



Citation: *Canada Employment Insurance Commission v NH*, 2025 SST 430

Social Security Tribunal of Canada Appeal Division

Decision

Appellant: Canada Employment Insurance Commission
Representative: Jonathan Dent

Respondent: N. H.
Representative: J. K.

Decision under appeal: General Division decision dated February 10, 2025
(corrigendum) (GE-25-141)

Tribunal member: Glenn Betteridge

Type of hearing: Teleconference

Hearing date: April 22, 2025

Hearing participants: Appellant's representative
Respondent
Respondent's representative

Decision date: April 28, 2025

File number: AD-25-127

Decision

[1] I'm dismissing the Canada Employment Insurance Commission's appeal.

[2] The General Division made jurisdictional errors. I have corrected those errors by making the decision the General Division should have made.

[3] N. H. was available for work from October 13 to November 30, 2024. This means he isn't disentitled from getting benefits during that period, for that reason.

Overview

[4] N. H. is the Claimant. He was a manager for a food service business.

[5] The business was seriously damaged in a fire. It closed for renovations, with an expected reopening date months later. Through his employer, he collected private income replacement insurance benefits for a few months. When those benefits were about to end, he renewed an EI claim.

[6] The Commission denied him benefits. It said he wasn't available for work under section 18(1)(a) of the *Employment Insurance Act* (EI Act). That section says for every day a person wants to get regular benefits, they have to show they're capable and available for work and unable to find a suitable job.

[7] The General Division decided he was available for work because he showed he met each of the three *Faucher* factors.¹ This meant he wasn't disentitled to benefits.

[8] The Commission asked for permission to appeal. It argued the General Division made legal, jurisdictional, and important factual errors. I gave permission because there was an arguable case the General Division made jurisdictional errors.

[9] The parties agree the General Division made three jurisdictional errors. I have fixed the General Division decision by making the decision it should have made. Relying

¹ See *Faucher v Canada (Employment and Immigration Commission)*, 1997 CanLII 4856 (FCA).

on a recent court decision and the exceptional circumstances in this case, I decided the Claimant was available.

Issues

[10] I'm going to decide three issues.

- Did the General Division make jurisdictional errors when it allocated the Claimant's private insurance benefits, and when it didn't decide the Claimant's entitlement for the proper period?
- If the General Division made a jurisdictional error, should I fix it by making the decision or send the case back to the General Division to reconsider?
- If I make the decision, I have to decide whether the Claimant was available for work from October 13 to November 30, 2024.

Analysis

What the law says

[11] I can step in and fix a General Division decision if the Commission shows the General Division made an error.² I can consider four types of errors: error of jurisdiction, error of law, or important factual error, and procedural unfairness.³

[12] I will also consider the availability for work requirement under section 18(1)(a) of the EI Act, which I explained above. The courts have said we use the three *Faucher* factors to decide whether a person is available for work under that section.

The General Division made jurisdictional errors

[13] Jurisdiction means the legal authority to decide an issue. The General Division makes a jurisdictional error in an appeal when it:

² See section 59(1) of the *Department of Employment and Social Development Act* (DESD Act).

³ See section 58(1) of DESD Act.

- decides a legal issue it had no authority to decide
- didn't decide an issue it should have decided

[14] The Claimant renewed an existing claim, effective October 13, 2024. His benefit period under the existing claim ended on November 30, 2024.

[15] Based on the Commission's reconsideration decision and the Claimant's appeal, the General Division had to decide one issue: Was the Claimant available for work from October 13 to November 30, 2024?

[16] The General Division correctly stated the availability issue, but didn't refer to dates (paragraph 8). It went on to make three jurisdictional errors, when it

- didn't decide whether the Claimant was available from October 13 to November 6, 2024—even though the Commission decided he wasn't, and he appealed that decision
- decided the Claimant wasn't entitled to benefits from August 6 to November 6, 2024, because of the income replacement benefits he got—even though the Commission didn't decide this issue and the renewal claim only started October 13, 2024
- decided the Claimant was entitled to benefits to December 15, 2024—even though the Commission could not pay him benefits after his benefit period ended on November 30, 2024

[17] I identified an arguable case of each error in my leave to appeal decision. The parties agree the General Division made these errors.⁴ I also agree.

⁴ The Commission agreed in its written submissions and at the hearing. The Claimant agreed at the hearing.

[18] Because I have found the General Division made an error, I don't have to consider the Commission's arguments about other errors. And the law gives me the powers to remedy (fix) the errors.

Fixing the errors by making the decision the General Division should have made

[19] The Commission asked me to make the decision the General Division should have made. It said the General Division gave the Claimant an opportunity to present evidence and make arguments. So I have the evidence I needed to decide whether the Claimant was available. The Claimant also wanted me to make the decision.

