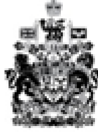

Citation: *SC v Canada Employment Insurance Commission*, 2024 SST 419

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	S. C.
Representative:	R. M.
Respondent:	Canada Employment Insurance Commission
Representative:	Kevin Goodwin

Decision under appeal:	General Division decision dated November 10, 2023 (GE-23-2190)

Tribunal member:	Stephen Bergen
Type of hearing:	Teleconference
Hearing date:	April 17, 2024
Hearing participants:	Appellant Appellant's representative Respondent's representative
Decision date:	**April 23, 2024**
File number:	AD-23-1072

Decision

[1] I am allowing the appeal. The General Division made errors of law and fact. I am sending the matter back to the General Division for reconsideration with directions. Those directions require the General Division to consider the availability of suitable jobs in the Claimant's area.

Overview

[2] S. C. is the Appellant. I will call her the Claimant because this appeal concerns her application for Employment Insurance (EI) benefits.

[3] The Claimant is a Registered Nurse living in X (the "Village"). She came out of retirement in March 2021 to work for X (the "Health Authority"), helping out with the vaccination clinic. She received significantly fewer shifts after August 2022, but she continued to work casually at the clinic through to February 2023. She also accepted shifts with the chemotherapy unit in the hospital in X (the "Town"), where she used to work.

[4] She applied for EI benefits in August 2022. The Respondent, the Canada Employment Insurance Commission (Commission), established a claim effective September 11, 2022, but did not pay her benefits. It decided that the Claimant was not entitled to benefits because she had said she was retired.

[5] The Claimant disagreed and requested a reconsideration. She said that she remained available for work. She said that she was still employed as a casual call nurse and that she followed job opportunity postings with the regional health authority.

[6] The Commission would not change its decision, so the Claimant appealed to the General Division of the Social Security Tribunal. The General Division agreed with the Commission that she was not available, so it dismissed her appeal. The Claimant appealed the General Division decision to the Appeal Division.

[7] I am allowing the appeal because the General Division made errors of law and fact. However, there is not enough information on the record for me to give the decision the General Division should have given. I am returning the matter to the General Division to reconsider.

Preliminary Issue

[8] The Claimant's submissions attached evidence of nursing-related courses she completed between April 1, 2021, and April 1, 2022.[1] She argues that the course information is additional evidence of her efforts to obtain work.[2]

[9] This course information is new evidence that was not available to the General Division. I cannot consider new evidence, even if I thought that the General Division might have reached a different decision if it had that additional evidence.[3]

Issues

[10] The issues in this appeal are:

a) Did the General Division make an error of law

i. by failing to consider all the factors in the legal test of availability?
ii. by failing to make a finding whether the Claimant had "unduly" limited her chances of re-employment?

b) Did the General Division make an error of fact

i. by failing to consider evidence that the Claimant updated her resume?
ii. when it found that the Claimant was only looking for work with the Health Authority?
iii. when it found that the Claimant was only looking for casual work?
iv. when it found that there existed a number of job postings in the Town?

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[1] See AD5-2 to AD5-9.
[2] See para 15 of the Claimant's submission: AD5-12.
[3] *El Haddadi v. Canada (Attorney General*), 2016 FC 482; *Mette v. Canada (Attorney General*), 2016 FCA 276.

Analysis

[11] 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.[4]

Error of law

– **Failing to consider all the *Faucher* factors**

[12] I granted leave to appeal on the basis that the General Division may have made an error of law in how it applied the legal test for availability.

[13] Availability must be evaluated by considering the following three factors:

a) whether the claimant has a desire to return to work as soon as a suitable job is available
b) whether the claimant expressed that desire through their job search efforts
c) whether the Claimant set personal conditions that unduly limit their chances of returning to the labour market.

[14] I will refer to these three factors as the *Faucher* factors because they were outlined in a Federal Court of Appeal decision called *Faucher*.[5] The General Division correctly identified the *Faucher* factors. It also acknowledged that it must consider all three.

[4] 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).
[5] These are called the "*Faucher* factors" because one of the court decisions from which it is derived is called *Faucher v Canada* (A-56-75, A-57-96).

[15] However, the General Division did not consider all three *Faucher* factors.

[16] The General Division found that the Claimant did not have a desire to return to work. However, it based that finding solely on her efforts to find employment.

