Citation: *FD v Canada Employment Insurance Commission*, 2024 SST 812

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	F. D.
Representative:	Elias Assefa
Respondent:	Canada Employment Insurance Commission
Representative:	Jonathan Dent

Decision under appeal:	General Division decision dated September 1, 2023 (GE-23-1382)

Tribunal member:	Stephen Bergen
Type of hearing:	Videoconference
Hearing date:	June 27, 2024
Hearing participants:	Appellant Appellant's representative Respondent's representative
Decision date:	July15, 2024
File number:	AD-24-177

Decision

[1] I am allowing the appeal in part. The General Division made an error of fact. I have corrected the error and made the decision that the General Division should have made.

[2] I find that the Claimant was available for work from September 28, 2021, to October 28, 2021. He is still disentitled from October 29, 2021, to January 27, 2022.

Overview

[3] Fikereye Debella is the Appellant. I will call him the Claimant because this appeal is about his claim for Employment Insurance (EI) benefits.

[4] The Claimant left his job around the end of September 2021, and made a claim for EI benefits. The Respondent, the Canada Employment Insurance Commission (Commission), refused to pay him benefits. It said that he had voluntarily left his job without just cause, which meant that he could not use his hours of insurable employment to qualify for benefits. It also said that he was not available for work between September 28, 2021, and January 27, 2022, which meant that he was disentitled to benefits in that period. The Claimant disagreed and asked the Commission to reconsider.

[5] The Commission would not change its decision, so the Claimant appealed to the General Division of the Social Security Tribunal. The General Division dismissed the appeal. The Claimant is now appealing that dismissal decision to the Appeal Division.

[6] I understand that the Commission issued a separate reconsideration decision for voluntarily leaving his job without just cause – which the Claimant successfully appealed to the General Division of the Social Security Tribunal (Tribunal). That appeal is not before the Appeal Division.

[7] I am allowing the Claimant's appeal on the question of his availability, but only in part.

[8] I accept that the General Division made an error of fact when it gave more weight to the Claimant's initial statement to the Commission. I say this because it did not consider his evidence and argument that he had not had an interpreter and that the Commission may have misunderstood him.

[9] I have made the decision that the General Division should have made, after taking this into account. I accept that the Claimant was available for work from September 28, 2021, until October 28, 2021.

Issues

[10] The issues in this appeal are:

a) Did the General Division act unfairly by producing two separate, and seemingly contradictory, decisions in one appeal?
b) Did the General Division act in a way that was procedurally unfair by failing to provide the General Division decision in a timely manner?
c) Did the General Division make an error of law in how it applied the Federal Court of Appeal decision in *Canada (Attorney General) v Whiffen*?[1]
d) Did the General Division make an important error of fact in how it found against the Claimant's credibility?

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.

[1] *Canada (Attorney General) v Whiffen,* A-1472-92.

d) The General Division based its decision on an important error of fact.[2]

Procedural fairness

– What does procedural fairness mean?

[12] 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.

[13] 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. This is procedural fairness.

– The General Division did not act in a way that was procedurally unfair

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

– Fairness of two separate decisions

[14] The Claimant argues that it was unfair of the General Division to decide in his favour in GE-23-1385, but then to decide against him in the present appeal.

[15] However, the two appeals do not consider the same question. In its original decision, the Commission disentitled the Claimant for a certain period, but it also disqualified him. Although they were in the same decision letter, they were different issues, with different consequences. The Commission explained both of these decisions to the Claimant.[3]

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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).
[3] See GD3-25.

[16] The Commission disentitled the Claimant based on its finding that the Claimant was not available for a certain period. This decision did not mean he could not qualify for any EI benefits. It meant only that he could not receive any benefits during the specified period of disentitlement.

[17] The Commission also disqualified the Claimant based on its finding that he had voluntarily left his job without just cause. Even if the Claimant had not been disentitled, he probably could not have received any benefits because of the disqualification. The disqualification meant that he could not use any of the hours of insurable employment (that he had accumulated prior to leaving his employment) for the purpose of qualifying for benefits.

[18] The General Division has jurisdiction to consider appeals from reconsideration decisions only.[4] The Commission apparently reconsidered each of the Commission's decisions separately. Likewise, the Claimant separately appealed the disqualification reconsideration decision.

