



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *G. M. v Canada Employment Insurance Commission*, 2020 SST 749

Tribunal File Number: AD-20-681

BETWEEN:

G. M.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Melanie Petrunia

DATE OF DECISION: September 1, 2020

DECISION AND REASONS

DECISION

[1] The appeal is allowed and the matter is referred back to the General Division for redetermination.

OVERVIEW

[2] The Appellant, G. M. (Claimant), was laid off from his employment on February 14, 2020. He had also been self-employed in an online marketing business while working full time. The Respondent, the Canada Employment Insurance Commission (Commission) decided that the Claimant was disentitled from receiving benefits because he failed to prove he was unemployed.

[3] The General Division dismissed the Claimant's appeal, finding that he did not rebut the presumption that he was working full weeks in self-employment. The Claimant is appealing the General Division's decision. He argues that the General Division made an error of jurisdiction. The Commission acknowledges that the General Division based its decision on erroneous findings of fact and failed to consider all relevant facts. The Commission also acknowledges that the General Division erred in law when improperly assessing the facts under subsection 30(3) of the *Employment Insurance Regulations* (Regulations).

[4] The Commission requests that the appeal be allowed and the matter returned to the General Division for redetermination. The Claimant is enduring significant financial hardship and stress and asks that the appeal be allowed and a decision rendered in his favour.

PRELIMINARY MATTERS

[5] With his application for leave to appeal, the Claimant included an email from a former employee which was not previously provided to the Commission or the Tribunal. The Claimant has also submitted to the Tribunal a medical report, bank and credit card statements, and a document to show participation in a career transition program.¹

¹ AD3, AD6, AD7, AD8 and AD9

[6] Generally, the Appeal Division does not consider new evidence on appeal. There are some exceptions to that rule but none of them apply here.² The exceptions apply when the new information provides general background, is required to prove procedural issues or demonstrates that there was no evidence before the decision maker. The new evidence provided by the Claimant does not fall into any of these categories.

[7] I will not consider the new evidence that the Claimant has provided in deciding his appeal.

ISSUES

[8] The issues are:

Issue 1: Did the General Division err by basing its decision on a finding of fact made without regard for the material before it?

Issue 2: Did the General Division commit an error of law by failing to explain the reasons for not considering the Appellant's evidence of job search efforts?

ANALYSIS

[9] Under section 58(1) of the *Department of Employment and Social Development Act* (DESDA), the Appeal Division can intervene in the General Division's decision in very limited circumstances. The section does not give the Appeal Division any jurisdiction to conduct any reassessments.³ The Appeal Division can intervene only if there has been a breach of natural justice, an error of law or if it based its decision on an error of fact made in a perverse or capricious manner or without regard for the material before it.

Issue 1: Did the General Division err by basing its decision on a finding of fact made without regard for the material before it?

[10] Yes, I find that the General Division erred by basing its decision on a finding of fact made without regard for the material before it.

² *Parchment v. Canada (Attorney General)*, 2017 FC 354.

³ *Maung v Canada (Attorney General)*, 2020 FC 74, at para. 10.

[11] The Claimant stated in his Notice of Appeal to the General Division that he is actively looking for work. He also attached communication from Suncor and WestJet confirming his application and stated that he interviewed with WestJet and applied to Suncor and Shell.⁴ The Claimant indicated on his application for benefits that he was looking to work 30 hours or more per week.⁵ He also testified that he is looking for full-time employment and had attended three interviews, registered with job search agencies and is attending career transition counselling.

[12] As the Commission states in their submissions, the General Division had to consider six circumstances in assessing whether the claimant's employment or engagement in the operation of a business is of a minor extent. These six circumstances are set out in section 30(3) of the *Regulations*. They are:

- (a) The time spent;
- (b) The nature and amount of the capital and resources invested;
- (c) The financial success or failure of the employment or business;
- (d) The continuity of the employment or business;
- (e) The nature of the employment or business; and
- (f) The claimant's intention and willingness to seek and immediately accept alternate employment.

[13] With respect to these criteria, the General Division considered the Claimant's intention and willingness to seek and immediately accept alternate employment. The member found that the Claimant initially indicated that he was looking for part-time work as well as working for X and then testified he was seeking full time employment and was only involved with X as a transition program participant. The member then refers to "paragraph 9 of the decision", which consists of a quote from a Federal Court of Appeal decision stating that more credibility is given to a claimant's initial statements.⁶ The member then finds that there is no other evidence of any

⁴ GD2

⁵ GD3-16

⁶ The member cites *Canada (AG) v. Gagné*, 2011 FCA 161 however, the statement quoted does not appear in this decision.

job search activity that could be considered as an on-going effort to obtain full-time employment.⁷

[14] The General Division did not consider the job search evidence included with the Claimant's Notice of Appeal or his testimony that he was looking for full-time employment. The General Division failed to objectively consider all of the Claimant's evidence in determining his intention and willingness to seek and immediately accept alternate employment. Accordingly, the General Division based its decision that the Claimant's engagement in his business was not of a minor extent on an erroneous finding of fact made without regard for the material before it.

Issue 2: Did the General Division commit an error of law by failing to explain the reasons for not considering the Appellant's evidence of job search efforts?

[15] As discussed above, the General Division failed to address evidence presented by the Claimant of his job search efforts. If the General Division member considered the evidence but dismissed it, or assigned it little or no weight, it must explain its reasons for doing so. The General Division cannot ignore contradictory evidence.⁸ The Commission submits that, in failing to address this evidence, the General Division did not consider and weigh all of the evidence that was before it.

[16] I agree with the Commission. I find that the General Division made erroneous findings of fact and failed to address contradictory evidence. The General Division failed to properly assess the six circumstances outlined above. The General Division states in its decision:

The Appellant was not seeking full time employment. Consequently, he has not rebutted the presumption that he is working a full working week because he does not meet the exception under subsection 30(2) of the Regulations.

[17] The Federal Court of Appeal has found that the test in subsection 30(2) of the Regulations requires objective consideration of whether the level of self-employment is sufficient to allow a claimant to normally rely on that self-employment as a principal means of

⁷ General Division decision at paragraph 13(f).

⁸ *Bellefleur v. Canada*, 2008 FCA 13 at para 3.

livelihood, when considered in light of the six factors outlined above.⁹ The General Division erred in law in failing to consider this test.

REMEDY

[18] The Commission submits that the General Division’s assessment of the facts in this matter was inadequate and led to an error of law. For this reason, and to provide the Claimant with an opportunity to provide additional evidence to the Tribunal to clarify his self-employment situation and job search efforts, the matter should be returned to the General Division for reconsideration. The Claimant is experiencing significant financial stress and anxiety and wishes for the matter to be resolved as soon as possible.

[19] I am sympathetic to the Claimant’s desire to have the matter decided quickly. However, there is unresolved contradictory evidence in the hearing file as a result of the inadequate assessment of the facts by the General Division. Given this incomplete record and the additional information the Claimant has provided and may wish to rely on, I agree with the Commission that the matter should be returned to the General Division for redetermination.

CONCLUSION

[20] The appeal is allowed and the matter is returned to the General Division for redetermination.

Melanie Petrunia
Member, Appeal Division

HEARD ON:	August 25, 2020
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	G. M., Appellant M. Allen, Representative for the Respondent

⁹ *Martens v. Canada*, 2008 FCA 240 at para 32.