[20] I agree with the parties, for the reasons the Commission gave. I will decide one issue: Was the Claimant available for work from October 13 to November 30, 2024?

[21] The Commission says the Claimant didn't prove he met the *Faucher* test. So he wasn't available for work and can't get benefits.

[22] The Claimant says the Commission's decision makes no sense. The Commission paid regular benefits to roughly 20 other employees of the business—who were in exactly the same situation. And the Commission usually gives people three weeks to start looking for work where they're waiting to go back to their job.

The Commission's argument ignores a recent court decision

[23] The Commission reads "a working day in a benefit period" in section 18(1)(a) rigidly and restrictively.⁵ The Commission argues the court cases say it's not enough for a claimant to say they're available. A claimant must clearly demonstrate with evidence their attitude and conduct and prove they have been seeking suitable employment for each working day in the benefit period.

[24] But Federal Court decisions tell me there is another more flexible, fact-specific way to interpret the availability requirement in exceptional cases. The Federal Courts

⁵ See AD3-4.

have long recognized in some circumstances a claimant can show they're available without actively looking for a suitable job starting the first working day of their unemployment.

[25] In *Page*, the Federal Court of Appeal said it was reasonable for the Tribunal to decide the claimant was entitled to wait a few months before starting his job search given the unique situation created by COVID-related business closures.⁶ Then the Court summarized the caselaw, referring to CUB and court decisions:

On this point, contrary to what the Appeal Division indicated, it appears that there is no hard and fast rule that a claimant must immediately engage in a job search in all circumstances, and other cases have recognized that claimants are afforded a reasonable opportunity to see if they will be recalled before being required to start looking for alternate employment... [citations not included]⁷

[26] The General Division thoughtfully cited *Page* for this proposition (paragraph 19).

In the circumstances, the Claimant was entitled to a reasonable opportunity of recall before he had to job search

[27] Availability is a question of fact and involves the application of settled law to the evidence in an appeal.⁸ Here is the evidence I accept and rely on to find the Claimant was entitled to a reasonable amount of time before he began an active, ongoing job search for suitable employment.

- The fire and need to repair the place of business were exceptional circumstances.
- When the Claimant renewed his claim, the employer/owner believed the business would reopen in January 2025.⁹

⁶ See *Page v Canada (Attorney General)*, 2023 FCA 169 at paragraph 81.

⁷ See *Page v Canada (Attorney General)*, 2023 FCA 169 at paragraph 82.

⁸ See *Page v Canada (Attorney General)*, 2023 FCA 169 at paragraphs 51, 59, 60, 61, and 80, reviewing and citing other Federal Court of Appeal decisions.

⁹ See GD3-23 and listen to the recording of the General Division hearing at 27:22 and 29:40.

- The Claimant was a manager, the employer/owner highly valued him, and wanted him to return when the business reopened.
- The Claimant had a desire to return to work with his employer as soon as the business opened—the first *Faucher* factor.
- In the second half of October 2024, the Claimant applied for work at three local retail businesses—the second *Faucher* factor.
- Focusing on returning to work with his employer for a reasonable amount of time didn't unduly restrict his chances of returning to the labour market—the third *Faucher* factor.

[28] In the circumstances, I find a reasonable amount of time is seven weeks—from October 13 to November 30, 2024. This means the Claimant has shown he was available for work during that period. So he isn't disentitled to benefits during that period, for that reason.

[29] I considered the Federal Court cases that say a person isn't available if they are waiting to be recalled.¹⁰ The *De Lamirande* decision says this undermines the purposes of the EI system, which is to compensate workers who are unemployed for reasons beyond their control. The *Page* decision and decisions it cites better reflect the exceptional circumstances in this case. In these circumstances, including the limited period of time I have dealt with, the Claimant was unemployed for reasons beyond his control. And his best chance of getting back to a suitable job was with his former employer.

[30] If the Claimant makes a new initial claim beginning after November 30, 2024, he will have to show the Commission he was available for work under that claim.

¹⁰ See, for example, *De Lamirande v Canada (Attorney General)*, 2004 FCA 311 (on vacation while awaiting recall); and *Canada (Attorney General) v Cornelissen-O'Neill*, (1994) A-652-93 (FCA) (teacher has to seek work during summer break).

Conclusion

[31] I'm dismissing the Commission's appeal.

[32] The General Division made errors. I fixed those errors by making the decision.

[33] In the Claimant's exceptional circumstances, I find he was available for work and not disentitled to benefits from October 13 to November 30, 2024.

Glenn Betteridge
Member, Appeal Division