[19] While the General Division held only one hearing and considered both appeals at the same time, this was for the Claimant's convenience. The General Division did not formally join the two appeals, and it issued separate decisions for each appeal.

[20] The Claimant has brought this appeal to the Appeal Division from the General Division decision on the issue of his disentitlement for non-availability.[5] The General Division decision followed from the Claimant's appeal of the reconsideration decision related to his disentitlement.[6]

[21] Neither the reconsideration file related to his disqualification is not before me, nor is the General Division decision on his disqualification. However, his representative says that he successfully appealed that decision to the General Division. I have no reason to doubt him.

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[4] See section 112 of the *Employment Insurance Act.*
[5] See GD3-49.
[6] See GD2-10.

[22] The Claimant has fully exercised his appeal rights. I do not see that the Claimant sought to join his two appeals, or that he has been prejudiced by the separate decisions of the two General Division appeals.

– **Delay in receiving the decision General Division decision**

[23] It is unfortunate that the Claimant did not receive the General Division decision in a timely manner. The Tribunal records show that it sent an email to him on September 5, 2023, at the email address that he provided in his Notice of Appeal. The email was meant to communicate the decision, but appears to have omitted to attach the decision. The Tribunal resent the General Division decision on February 13, 2024, at the request of the Claimant's representative.

[24] Because the Appeal Division accepted that the General Division decision was not communicated in the first email, it did not consider the appeal to be late and it was allowed to proceed. Therefore, there was no prejudice to the Claimant's appeal rights. He has not shown that the delay was procedurally unfair.

– **Summary on procedural fairness**

[25] 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.

Error of law

[26] The Claimant submits that the General Division made an error of law. He says that it relied on the decision in *Canada (Attorney General) v Whiffen* to support the notion that a claimant is presumptively unavailable if they seek employment in another province.[7]

[27] I disagree with the Claimant's interpretation of the General Division decision. In my view, the General Division upheld the disentitlement based on its finding that the

[7] *Canada (Attorney General) v Whiffen, A-474-97.*

Claimant did not look for work at all until he moved to Alberta. The General Division did not find that he was not unavailable because he was looking for work out-of-province.

[28] A plain reading of the General Division decision reveals that it cited *Whiffen* for the *general* proposition that the law requires it to consider the Claimant's attitude and conduct for the period of the disentitlement.[8]

[29] The Claimant may disagree with how the General Division evaluated the Claimant's attitude and conduct, but this does not suggest an error of law. If he disagrees with how the General Division applied settled law to the facts, this would be an argument that the General Division made an error of "mixed fact and law." The Appeal Division has no authority to review this kind of error.[9]

[30] Likewise, I cannot intervene just because the Claimant disagrees with how the General Division weighed the evidence. The General Division is the primary finder of fact. The Appeal Division cannot re-weigh or re-evaluate the evidence even if it would have seen things differently.[10]

Important error of fact

[31] The General Division makes an important error of fact where it bases its decision on a finding that ignores or misunderstands relevant evidence, or does not follow rationally from the evidence.[11]

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[8] See para 15 of the General Division decision and footnote 4.
[9] *Quadir v. Canada (Attorney General)*, 2018 FCA 21.
[10] See, for example: *Tracey v Canada (Attorney General)*, 2015 FC 1300; *Hideq v Canada (Attorney General)*, 2017 FC 439.
[11] I have tried to make this error more understandable. This ground of appeal is defined in section 58(1)(c) of the DESDA. The General Division will have made an error of fact where it, "based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it."

– **Assessment of credibility**

[32] The Claimant asserts that the General Division made an error of fact in how it assessed his credibility. He also argued that his statements to the Commission were affected by a language barrier.[12]

[33] According to the Commission's file notes, the Claimant told the Commission that he had not looked for work between September 28, 2021, and approximately January 7, 2022.[13] The Claimant said that this is not what he meant. When he testified to the General Division, he said that he was looking for work in Toronto while he considered his move to Alberta. He also said he did not have a record of earlier job applications because it was not until he moved to Alberta that he learned how to apply online.

[34] The General Division could not accept that both versions were true. It chose to give more weight to the Claimant's initial statements to the Commission than it gave to his testimony. If it was concerned about the inconsistency in the Claimant's testimony, it did not find against his credibility generally. In other words, the General Division did not say that it could not believe any of his evidence because of the inconsistency.