[17] The General Division also found that the Claimant set personal conditions that unduly limited her chances of returning to the labour market. Again, it based that finding on her expectation of recall to casual work and on its view that she was not seeking other work.

[18] I accept that the nature and extent of a claimant's job search may be **evidence** of a claimant's desire to return to work, but a claimant's job search is not equivalent to their desire to work. There is a reason that "job search efforts" is a distinct factor, considered separately from desire. It is possible for a claimant to have a desire to return to work even where their circumstances inhibit or prevent them from actively seeking work.

[19] The General Division did the same thing when it analyzed the third Faucher factor, which concerns "setting personal conditions." The General Division found that the Claimant had set personal conditions because she did not seek work other than "the possible casual work at the vaccine clinic or with [the Health Authority] in general." Its analysis considered only the Claimant's job search efforts. Where the Claimant focused her job search is different from what **kind of work she would accept** if offered.

[20] The Commission conceded that the General Division failed to distinguish the first *Faucher* factor from the second and therefore failed to correctly to consider all the factors. It also conceded that the General Division made an error in the second *Faucher* factor, although it identified as an error what it believed to be a misplaced focus on the suitability of available employment.[6] However, the Commission argued that the General Division properly considered the third *Faucher* factor by finding that she had not sought work outside the possible casual work at the vaccine clinic or with the Health Authority generally. It suggested that this statement implicitly incorporated the General Division's

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[6] See AD4-4.

earlier findings related to the Claimant's job search, where it said that she did not have the training to compete for full-time positions in other areas of the hospital.[7] The Commission noted that the Claimant could be disqualified if she did not meet even one of the *Faucher* factors.

[21] I disagree. A Claimant "may" be disqualified for failing to meet one of the Faucher factors, but is not necessarily disqualified. In the facts of Faucher, the FCA stated that the claimants could **not** be found to be unavailable on the basis of the third factor only. That means that the General Division decision might have been different if it had properly considered the other two factors.

[22] Furthermore, the General Division continues to focus on job search efforts, even in respect of the third *Faucher* factor. The "personal conditions" of the third factor are the conditions under which a claimant is willing to work; not conditions limiting their job search. This factor is concerned that a claimant may unreasonably rule out certain kinds of work, or work arrangements, which would otherwise be suitable.

[23] The General Division made an error of law in how it applied the *Faucher* test. It failed to consider all three factors, and instead relied exclusively on the Claimant's job search efforts.

– **Failing to make a finding on whether the Claimant's personal conditions "unduly" limited her chances of re-employment.**

[24] The General Division made another error when it considered the third *Faucher* factor. The third *Faucher* factor does not mean that claimants are prohibited from setting any kind of condition on the kind of work that they would be willing to accept. Rather, it states that claimants may not set conditions that "unduly" (or unreasonably) limit their chances of re-employment.

[7] See AD4-5.

[25] The General Division did not define what it understood the Claimant's personal conditions to be. Nor did it turn its mind to whether her conditions were "**unduly** limiting."

[26] The General Division either misapplied the third *Faucher* factor to capture **all** limitations (and not just unreasonable limitations) or it failed to find as fact that her personal conditions were, or were not, "unduly limiting"—which is a required finding. Whichever way you look at it, the General Division made an error of law.

Error of fact

– Evidence of updated resume

[27] When the General Division considered the Claimant's job search efforts, it found that she made no effort to find work other than with the regional health authority.

[28] A claimant's "job search efforts" may involve activities other than reviewing postings, applying for positions, and attending interviews. The Claimant testified that she updated her resume as well, which may be considered a job search effort.

[29] The Commission acknowledged that the General Division did not refer to the fact that the Claimant had updated her resume, and suggested that the General Division may have failed to consider her resume activities.[8]

[30] I agree that updating a resume is a "job search effort." However, I do not think this was an important error of fact.

[31] The General Division may generally be presumed to consider all the evidence before it. It does not have to refer to each and every piece of evidence.[9] The evidence that the Claimant updated her resume was not so important that the General Division needed to show that it considered it.

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[8] Listen to the General Division audio record at timestamp 14:20.
[9] Simpson v Canada (Attorney General), 2012 FCA 82.

[32] The General Division accepted that the Claimant was looking for jobs within the Health Authority (which seems to have occupied the entire health care field in the Claimant's region). However, it did not accept that she satisfied the job search factor because her efforts did not extend to other types of jobs.

