Citation: *LC v Canada Employment Insurance Commission*, 2024 SST 799

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	L. C.
Respondent:	Canada Employment Insurance Commission
Representative:	Jessica Murdoch

Decision under appeal:	General Division decision dated January 30, 2024 (GE-23-3431)

Tribunal member:	Stephen Bergen
Type of hearing:	Teleconference
Hearing date:	June 5, 2024
Hearing participants:	Appellant Respondent's representative
Decision date:	July 10, 2024
File number:	AD-24-160

Decision

[1] I am dismissing the appeal. The General Division made an error of fact, so I have corrected that error when I made the decision the General Division should have made. However, the final result is unchanged. The Claimant was not available for work from December 26, 2022, to March 12, 2023. She is disentitled to benefits during that period.

Overview

[2] L. C. is the Appellant. I will call her the Claimant because this application is about her claim for Employment Insurance (EI) benefits.

[3] The Respondent, the Canada Employment Insurance Commission (Commission), decided that the Claimant was not entitled to benefits from December 26, 2022, onwards because she was not available for work. The Claimant disagreed and asked the Commission to reconsider, but it would not change its decision.

[4] The Claimant appealed to the General Division of the Social Security Tribunal. The General Division allowed her appeal in part. It found that the Claimant was available after March 12, 2023, but confirmed that she was not available from December 26, 2022, to March 12, 2023. The Claimant appealed the General Division decision to the Appeal Division.

[5] The General Division made an error of fact by not considering that the Claimant was working as a part-time school bus driver from January to mid-March 2023.

[6] I have made the decision the General Division should have made. I have taken into consideration that the Claimant was working part-time from January to March 2023. However, the outcome remains unchanged. The Claimant has not demonstrated that she was available for work within the meaning of the *Employment Insurance Act* (EI Act).

Preliminary Issues

[7] In her Appeal Division hearing, the Claimant talked about having looked for full-time work and even night-shift jobs in the period between the 2022 Christmas school break and the March 2023 school break. This was new evidence. She did not tell the General Division that she wanted to look for different or additional work during that period or that she made any effort to find different or additional work. And there is no evidence of this in the reconsideration file, or elsewhere in the appeal record.

[8] The Appeal Division cannot consider new evidence that was not available to the General Division, if that evidence is intended to help prove any fact that is relevant to the appeal outcome.[1]

[9] I will not be considering the statements that the Claimant made to the Appeal Division about her desire or effort to find work between December 26, 2022, and March 13, 2023, other than the part-time school bus driver job that she held.

Issue

[10] The issue in this appeal is this:

> Did the General Division make an important error of fact by ignoring or misunderstanding the evidence about the Claimant's employment from January to March 2023?

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).

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[1] Gittens v Canada (Attorney General), 2019 FCA 256 at para 13; *Parchment v. Canada (Attorney General),* 2017 FC 354; *Mette v. Canada (Attorney General)*, 2016 FCA 276).

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.[2]

Procedural Fairness

[12] The only ground of appeal that the Claimant selected in completing her application to the Appeal Division was the ground of appeal concerned with procedural fairness. However, she also expanded on why she was appealing. Her reasons did not suggest that she had a concern with the fairness of the General division process.

– What does procedural fairness mean?

[13] Procedural fairness is concerned with the fairness of the process. It is not concerned with whether a party feels that the decision result is fair.

[14] Parties before the General Division have a right to certain procedural protections such as the right to be heard and to know the case against them, and the right to an unbiased decision-maker.

– There is no arguable case that the General Division acted in a way that was procedurally unfair

[15] The Claimant has not said that she did not have a fair chance to prepare for the hearing or that she did not know what was going on in the hearing. She has not said that the hearing did not give her a fair chance to present her case or to respond to the Commission's case. She has not complained that the General Division member was biased or that he had already prejudged the matter.

[16] When I read the decision and review the appeal record, I do not see that the General Division did anything, or failed to do anything, that causes me to question the fairness of the process.

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[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).

Important error of fact

[17] The Claimant did not assert that the General Division made an error of fact, but she insisted that she told the General Division that she was working between January 2023 and March 2023. As a result, I have also considered whether the General Division may have made an important error of fact.

[18] The General Division makes an important error of fact where it bases its decision on a finding of fact that ignores or misunderstands relevant evidence, or does not follow rationally from the evidence.

[19] The Claimant is correct that she testified that she was working as a part-time bus driver for her employer after the 2022 Christmas break, and through the period from January to March 2023.[3]

[20] The General Division did not mention the Claimant's testimony, and its findings suggest that it misunderstood or overlooked that evidence. It found that, during this period:

- The Claimant did not want to go back to work.
- She wasn't interested in working at that time.
- She was not ready to work.
- She only secured a job with her former employer in late July 2023.
- She decided not to work or look for work.

[21] Evidence that the Claimant had returned to part-time bus driving is a relevant consideration and should have been considered when evaluating whether she satisfied the *Faucher* test for availability.[4]

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[3] Listen to the audio recording of the General Division hearing at timestamp 34:30 through to 36:40.
[4] The *Faucher* test is a reference to the factors described in the decision of *Faucher v Canada (Employment and Immigration Commission)*, A-56-96 and A-57-96. See para 19 to follow.

[22] The Commission concedes that the General Division made an error of fact by failing to take into consideration the Claimant's part-time employment between January and March 2023.

[23] I accept that the General Division made an important error of fact. It ought to have considered the significance of her part-time employment to the question of her availability.