[35] When the General Division chose the Claimant's initial statement over his testimony, it did so because if found it implausible that the Claimant would be looking for work when he was considering a move and did not know where he would be living. It also rejected the Claimant's explanation for why his job search was not documented before January 28, 2022. It apparently drew an adverse inference because the Claimant did not explain why he had no earlier record of his job search when the Commission raised this issue with him.

[36] However, the General Division did not refer to, or consider, the Claimant's language barrier. The Claimant testified that there was a language barrier between himself and the Commission agent with whom he discussed his claim.[14] He said that he

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[12] See AD1-11.
[13] See GD-25.
[14] Listen to the audio recording of the General Division hearing at timestamp 42:35.

did not have an interpreter and may have chosen the wrong words.[15] The Claimant required an interpreter at both his General Division and Appeal Division hearings. In my view, it was evident that the Claimant had some difficulty expressing himself without the services of the interpreter.

[37] The Commission concedes that this is an important error of fact.

[38] I find that the General Division made an error of fact by ignoring evidence relevant to how it weighed the Claimant's evidence. It is the role of the General Division to make findings of credibility and to weigh evidence, but it cannot ignore relevant factors that might affect the weight it gives to the evidence.

[39] The General Division based its decision on a finding that the Claimant did not look for work until January 28, 2022. It chose to rely on the Claimant's statements to the Commission without an interpreter, in preference to his testimony at the hearing using an interpreter. The General Division did not consider whether, in light of the language barrier, the Claimant may have misunderstood the Commission's questions or that his responses may have been misunderstood.

Remedy

[40] 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.[16]

[41] The Claimant asked that the matter be returned to the General Division. The Commission recommended that I make the decision the General division should have made.

[42] I accept the Commission's recommendation. I appreciate that the Claimant and his representative are now saying they were unfamiliar with the process and that they would like the opportunity to provide additional evidence of his job search. However,

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[15] Listen to the audio recording of the General Division hearing at timestamp 45:10.
[16] See section 59(1) of the DESDA.

there is at least some evidence about his desire to return to work, his job search efforts, and any personal conditions he may have set. The record is sufficiently complete that I may make the decision. It would not be proper for me to return the appeal to give the Claimant an opportunity to strengthen his appeal.

Was the Claimant entitled to Employment Insurance benefits from September 28, 2021, to January 27, 2022?

[43] The Commission accepted that the Claimant's last day of work was September 28, 2021, but found that he was not available for work until after January 27, 2022.

[44] According to the Claimant's testimony, he took time off from his job because of a skin reaction to workplace chemicals, and other problems with painful safety equipment. When he gave his employer a doctor's note asking for reduced working days, the employer said it would eventually call him back.[17] After waiting for a call back for two or three weeks, the Claimant called his employer. The employer again said that it would call him, but it did not.[18] The Claimant said that he thought he still had a job, but he needed to work so he started looking for other work. He said he looked for work in Toronto before he went to Alberta.

[45] "Availability" is not defined in the *Employment Insurance Act* (EI Act), so the Federal Court of Appeal has had to supply its meaning. According to decisions such as *Faucher v Canada (Employment and Immigration Commission)* and others, the Claimant must prove his availability by satisfying three factors. [19] He must show that he had a desire to return to work as soon as a suitable job is available, that he expressed that desire through his job search efforts, and that he did not set personal conditions that unduly (or unreasonably) limited her ability to get back to work. These are known as the *Faucher* factors.

[17] See medical note at GD3-22.
[18] Listen to the audio recording of the General Division decision at timestamp 16:30.
[19] *Faucher v Canada (Employment and Immigration Commission)*, A-56–96 and A-57-96.

– **Desire to return to work**

[46] The General Division found that the Claimant had the desire to return to work, so he satisfied the first *Faucher* factor. I have no reason to disturb the General Division's findings on this factor.

[47] The General Division relied on the Claimant's evidence that he needed to support his wife and children and other relatives "back home," and that it was expensive to live in Toronto. In addition, the Claimant testified that he was waiting for his employer to call him back, but life was "hard," and that he needed to work. According to Canada Immigration documentation, the Claimant was in Canada on a work permit, without even temporary resident status.[20] It is likely that he was anxious to return to work in these circumstances.

