



Citation: *Canada Employment Insurance Commission v JS*, 2025 SST 64

Social Security Tribunal of Canada Appeal Division

Decision

Appellant: Canada Employment Insurance Commission
Representative: Nikkia Janssen

Respondent: J. S.

Decision under appeal: General Division decision dated November 7, 2024
(GE-24-3523)

Tribunal member: Glenn Betteridge

Type of hearing: Videoconference

Hearing date: January 28, 2025

Hearing participants: Appellant's representative
Respondent

Decision date: January 30, 2025

File number: AD-24-803

Decision

[1] The Canada Employment Insurance Commission's (Commission) appeal is allowed.

[2] The General Division made an important factual error. I have remedied (fixed) the error by making the decision.

[3] I have decided J. S. wasn't available for work from July 23 to September 5, 2024. This means she can't get benefits from June 30 to September 5, 2024.

Overview

[4] J. S. is the Claimant. She left her job in late June 2024 and applied for Employment Insurance (EI) regular benefits.

[5] She left her job to pack her home and accompany her spouse to Saskatchewan. They left Newfoundland by car at the end of August 2024. They arrived in Saskatchewan on September 5, 2024.

[6] To get regular benefits, a person has to be available for work. This means they have to be looking for work and ready to take a job each working day they want to get benefits.¹ The Claimant admitted she didn't look for work until the Commission told her she had to do that. This was near the end of July 2024.

[7] The Commission decided the Claimant wasn't entitled to benefits from June 30 to September 5, 2024.

[8] The General Division allowed the Claimant's appeal, in part. It decided she proved she was available for work from July 23, 2024. So, she was entitled to benefits starting then.

¹ See section 18(1)(a) and 50(8) of the *Employment Insurance Act*.

[9] The Commission argues the General Division made a legal error and factual errors.² It says I should decide the Claimant wasn't available from July 23 to September 5, 2024. The Claimant says after the Commission told her she should be looking for work, that's what she did. And since then she has been actively looking for work. She did everything she could.

Issues

[10] The Commission agrees with the General Division's finding it didn't use section 50(8) of the *Employment Insurance Act* (EI Act) to deny the Claimant benefits.³ The Claimant agrees she didn't look for work—so she wasn't entitled to benefits—from June 30 to July 23, 2024. And at the Appeal Division hearing, the Commission conceded the Claimant was available for work starting September 6, 2024.

[11] This means I have to decide three issues.

- Did the General Division make an important factual error by ignoring evidence the Claimant was only willing to start a job from September 6, 2024?
- If the General Division made that error, should I fix it by making the decision it should have made?
- Has the Claimant shown she was available for work under section 18(1)(a) of the EI Act from July 23 to September 5, 2024?

Analysis

[12] The Appeal Division's role is different than the General Division's role. The law lets me step in and fix a General Division decision if it used an unfair process, or made a legal error, a jurisdictional error, or an important factual error.⁴

² See AD3.

³ When I asked about this issue at the Appeal Division hearing, this is what the Commission's representative said.

⁴ Section 58(1) of the *Department of Employment and Social Development Act* (DESD Act) calls these the "grounds of appeal." I call them errors. Section 59(1) of the DESD Act gives the Appeal Division the power to fix General Division errors.

[13] Section 18(1)(a) of the EI Act says that to get regular benefits a person has to be available for work and unable to find a suitable job. A person has to show three things to prove they're available. These are called the *Faucher* factors.

- They want to get back to work as soon as possible and will take a suitable job when they get an offer.
- They're actively looking for a suitable job on an ongoing basis.
- They haven't set personal conditions that unduly limit their chances of returning to work.

[14] When it applied the *Faucher* factors, the General Division had to consider the Claimant's attitude and conduct.⁵ It also had to consider the Claimant's availability for every working day (meaning Monday to Friday) she wanted to get benefits.⁶

[15] The General Division decided the Claimant met all three *Faucher* factors (paragraphs 15, 17, 18, 24, and 25). And this meant she was available for work, and not disentitled to benefits, starting July 23, 2024 (paragraphs 2, 33, and 34).

The General Division ignored evidence the Claimant was unwilling to start work until September 6, 2024

[16] The General Division makes an important factual error if it bases its decision on a factual finding it made by ignoring or misunderstanding relevant evidence.⁷ In other words, some evidence goes squarely against or doesn't support a factual finding the General Division made to reach its decision.

⁵ See *Canada (Attorney General) v Whiffen*, A-1472-92; and *Carpentier v Canada (Attorney General)*, A-474-97.

⁶ See section 18(1)(a) of the *Employment Insurance Act* (EI Act) and section 32 of the *Employment Insurance Regulations*.

⁷ Section 58(1)(c) of the DESD Act says it's a ground of appeal where the General Division based its decision on an erroneous finding of fact it made in a perverse or capricious manner or without regard for the material before it. I have described this ground of appeal using plain language, based on the words in the Act and the cases that have interpreted the Act.

[17] The General Division considered under the first *Faucher* factor the date the Claimant arrived in Saskatchewan. “Although she admits it might have been challenging for her to start a new job before arriving in her new place of residence on September 6, 2024, she says she was willing to start the very next day” (paragraph 16). It also found she had job offers she answered before September 5, 2024 (paragraph 17). The General Division concluded she wanted to go back to work as soon as a suitable job was available (paragraphs 15 and 17).

