because he had only what he called the "reliable" security classification.[26]

[58] In addition, the Claimant said that he had worked in his field in Canada. This seems to be supported by his Record of Employment which indicates that he accumulated 2172 hours of insurable hours at X, while his address was X, X.[27] He testified that he had completed his degree before working at X, and that he was getting training at X towards his professional engineer designation.[28] He also talked about working at X in X (X).[29]

[59] The General Division misunderstood that the Claimant was ineligible for certain jobs within his field because he was not a Canadian citizen, and it misunderstood that he had no experience in his field in Canada.

[60] By misunderstanding the Claimant's barriers to employment in his specialized field of marine and naval engineering field, the General Division might have misjudged the availability of jobs to the Claimant in that field. This may have influenced its finding that he unduly limited his chances of employment.

Job search processes started before benefit period

[61] The General Division said that any job search efforts that took place outside of the benefit period were not relevant.[30]

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[25] See the General Division decision at para 28.
[26] Listen to the audio record of the General Division hearing at time stamp: 1:27:43.
[27] See GD3-19.
[28] Listen to the audio record of the General Division hearing at time stamp: 1:25:00.
[29] Listen to the audio record of the General Division hearing at time stamp: 1:16:20.
[30] See the General Division decision at para 16.

[62] The Claimant argued that the General Division should have considered the job search activities that he started before his benefit period, but which continued into his benefit period.

[63] The General Division did not make an error by excluding from consideration those job search activities that occurred outside of the benefit period. The fact that a claimant may apply for a job before the benefit period begins is not evidence that they are still available to take that job during the benefit period.

[64] The General Division could not count applications or interviews from before the benefit period as though they were applications or interviews made during the benefit period. However, there is more to a job search than the application itself. Evidence that a claimant follows up on an application during the benefit period is still evidence of availability.

[65] Nothing in the General Division's decision suggests that it refused to consider any of the Claimant's job search activities that occurred within the benefit period; even those activities that may have been related to a process that he initiated before the benefit period. The General Division acknowledged that the Claimant made different kinds of efforts. It said that his efforts included "having a resume, registering for job search websites, applying for jobs, and attending interviews."[31]

[66] The General Division appears to have given more weight to actual applications than to other job search activities,[32] but it may weigh the evidence as it sees fit. As I noted earlier, it is not the Appeal Division's role to reweigh the evidence.

Exclusion of co-op summer job applications

[67] The Claimant submitted evidence that he had made a large number of job applications for summer co-op positions that would start in the summer of 2022.

[31] See the General Division decision at para 49.
[32] See General Division decision at paras 46 and 50.

[68] The General Division accepted that the Claimant attended interviews for co-op positions related to his computer science school problem. However, it found that he had attended only six interviews from January 2022 to March 2022.[33]

[69] The Claimant argued that the General Division ignored evidence of his many co- op job applications.

[70] The General Division excluded some of this evidence because it was of little probative value.[34] It did not accept that the evidence would help the Claimant to prove that he had made actual applications.

[71] I agree that the evidence is of little probative value. However, I do not say this because the evidence could not help to prove the Claimant made more applications. In my view, the evidence is not probative because it does not help the Claimant to prove he was available for work during his benefit period.

[72] For the General Division to make an error by ignoring evidence, the evidence would have had to be relevant to a finding of fact on which the decision was based.

[73] The Claimant believes the General Division ignored evidence showing that made a large number of applications for **summer co-op jobs**. The Claimant's applications and interviews for co-op positions would certainly have been "job search efforts," but they were efforts directed to obtaining employment in co-op opportunities that would **not begin until after the benefit period** ended on April 2, 2022.

[74] No matter how many applications to summer co-op positions the Claimant made, or could prove, this evidence could not help him to show that he was available for work during the benefit period.

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[33] See General Division decision at para 27.
[34] See General Division decision at para 9.

[75] Furthermore, the law presumes that full-time students are unavailable for work while they are going to school.[35] A full-time student may be able to overcome this presumption of unavailability by showing that they are willing to quit school to take a job.

[76] The Claimant convinced the General Division that he would have quit his job for a job **in his field**. If the General Division had found that such a job was a "suitable" job (such that it was reasonable for him to limit his job search in this way), he might have been able to overcome the presumption.

[77] However, the Claimant would not be able to overcome a presumption of unavailability by showing that he was searching for summer co-op positions while he was still in school. Those co-op applications were for jobs that would only begin after he was out of school for the summer. Proof of those applications does not show that the Claimant could or would work and go to school full-time, at the same time.

[78] The General Division's decision was not based on any finding that relied on evidence of the Claimant's efforts to find summer co-op jobs. The General Division did not make an important error of fact by ignoring or misunderstanding this evidence.

Remedy

[79] I have found that the General Division made a number of errors in how it reached its decision. That means I must decide what to do about those errors.

[80] I have the authority to return the matter to the General Division to reconsider but I also have the authority to make the decision that the General Division should have made.[36]

[81] I asked the Claimant the Commission and they both said that I should make the decision the general Division should have made.

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[35] See the Federal Court of Appeal case in *Canada (Attorney General)* v *Wang*, 2008 FCA 112; See also *Landry v The Deputy Attorney General of Canada,* A-719-91
[36] See section 59(1) of the DESDA.

[82] However, I do not believe that the evidence is sufficient for me to make the decision. I have said that the Claimant may have been available during some portion of the benefit period. I have also said that that this may depend on whether the Claimant could show that his regular occupation was “suitable employment” for some period.

[83] Deciding whether a job within his regular occupation was “suitable employment” within the meaning of section 6(4) of the EI Act would require evidence that other kinds of jobs would likely be at a lower rate of earnings or on less favourable conditions than the Claimant’s regular occupation. The General Division did not consider the application of section 6(4) and there no evidence on this issue that is available to me.

[84] Furthermore, it may be necessary to decide for how long the Claimant could reasonably restrict his job search efforts to his regular occupation under section 6(5) of the EI Act. In my view, the evidence is insufficient to evaluate the number of opportunities open to the Claimant in his field.

[85] For these reasons, I am referring the matter to the General Division for reconsideration.

Conclusion

[86] I am allowing the appeal.

[87] I have cancelled the decision about the disentitlement for not making reasonable and customary efforts because the General Division did not have jurisdiction to make this decision.

[88] I am returning the matter of section 18(1) availability to the General Division for reconsideration. The General Division made errors of law and fact when it confirmed that the Claimant was disentitled because he was not available for work.

Stephen Bergen
Member, Appeal Division