[48] I accept that the Claimant had a desire to return to work as soon as a suitable job was available in the period from September 28, 2021, to January 27, 2022. He satisfies the first *Faucher* factor.

– **Job search efforts**

[49] I accept that the Claimant's job search efforts sufficiently demonstrate his desire to return to work for part of the period from September 28, 2021, to January 27, 2022, **but not the whole period**.

[50] I accept the Claimant's evidence that the Claimant looked for work before he went to Alberta—after a fashion. I accept that he asked some other people he knew if they were aware of any job opportunities, and I accept that he asked them to look out for opportunities on his behalf.

[51] I am aware that the Commission's records show that he initially told the Commission he had not looked for work in either Ontario or Alberta before

[20] See GD3-19.

approximately January 7, 2022.[21] However, he spoke to the Commission again on April 18, 2023. The notes of that conversation state the following:

> He stated that, while he didn't submit any job applications between the time he stopped working for X and January 28, 2022, he said that he was talking to friends, people at church, people in his community, asking them to look for jobs for him. He said he was not just "sitting around."

[52] This second statement was actually consistent with his testimony to the General Division. The Claimant did not have an interpreter when he spoke to the Commission, and he has some difficulty choosing the right words in English. In light of this, I accept that the Claimant meant the Commission to understand that he did not **apply** for jobs before he went to Alberta, but that he did ask some people he knew about job opportunities.

[53] I am not drawing an adverse inference from the fact that the Claimant did not elaborate on why his online job search efforts were only documented from January 28, 2022.

[54] The Commission's notes state that the agent "noted" (to the Claimant, presumably) that his job search shows that he did not start applying for jobs in Edmonton until January 28, 2022.[22] These notes do not state explicitly that the Claimant had no response to this.

[55] It would be understandable if the Claimant did not respond. I have accepted that he has limitations in English. It is also possible that he would not have known a reply was expected due to cultural differences in conversational style. It does not appear that the Commission posed an actual question to him.

[56] Even so, the fact remains that the Claimant did not document any particular jobs that he considered, or to which he applied, until he moved to Alberta. Nor did he claim that he actually applied for any jobs before arriving in Alberta. He had numerous

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[21] See GD3-25.
[22] See GD3-47.

opportunities to discuss other job search efforts in conversation with the Commission, but he never mentioned any job search efforts beyond letting friends and acquaintances know that he was looking. The Claimant did not mention if he reviewed online or newspaper advertisements, or job boards at Service Canada centres or private employment agencies, at X where he had worked, or anywhere else. He did not say that he dropped in on any prospective employer to ask about jobs.

[57] I cannot attribute all of this to his language barrier. I accept that he may have misunderstood certain nuances and fine distinctions in conversation with the Commission, or that he may always have had the vocabulary to express himself clearly. However, his imperfect English does not explain the fact that he has never mentioned any other job search efforts beyond his assertion that he networked with others he knew socially. There is nothing in the Commission's notes to indicate that the Claimant was having substantial problems understanding or being understood, or that he ever asked for an interpreter or objected to discussing his claim without one.

[58] Furthermore, the Claimant had an interpreter when he testified at the General Division, but he did not discuss any job search efforts beyond what may be found in the reconsideration file.

[59] The Claimant is required to prove his desire to work through job search efforts. I appreciate that he is relatively new to Canada. The copy of his work permit in the file was issued on November 21, 2020, so he may have been in Canada as little as nine months when he lost his job. I would not expect him to have mastered the Canadian job market or know everything about searching for work in Canada.

[60] At the same time, the Claimant was relatively passive about seeking out work opportunities. He has stated that he asked friends, and others in his church and community if they knew about any jobs. If he talked to very many people at all, one would expect that at least one of them might have pointed him to some of the usual tools or techniques that a jobseeker in Canada might use.

[61] I do not accept that the Claimant's efforts to find **another** job were sufficient to show that he was available for work prior to January 28, 2022. However, the Claimant also said that he was waiting for X to call him to return to his old job.

[62] According to his application for benefits, his last day of work was August 22, 2021. Elsewhere in the file, his last day is given as September 28, 2021, but I infer that this related to the Commission's understanding that he had never given the employer the medical note and just left his job voluntarily.[23] The Claimant did not object when the Commission treated him as having left his employment on September 28, 2021, but he has maintained that he gave the employer the note, and he has never agreed that he left voluntarily. There is no Record of Employment in the file.