[18] The Commission argues the evidence doesn’t support the General Division’s finding.⁸ The Claimant didn’t say “challenging” in her testimony. She said she wrote on her resume she would be arriving in Saskatchewan in the beginning of September and was only available for an interview by phone before then.⁹

[19] I agree with the Commission.

[20] The uncontradicted evidence before the General Division shows the Claimant wasn’t willing to start a job in Saskatchewan before September 6, 2024.¹⁰ She was focused on preparing for the move and moving. She told prospective employers she wasn’t available to start work until the beginning of September 2024. She was available for a phone or online interview. She didn’t arrive in Saskatchewan until September 5, 2024. She said she was ready to go to work starting September 6, 2024.

[21] This evidence was highly relevant to the first and third *Faucher* factors, including the Claimant’s attitude and conduct. Yet the General Division misunderstood or ignored this evidence when it considered the first *Faucher* factor. And it ignored this evidence when it considered the third *Faucher* factor.

[22] Because it misunderstood and ignored this evidence, the General Division was able to find the Claimant met all three *Faucher* factors (paragraph 33). Then it used these findings to decide she was available for work from July 23, 2024 (paragraphs 2

⁸ See AD3-5.

⁹ The Commission cites the General Division hearing recording at 7:35 to 7:50.

¹⁰ See GD2-4, GD3-20, GD3-23. And listen to the General Division hearing recording at 7:31 and 9:40.

and 34). In other words, the General Division based its decision on a mistake about the evidence. So, its decision isn't supported by the evidence.

[23] This means the General Division made an important factual error.

Fixing the General Division's error by making the decision it should have made

[24] The Claimant and the Commission agreed that I should make the decision if I found the General Division made an error.¹¹ That is what I will do.

[25] The Claimant and the Commission both had a full and fair opportunity to present their evidence and arguments to the General Division. And at the Appeal Division hearing I allowed each party to summarize their argument about the Claimant's availability from July 23 to September 5, 2024.

– The Claimant unduly limited her chances of returning to work, and wasn't willing to start work until September 6, 2024

[26] I have to decide whether the Claimant has shown she met all three *Faucher* factors from July 23 to September 5, 2024.

[27] The Claimant didn't meet the first *Faucher* factor.

[28] The evidence shows me the Claimant's primary focus from when she left work until she arrived in Saskatchewan was on packing and moving. It wasn't on getting back to work as soon as a suitable job was offered. She was looking for work that started at the beginning of September 2024.

[29] I adopt the General Division's finding the Claimant made enough efforts to find a suitable job (paragraphs 18 and 22 to 24). This is the second *Faucher* factor. The Commission didn't challenge that finding. And the relevant evidence supports that finding.

¹¹ Section 59(1) of the DESD Act says this is a remedy the Appeal Division can use.

[30] The Claimant didn't meet the third *Faucher* factor.

[31] She set a personal condition that unduly limited her chances of going back to work. She was waiting to arrive in Saskatchewan to go back to work. Even if her job search landed her a suitable job before September 6, 2024, she wasn't going to accept that job unless she could start after September 5, 2024. There is no evidence she was willing to go to Saskatchewan to start a job before that.

– I have to follow the Court's decision in the *Cloutier* case

[32] My decision follows the Federal Court of Appeal's decision in the *Cloutier* case.¹² That case was also about availability under section 18(1)(a) of the EI Act.

[33] Availability is a question of fact or about applying settled law to the facts.¹³ The law about availability under section 18(1)(1)(a) is settled. This Tribunal has to use the *Faucher* factors.

[34] The relevant facts in *Cloutier* and this appeal are the same in all important respects. In *Cloutier* the claimant also left work to follow a spouse who was moving to accept work. And in both cases the claimant wasn't going to take a new job until after she moved. The claimants' primary focus was on preparing for the move and moving—not returning to work as soon as possible.

[35] Because the law and the relevant facts are the same, I have to follow the *Cloutier* decision.

[36] In *Cloutier*, the Court rejected the Umpire's finding that the claimant was available. (Umpires decided second level EI appeals before this Tribunal was created.) The Umpire reasoned that leaving a job to accompany a spouse includes a period when a claimant has to make necessary moving arrangements.

[37] The Court said the Umpires reasoning confused the law about disqualification for voluntary leaving under section 29(c) of the EI Act with the law about disentitlement

¹² See *Canada (Attorney General) v Cloutier*, 2005 FCA 73.

¹³ See *Page v Canada (Attorney General)*, 2023 FCA 169.

under section 18(1)(a). The Court decided the Umpire should have assessed the claimant's availability for each working day in her benefit period—regardless of whether the claimant was busy arranging the family move.

– **Summary of my decision about the Claimant's availability**

[38] The Claimant had to meet all three *Faucher* factors to prove she was available for work. She hasn't shown she meets the first and third *Faucher* factors from July 23 to September 5, 2024. This means she wasn't available for work and is disentitled from getting benefits for that time.

Conclusion

[39] The General Division made an important factual error.

[40] To fix that error, I made the decision the General Division should have made.

[41] The Claimant admits she wasn't looking for work from June 30 up to July 23, 2024. I decided she wasn't available for work from July 23 to September 5, 2024. This means she can't get EI benefits from June 30 to September 5, 2024.

Glenn Betteridge
Member, Appeal Division