[33] There was no evidence of how the Claimant updated her resume or to what purpose. The mere fact that the Claimant updated her resume helps her show that she was making efforts to find work, but it does not help her show that those efforts went beyond looking for jobs in the health authority. Her updated resume does not help her prove anything that the General Division had not already accepted.

[34] It was not an important error of fact for the General Division to omit referring to the Claimant's update of her resume.

– **Limits on job search**

[35] The Claimant argued that she had not limited her job search to the health care or casual nursing field.[10] However, she did not point to any evidence on which the General Division could have found that she expanded her job search to other types of work.

[36] I see no evidence that she was looking for work outside of health care. However, there is evidence on the file that the Claimant thought she would jeopardize her ability to pick up nursing shifts if she found alternate work.[11] Her own submissions acknowledge that seeking full-time employment elsewhere would have severely hindered her ability to fulfill the terms of her casual nursing employment.[12] This implies that she was not looking for other kinds of work.

[37] The General Division did not make an error by finding that she made no effort to obtain employment outside of the Health Authority.

[10] See para 17, Claimant's submissions: AD5-13.
[11] See GD3-25.
[12] See para 11, Claimant's submissions, AD5-12.

[38] However, the General Division made an error of fact when it found that she had not made efforts to find work that was not **casual**.

[39] The General Division ignored evidence that the Claimant told the Commission that she had been looking for **other full-time nursing positions**, but nothing had been posted on the boards that she usually searches.[13]

– **Availability of non-nursing jobs**

[40] The Claimant's husband testified as to the availability of work in the region. He said that health care, education and government were the only jobs available. There was no fish plant, no stores, no Walmart, or anything else. He said the only other work was offshore. His evidence was the only evidence before the General Division about local labour market conditions.[14]

[41] The Claimant had worked, and continued to work, in a town of about 3500 people, located thirty kilometres from her Village. One might expect that a town of 3500 people would have more potential employers than suggested by the husband's description.

[42] It is possible that the Claimant's husband was describing the labour market in the immediate area around their home Village, and not meaning to include the larger Town where his wife worked. This seems to be the way it was understood by the General Division.[15]

[43] However, the husband did not say that he was excluding the Town. His evidence that the only jobs available locally were in health care, education, and government, suggests that he was thinking of a larger centre than their Village. The General Division member did not ask him to clarify whether he was referring only to the immediate area of their Village or to a larger area that would include the Town.

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[13] See GD3-25.
[14] Listen to the audio record of the General Division hearing at 28:50.
[15] See para 19 of the General Division decision.

[44] The General Division stated that there were "a number of job postings in [the area of the Town] albeit not in nursing."

[45] This was an error of fact. The General Division does not say how it arrived at this conclusion, but there was nothing in evidence to support it. The General Division's view that non-nursing jobs were available in the Town may have affected its finding that the Claimant had not made appropriate job search efforts. It may also have affected its finding that she had set personal conditions that were unduly limiting.

– Summary

[46] I have found that the General Division made errors of law and fact. Now I must decide what I can do to fix those errors. I have the power to either send the matter back to the General Division to reconsider, or to make the decision that the General Division should have made.[16]

Remedy

[47] The Claimant would like me to make the decision the General Division should have made. She does not want the process to go on longer than necessary and would like a decision as soon as possible.

[48] The Commission suggests that the record is complete, which means that I have everything I need to make the decision. It asked that I make the decision the General Division should have made. However, it also indicated that it would not oppose having the matter returned to the General Division for reconsideration.

– I am sending the matter back to the General Division

[49] I appreciate that the decision and appeal process has been difficult for the Claimant. Unfortunately, I do not have all the evidence I need to make the decision.

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[16] See sections 59(1) and 64 of the DESD Act.

[50] When the Commission found that the Claimant was not available originally, it had understood that the Claimant was retired. When it maintained its decision on reconsideration, its decision seemed to be based on how the Claimant had not broadened her job search beyond seeking another nursing job.

[51] However, the Commission had not justified its reconsideration decision with any information on the local labour market. The only evidence before the General Division on the availability of non-nursing jobs came from the testimony of the Claimant's husband. That testimony was not clear or specific. He testified about how there were few employers, but not about the number of job openings. When he spoke about the lack of employers, he did not clarify if he meant employers in the area immediately surrounding their Village, or if he included employers in the Town in which the Claimant sometimes worked.