[63] September 28, 2021, is just over three weeks past September 4, 2021, which is the date on the medical note that the Claimant said he gave the employer.[24] The Claimant said that he waited two or three weeks after he gave the employer the note to hear when he could come back to some kind of modified work or schedule. Then he called the employer back. This means that he likely called the employer back around September 28, 2021. He said that, when he spoke to X, it put him off again without any date on which he could expect a recall. Somewhere around this time, he understood he needed to look for something else.

[64] In the circumstances, I accept that it was reasonable for the Claimant to expect that he could have been called in to work on short notice. According to the Claimant he was waiting for the employer to figure out how it could accommodate him. He does not agree that he quit and there is no suggestion on the file that X fired him. Although he had started to ask around about other jobs while he was waiting, he still expected or hoped to be called in to work with X.[25]

[65] Because the Claimant's job status was uncertain, and he had a reasonable expectation of imminent recall to his job duties, I accept that it was reasonable for him to

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[23] See GD3-23; GD3-40.
[24] See GD3-22.
[25] GD3-47

limit his job search efforts to social networking for a period of time, while he waited for the employer to arrange his return to work. The Federal Court of Appeal has recognized that claimants may sometimes be afforded a reasonable opportunity to see if they will be recalled before having to look for alternate employment.[26]

[66] However, he could not wait for a callback indefinitely. The Claimant flew to Alberta on October 29, 2021, to scout out the possibility of relocating. He came back to Toronto on November 11, 2021, and then made the move to Alberta within a short time. Once there, he picked up his job search efforts as evidenced by his online search record.

[67] This suggests that the Claimant was already beginning preparations to move by October 29, 2021, and that he did not expect to return to his old job. By October 29, it is unlikely that he would have returned to his employer. Better job opportunities in Alberta were not the only reason he wanted to move. He also cited his intention to settle his family where the cost of living was lower.

[68] I accept that the Claimant's job search efforts were sufficient but only prior to October 29, 2021.

[69] The first evidence that the Claimant did anything beyond talking to people he knew (and waiting to be recalled to work), is the documentation of his online search. The earliest entry documents a January 28, 2022, application.

[70] Therefore, I find that the Claimant satisfies this *Faucher* factor up to and including October 28, 2021, but not during the period from October 29, 2021, to January 27, 2022.

– **Personal conditions**

[71] The final *Faucher* factor concerns whether the Claimant set personal conditions that unduly limited his labour market prospects.

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[26] *Page v Canada (Attorney General),* 2023 FCA 169 at paras 81-82.

[72] The Claimant did not set this kind of personal condition. The Claimant was initially expected to be recalled to a driving job. When I look at the kind of jobs that the Claimant was seeking and to which he was applying in Alberta, I see that many of them are for professional driving jobs. It is likely that whatever inquiries he was making about job opportunities in Toronto was about similar kinds of opportunities.

[73] The Claimant has status on a work permit only. His English is imperfect. His work experience in Canada was working as a commercial bus driver. I take notice that professional driving is a job classification with a large number of jobs.

[74] For the period in question, it would be reasonable for him to focus on professional driving. I do not think this would be an undue limit, given the other circumstances over which he has no control. However, I see from his job search documentation from Alberta, that he was not limiting himself exclusively to driving jobs after his move to Alberta. There was no positive evidence to suggest he was limiting the kind of work he would accept.

[75] The Claimant has satisfied the third *Faucher* factor.

– **Was the Claimant "available for work" within the meaning of the EI Act?**

[76] The Claimant was not available for work in the period from October 29, 2021, to January 27, 2022. He had the desire to work during this period and he did not unduly limit himself. However, the nature and extent of his job search efforts were insufficient. I find that those efforts do not express his desire to return to work as soon as a job is available.

[77] He satisfies all of the *Faucher* factors prior to October 29, 2021, so I find that he was available in this period.

Conclusion

[78] I am allowing the appeal in part. The General Division made an error of fact, which I have corrected in this decision. I have allowed that the Claimant was available for part of the period in question but not the whole period.

[79] The Claimant was available for work until October 28, 2021, and should be entitled to the benefits he would have received had he been found available. He is not entitled to benefits from October 29, 2021, to January 27, 2021, because he was not available for work.

Stephen Bergen
Member, Appeal Division