Remedy

[24] I must decide what I will do to correct the General Division's error. 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.[5]

[25] Both the Claimant and the Commission have recommended that I make the decision the General division should have made. I accept their recommendation. The record is sufficiently complete that I may make the decision.

Was the Claimant entitled to Employment Insurance benefits from December 26, 2022, to March 12, 2023?

[26] The Claimant testified that she had worked for four years as a part-time school bus driver before she applied for benefits.[6] She testified that she only began to look for full-time work in March 2023.[7] The Claimant said that she could not work full-time between December and March because of her child-care obligations. She had to drop her children off at school, or be home if her children were sick.[8]

[27] The Claimant was not interested in full-time work from December 26, 2023, up to and including March 12, 2023. She said she could only work a part-time schedule. As

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[5] See section 59(1) of the DESDA.
[6] Listen to the audio recording of the General Division hearing at timestamp 30:10.
[7] See GD3-44; Also listen to the audio recording of the General Division hearing at timestamp 25:50 through to 26:20.
[8] See GD3-35. Also listen to the audio recording of the General Division hearing at timestamp to 36:00 – 38:00.

she explained in this appeal, that is exactly what she did. She returned in early January 2023 to work as a part-time school bus driver job for the same employer.

[28] A claimant is only required to prove their availability for "suitable" employment. The *Employment Insurance Regulations* allows that "suitable employment" is employment in which the hours of work are not incompatible with a claimant's family obligations.[9]

[29] The hours that the Claimant worked as a part-time school driver apparently permitted her to look after the needs of her children, so her schedule was not incompatible with her family obligations: It was suitable employment. She has proven she was "available" for work in accordance with her previous pattern and schedule of work because she actually worked the same or similar hours.

[30] Furthermore, the Claimant's work history was part-time, and her EI benefits would have been calculated using her weekly earnings from her part-time employment. So, it may have been possible for her to establish availability based on her availability for part-time work only.[10]

[31] However, in this case, the Claimant's wholly occupied her "availability" working at her part-time driving job. The fact that she was available for work during the hours she was actually working does not establish her entitlement to receive Employment Insurance benefits for the same period.

[32] To be entitled to benefits, a claimant must show that they are capable and available for work. But that is not all. A claimant may only receive benefits if they can show that they are "unable to obtain suitable employment."[11] The Claimant was not unable to obtain suitable employment. She had found suitable employment for the hours she considered herself available.

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[9] See section 9.002(1) of the *Employment Insurance Regulations.*
[10] *Page v Canada (Attorney General)*, 2023 FCA 169.
[11] See section 18(1)(a) of the *Employment Insurance Act.*

[33] The Claimant made it clear that she had not been ready to look for a full-time job until March 13, 2023, but it is theoretically possible that there was no "suitable" employment in which she could work more hours. As noted earlier, a claimant is only required to be available for suitable employment. Perhaps the Claimant could not have found another full-time job or combination of part-time jobs that would have allowed her to also meet her child-care obligations.

[34] While this is possible, I cannot just assume that the Claimant could not have found additional or other employment that would also be suitable. It is up to the Claimant to prove that she was available for suitable employment. If the Claimant means to argue that she would be unlikely to find other suitable employment, she must prove it.

[35] There was no evidence before the General Division that the Claimant investigated whether she could coordinate more hours of work with her child-care obligations.[12] There was no evidence she looked into adding or extending her shifts, searched for other full-time job opportunities, or considered the possibility of adding another part-time job. The Claimant said she was not looking for other work because her children had to get to school and needed care if they became ill, but she told the Commission a neighbour had been willing to help with some of this.[13] She did not provide other evidence to suggest she could not have arranged for her children to get to school or for their care or supervision while she was at work.

[36] So, I accept that her part-time job driving school bus was not the only suitable employment for which the Claimant needed to be available to obtain EI benefits.

[37] To prove that she was available, the Claimant had to show that she had a desire to return to work as soon as a suitable job is available, show that she expressed that desire through her job search efforts, and show that she did not set personal conditions

[12] For clarity, this is meant to refer to the period between December 26, 2022, and March 13, 2023.
[13] See GD3-35.

that unduly (or unreasonably) limited her ability to get back to work. These are known as the *Faucher* factors, and they are used to evaluate availability.

[38] The Claimant told the General Division that she was not ready to return to work full-time until March 13, 2023, so I accept that she did not have the desire to obtain full-time employment as soon as it might be available. Outside her existing job, she did not look for any other or additional work, so her job search efforts were clearly insufficient to demonstrate she was looking for other work. There is no evidence that she considered or would consider any other kind of job beyond driving a school bus, during the period between January and March 2023, so she has not shown that she did not set conditions that unduly limited her chances of getting back to work.

[39] If the Claimant failed to satisfy even one of the *Faucher* factors. I could find that she was not available. I find that she did not satisfy any of the factors for the period from December 26, 2022, to March 12, 2023.

[40] In respect of this period, I find that the Claimant has obtained suitable employment for those hours in which she was actually working, and that she has not shown that she was available outside those hours. Taken together, these findings mean that she is not entitled to EI benefits for the period between December 26, 2022, and March 12, 2023,

[41] I confirm the General Division's decision in all other respects.

Conclusion

[42] I am dismissing the appeal. I have corrected the General Division's error and made the decision that the General Division should have made. The Claimant remains disentitled to benefits from December 26, 2022, to March 12, 2023.

Stephen Bergen
Member, Appeal Division