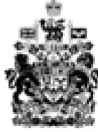

Citation: *PS c Canada Employment Insurance Commission*, 2023 SST 957

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	P. S.
Respondent:	Canada Employment Insurance Commission
Representative:	Nikkia Janssen

Decision under appeal:	General Division decision dated December 19, 2022 (GE-22-2913)

Tribunal member:	Candace R. Salmon
Type of hearing:	Teleconference
Hearing date:	July 19, 2023
Hearing participants:	Appellant Respondent's representative
Decision date:	July 24, 2023
File number:	AD-23-85

Decision

[1] The appeal is allowed. The Claimant is not disentitled from receiving Employment Insurance (EI) benefits.

Overview

[2] The Claimant quit his job. He told the Canada Employment Insurance Commission (Commission) that he was injured at work and was unable to work for a few months. He also said that he could only work on certain days due to childcare requirements.

[3] The Claimant applied for EI benefits after quitting his job. The Commission established a claim and paid benefits. However, it later contacted the Claimant to discuss the claim and decided that he shouldn't have received benefits because he wasn't available for work due to injury.

[4] The Claimant appealed the Commission's decision to the Tribunal's General Division. The General Division dismissed the appeal, saying he unduly limited his chances of going back to work by only being available to work around his parenting schedule. The Claimant appealed the General Division decision to the Appeal Division. I gave the Claimant permission to appeal because the General Division may have made an error of law.

[5] The Commission now concedes that the General Division made a mistake. It says that the Claimant should not have been disentitled from EI benefits.

The parties agree on the outcome of the appeal

[6] Prior to the hearing, the Commission conceded the appeal. The Commission stated that the General Division made an error of law by failing to apply section 9.002(1)(b) of the *Employment Insurance Regulations* and by not addressing

how the Claimant's family obligations may have affected his availability.[1] At the hearing, the Commission explained that its position went beyond its written submission, and said it was conceding the entire appeal. It asks that I substitute my decision for that of the General Division, and remove the disentitlement it placed on the Claimant due to not being available for work due to injury.

[7] The Claimant stated at the hearing that he agrees with the Commission and wants me to give the decision the General Division should have given.

The General Division made an error of law by not considering section 9.002(1)(b) of the *Employment Insurance Regulations*

[8] I agree that the General Division made an error of law by not considering whether section 9.002(1)(b) of the *Employment Insurance Regulations* (EI Regulations) applied to render certain employment unsuitable for the Claimant.[2]

[9] The General Division referenced section 9.002 of the EI Regulations when it found the Claimant's efforts to find a job were reasonable and customary.[3] However, it did not consider section 9.002(1)(b) when determining suitable employment. This is a legal error. It then found that the Claimant set a personal condition that unduly limited his chances of going back to work, because he was only available to work around his parenting schedule.[4]

[10] Since I agree with the parties that there is an error of law, I must decide how to fix the mistake.

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[1] See Commission's representations at page AD03-1. See also section 9.002(1)(b) of the *Employment Insurance Regulations* (EI Regulations), which say that a person's family obligations can be a relevant part of the availability assessment.
[2] This section says one of the criteria for determining what constitutes "suitable employment" is that the hours of work are not incompatible with the claimant's family obligations or religious beliefs.
[3] See General Division decision at page 7, paragraph 29.
[4] See General Division decision at page 9, paragraph 45.

The Claimant’s childcare was not a personal circumstance that unduly limited his chances of going back to work

[11] The law says that people must show they are “capable of and available for work” but aren’t able to find a suitable job.[5]

[12] Availability is assessed using three factors, established in the *Faucher* decision:

- Did the Claimant want to go back to work as soon as a suitable job was available;
- Did the Claimant make efforts to find a suitable job; and
- Did the Claimant set any personal conditions that might have unduly limited his chances of going back to work.[6]

[13] The General Division found that the Claimant met the first two *Faucher* factors. I am only considering the third factor, which was the basis for the General Division’s denial of the appeal.

[14] Claimants only have to prove their availability for suitable employment.[7] The *Employment Insurance Act* (EI Act) and EI Regulations explain how to determine whether a job is suitable.[8]

[15] The suitability of employment depends on factors including:

- a person’s usual occupation
- their past earnings
- their previous working conditions
- whether their health and physical capabilities allow them to commute to the place of work and to perform the work

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[5] See section 18(1)(a) of the *Employment Insurance Act* (EI Act).

[6] These factors were described by the Federal Court of Appeal in *Faucher v Canada (Employment and Immigration Commission)*, 1997 CanLII 4856 (FCA).

[7] See section 18(1)(a), section 50(8), and section 27 of the EI Act that all refer to the “suitable employment.” See also the first two *Faucher* factors.

[8] See section 6(4) and 6(5) of the EI Act and section 9.002(1) of the EI Regulations.

- whether the hours of work are incompatible with their family obligations or religious beliefs.

[16] In this case, I find the Claimant has proven his availability from September 28, 2020, onwards.

[17] Aside from meeting all of the other criteria, he also meets the third *Faucher* factor. He did not set personal conditions that might have overly limited his chances of returning to work.

[18] While the Claimant had to arrange his employment around his parenting schedule, this is not a personal condition that affects his ability to find suitable employment. Some of the jobs the Claimant applied for had scheduling requirements that weren't possible for him, considering his childcare obligations. This means those jobs were not suitable employment, considering his family obligations.

[19] I am satisfied, having regard to the *Faucher* factors, and considering all the circumstances, that the Claimant has proven his availability for work from September 28, 2020, onwards.

Conclusion

[20] The appeal is allowed. The General Division made an error of law. The Claimant was available for work and is meets the availability requirements for receiving EI benefits.

Candace R. Salmon
Member, Appeal Division