[52] As the Federal Court of Appeal noted in *Page*, "the case law mandates a nuanced and contextualized consideration of the Claimant's circumstances."[17] In my view, the evidence before the General Division raised important questions about the circumstances in which the Claimant was said to be available. The availability or non-availability of alternate suitable employment in the Claimant's region is relevant to whether the Claimant satisfied each of the *Faucher* factors.

[53] The Claimant is a nurse by profession. She continued to work as a nurse for the health authority in an on-call capacity even during the period in which the Commission said she was not available. The evidence confirmed that the Claimant was trying to find additional work with the regional health authority, which seems to be the only local employer of nurses. There was no evidence that she considered working in other occupations, and she told the Commission she would jeopardize her position if she was working at another job and could not come in when called for a nursing shift.[18]

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[17] *Page v Canada (Attorney General)*, 2023 FCA 169, at para 74.
[18] See GD3-25.

[54] Since the Claimant was a nurse who was trying to obtain more work in the nursing field, her availability would depend on:

- whether she could demonstrate that she wanted to return to work "**as soon as** suitable work was available" without seeking work outside of the nursing field
- whether a job search limited to the nursing field was a sufficient job search
- whether her willingness to only work in nursing or health care was an "undue" limitation.

– **Can the Claimant limit her search to her usual occupation?**

[55] A Claimant may only be expected to seek or accept work that is "suitable." According to the sections 6(4)(c) and 6(5) of the *Employment Insurance Act* (EI Act), employment outside a claimant's usual occupation may not be considered suitable for a "reasonable interval."[19]

[56] The Claimant had 36 years of experience as a registered nurse, and she came out of retirement to work as a nurse. Her usual occupation was nursing. She continued to work as a nurse, picking up whatever shifts she could, and she sought additional nursing work, including full-time nurse positions.

[57] Neither the Commission, nor the General Division, considered whether the Claimant was available for some initial period while she was looking for nursing work. At the Appeal Division, the Commission argued that this should not apply because the Claimant's evidence suggested she would have had difficulty obtaining additional employment as a nurse.

[58] However, the applicability of section 6(4)(c), as well as the length of the "reasonable interval," would depend on the prospects of employment in the usual occupation **relative to** the prospects of employment outside the Claimant's usual occupation.

[19] See sections 6(4)(c) and 6(5) of the EI Act.

– **What is a sufficient job search in the circumstances?**

[59] I take notice that the Claimant lives in a sparsely populated and economically depressed area of Canada. In my view, the sufficiency of the Claimant's job search (limited to nursing work) was also related to the availability of alternate employment.

[60] The Claimant has a great deal of training and experience in nursing, but there is no evidence that she is equipped for other skilled jobs. She came out of retirement after a long career, so I presume she is older. This could limit the number of jobs that are physically suitable, particularly the number of unskilled jobs.

– **Was it unduly limiting for the Claimant to want to work only as a nurse?**

[61] As noted, the General Division did not consider this question. The Claimant may have set a personal condition by wanting to work only within the nursing field, but this may have been reasonable in the circumstances. The answer to that question depends, in part, on the number and nature of other suitable jobs available. The Claimant was concerned that she would lose her ability to pick up nursing shifts if she were busy with another job, so it could also depend on the stability of such alternate employment as may be available.

[62] I cannot answer any of these questions satisfactorily without evidence of the local labour market conditions at the time the Claimant was seeking benefits. The General Division will be better positioned to answer these questions because it can obtain evidence on the availability of suitable non-nursing jobs in the Claimant's region.

Conclusion

[63] I am allowing the appeal. The General Division made errors of law and fact. I am sending it back for the General Division to reconsider with directions to address the following points in particular:

a) Evaluate the Claimant's prospects of alternate (non-nursing) employment in her home community and its region (including the town in which she worked as a nurse).

b) Consider the Claimant's availability for work in light of the prospects of alternate suitable employment.[20]

c) Consider also whether sections 6(4)(c) and 6(5) of the EI Act authorized the Claimant to limit her job search to her usual occupation for a reasonable interval. If so, assess the length of that reasonable interval.

Stephen Bergen
Member, Appeal Division

[20] In this direction, I mean "suitable employment" as it is defined in the *Employment Insurance Regulation*, section 9.002.