



[TRANSLATION]

Citation: *AP v Canada Employment Insurance Commission*, 2021 SST 501

Social Security Tribunal of Canada Appeal Division

Decision

Appellant: A. P.
Representative: William Gogas

Respondent: Canada Employment Insurance Commission
Representative: Josée Lachance

Decision under appeal: General Division decision dated
June 9, 2021 (GE-21-708)

Tribunal member: Pierre Lafontaine

Type of hearing: Videoconference
Hearing date: September 16, 2021
Hearing participants: Appellant
Appellant's representative

Decision date: September 21, 2021
File number: AD-21-222

Decision

[1] The appeal is allowed. The file returns to the General Division for reconsideration.

Overview

[2] The Respondent, the Canada Employment Insurance Commission (Commission), decided that the Appellant (Claimant) was not entitled to Employment Insurance (EI) regular benefits as of September 28, 2020, because she was taking unauthorized training and was not available for work.

[3] The General Division found that the Claimant had not made significant efforts to find a job during her studies. It also found that the Claimant was limiting her chances of finding a job by prioritizing her studies. The General Division found that the Claimant was available for work only after her two sessions had ended, that is, after May 10, 2021.

[4] The Claimant was granted leave to appeal the General Division decision. She argues that the General Division made an error of fact or law.

[5] I have to decide whether the General Division made an error in finding that the Claimant had failed to rebut the presumption that a person enrolled in a full-time training course is not available for work.

[6] I am allowing the Claimant's appeal. The file returns to the General Division for reconsideration.

Issue

[7] Did the General Division make an error in finding that the Claimant had failed to rebut the presumption that a person enrolled in a full-time training course is not available for work?

ANALYSIS

Appeal Division's mandate

[8] The Federal Court of Appeal has established that the Appeal Division's mandate is conferred to it by sections 55 to 69 of the *Department of Employment and Social Development Act*.¹

[9] The Appeal Division acts as an administrative appeal tribunal for decisions made by the General Division and does not exercise a superintending power similar to that exercised by a higher court.

[10] Therefore, unless the General Division failed to observe a principle of natural justice, made an error of law, or 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, I must dismiss the appeal.

Preliminary remarks

[11] In support of her appeal, the Claimant filed evidence that was not before the General Division. It is well-established case law that the Appeal Division does not consider new evidence because its powers are limited by the law.² Therefore, my decision does not consider the new evidence filed in support of the Claimant's appeal.

[12] It is also appropriate to point out that, given the confusion created by my calendar over the time of the hearing, the hearing took place without the Commission.

¹ *Canada (Attorney General) v Jean*, 2015 FCA 242; *Maunder v Canada (Attorney General)*, 2015 FCA 274.

² *LL v Canada Employment Insurance Commission*, 2019 SST 1342; *SD v Canada Employment Insurance Commission*, 2019 SST 196; *JH v Canada Employment Insurance Commission*, 2019 SST 441.

[13] I gave the Commission the opportunity to continue the hearing on a new date. The Commission chose to refer me to the written submissions it had filed to make the final decision.³

Did the General Division make an error in finding that the Claimant had failed to rebut the presumption that a person enrolled in a full-time training course is not available for work?

[14] The Claimant submits that the General Division did not consider that the classes were by videoconference, recorded, and posted online and that, as a result, she did not have to physically attend at the specified time.

[15] According to the Claimant, this means that she established before the General Division that there were exceptional circumstances that allowed her to work and take her training. So, she was available for work within the meaning of section 18(1)(a) of the *Employment Insurance Act* despite attending university full time.

[16] According to the Commission, the General Division is presumed to be aware of the evidence that is before it. This means that it is not required to refer to each and every piece of evidence in its decision. The Commission argues that the General Division's finding is based on the fact that the Claimant was taking full-time training and that her participation in her classes prevented her from going back to work during her two full-time sessions.

[17] As the General Division noted, taking a full-time training course creates a strong presumption that the person taking the course is not available for work. However, that presumption may be rebutted by evidence of "exceptional circumstances."

[18] Since the burden of proving "exceptional circumstances" is on the Claimant, the General Division could not ignore the Claimant's evidence that was precisely meant to prove that such circumstances existed.

³ AD5-1.

[19] In an interview with the Commission, the Claimant said that, since the pandemic, her classes had been distance learning and recorded. She did not have to attend her classes according to the established schedule, since she could watch the videos any time after the classes.⁴

[20] At the hearing, the Claimant repeated that she was not required to attend her classes according to the established schedule, since she could watch the videos any time after the classes.

[21] In its analysis, the General Division did not consider whether the classes were by videoconference, recorded, and posted online, and, if so, whether it affected the Claimant's availability for work.

[22] The General Division dismissed the appeal without addressing that and, as a result, did not make a finding about whether it was enough to rebut the presumption of non-availability.

[23] I find that this was a question of material fact. In my view, it was the General Division's responsibility to say, at least briefly, why it rejected a crucial part of the Claimant's evidence.

[24] So, this involves an error of law that justifies my intervention.⁵

Remedy

[25] I listened to the recording of the General Division hearing.

[26] Despite the Claimant's statement to the Commission and her testimony at the hearing, the General Division did not consider the issue of the classes that were by videoconference, recorded, and posted online, and whether this affected the Claimant's availability for work. I am therefore of the view that the Claimant

⁴ GD3-37.

⁵ *Oberde Bellefleur OP Clinique dentaire O. Bellefleur v Canada (Attorney General)*, 2008 FCA 13; *Parks v Canada (Attorney General)*, [1998] FCJ No 770 (QL).

did not have the opportunity to fully present her case. In these circumstances, I have no choice but to return the file to the General Division for reconsideration.

Conclusion

[27] The Claimant's appeal is allowed. The file returns to the General Division for reconsideration.

Pierre Lafontaine
Member, Appeal Division