Citation : *HS v Canada Employment Insurance Commission*, 2022 SST 92

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	H. S.
Representative:	Joel Yinger
Respondent:	Canada Employment Insurance Commission
Representative:	Gilles-Luc Bélanger

Decision under appeal:	General Division decision dated September 12, 2021 (GE-21-1150)

Tribunal member:	Melanie Petrunia
Type of hearing:	Videoconference
Hearing date:	January 17, 2022
Hearing participants:	Appellant Appellant's representative Respondent's representative
Decision date:	February 21, 2022
File number:	AD-21-338

Decision

[1] The appeal is allowed. The Claimant has proven that she was available for work as of April 5, 2021.

Overview

[2] The Appellant, H. S. (Claimant), made a request to convert Employment Insurance (EI) sickness benefits to regular benefits. The Claimant was enrolled in a university program at the time. The Commission decided that the Claimant was disentitled from receiving benefits because she was not available for work.

[3] The Commission decided that the Claimant was presumed to not be available because she was enrolled in a full time university program. It argued that she had a personal restriction that unduly limited her ability to return to the labour force as she was only willing to accept part-time work outside her course schedule.

[4] The Claimant appealed this decision to the Tribunal's General Division. The General Division found that the Claimant rebutted the presumption that she was not available for work because she was enrolled in university full-time. However, the General Division also found that the Claimant did not show that she was available for work because she did not make sufficient efforts to find suitable employment.

[5] The Claimant now appeals the General Division decision to the Appeal Division. She argues that the General Division made errors of fact in its decision, exceeded its jurisdiction and violated natural justice and procedural fairness.

[6] I have decided that the General Division based its decision on an erroneous finding of fact when it failed to consider all of the Claimant's job search activities. The Commission acknowledges that the General Division based its decision on a factual error. It requests that the appeal be allowed and the matter be returned to the General Division for reconsideration. The Claimant would like me to make the decision that the General Division should have made and allow the appeal.

[7] I have decided to give the decision that the General Division should have given. The Claimant has proven her availability for work from April 5, 2021.

Issues

[8] I have focused on the following issues:

a) Did the General Division base its decision on an erroneous finding of fact made when it failed to consider all of the Claimant's job search activities?

b) If so, how should the error be fixed?

c) Has the Claimant proven that she was available for work from April 5, 2021?

Analysis

[9] I can intervene in this case only if the General Division made a relevant error. So, I have to consider whether the General Division:[1]

- failed to provide a fair process;
- failed to decide an issue that it should have decided, or decided an issue that it should not have decided;
- misinterpreted or misapplied the law; or
- based its decision on an important mistake about the facts of the case.

Did the General Division base its decision on an erroneous finding of fact when it failed to consider all of the Claimant's job search activities?

[10] To be considered available for work, a claimant must show that she is capable of, and available for work and unable to obtain suitable employment.[2]

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[1] The relevant errors, formally known as "grounds of appeal," are listed under section 58(1) of the *Department of Employment and Social Development Act* (DESD Act).
[2] Section 18(1) (a) of the *Employment Insurance Act* (EI Act).

[11] Availability must be determined by analyzing three factors:

> (1) the desire to return to the labour market as soon as a suitable job is offered,
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> (2) the expression of that desire through efforts to find a suitable job, and
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> (3) not setting personal conditions that might unduly limit the chances of returning to the labour market.[3]

[12] The General Division found that the Claimant did not have a desire to return to the labour market as soon as a suitable job was offered because she did not apply to enough jobs, or to jobs in the fields in which she had the most experience.[4] The General Division also relied on these reasons in finding that the Claimant did not make enough efforts to find a suitable job.[5]

[13] The Claimant says that the General Division made an erroneous finding of fact when it found that she was not willing to return to work as soon as the first job was available. She claims that this finding was made by the General Division without regard to the material before it. The Claimant argues that the General Division failed to take into consideration the Claimant's health considerations or the impact of Covid-19 related disruptions to the restaurant industry.

[14] The Commission agrees that the General Division made a factual error when it decided that the Claimant did not apply for jobs serving or cleaning. It submits that these areas were directly impacted by the pandemic. The Commission argues that the General Division contradicted its own finding that jobs in these fields were limited by basing its decision on her lack of applications.

[15] The Commission also submits that the General Division based its decision on an erroneous finding of fact made without regard to the material before it in failing to take into consideration all of the Claimant's job search efforts. It argues that the General

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[3] *Faucher v Canada (Employment and Immigration Commission)*, A-56-96.
[4] General Division decision at para 58.
[5] General Division decision at para 62.

Division erred by failing to explain why it dismissed or assigned little weight to the Claimant's other job search activities, submitted in a post-hearing document.

[16] I agree with the parties that the General Division based its decision on an important error of fact. In its decision, the General Division found that the Claimant did not make sufficient efforts to find a suitable job, noting that she should have applied jobs as a server or cleaner.[6]

[17] The General Division found that the Claimant's job search efforts did not show a desire to return to the workforce as soon as a suitable job was available. It found that, if the Claimant had a desire to return to the workforce as soon as possible, she would have applied for jobs as a server because she had recent experience in the service industry.[7]

[18] The Claimant gave evidence that most restaurants were either closed or not allowing dining-in, which meant there was limited options in that industry. The General Division found that the pandemic had reduced the number of jobs that were available to apply to but, despite this, the Claimant had not applied to enough jobs.[8] It specifically noted that the Claimant did not apply to jobs serving or cleaning. The General Division failed to take into consideration the Claimant's testimony that many places of business were closed down and that the restaurant industry was particularly effected by the pandemic.

[19] I find that the General Division based its decision on an important factual error made without regard for the material before it when it decided that she should have applied for jobs serving and cleaning.

[20] The General Division accepted the Claimant's records of her job search activities submitted after the hearing.[9] I agree with the Commission that the General Division failed to explain why it dismissed or assigned little weight to the other job search

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[6] General Division decision at paras 58 and 62.
[7] General Division decision at para 57.
[8] General Division decision at para 57.
[9] GD7

activities outlined in the post-hearing document. The various job search activities that the Claimant engaged in are relevant to the second factor of the legal test and should have been considered when analyzing the Claimant's efforts to find a suitable job.

[21] I have found that the General Division based its decision on an important factual error. I do not need to consider the other grounds raised by the Claimant.

Remedy

[22] The Commission argues that I should allow the appeal and return the matter to the General Division for reconsideration. The Claimant would like me to make the decision that the General Division should have made and allow the appeal. The Claimant says that the record is complete and there is no need to have another hearing that the General Division.

[23] At the hearing, the Commission's representative stated that, if I find that the record is complete, the evidence supports that the Claimant was available for work from April 5, 2021. I agree.

[24] The Claimant had an opportunity to fully present her case before the General Division and the record is complete. I find that this is an appropriate case for me to make the decision that the General Division should have made.

The Claimant has shown that she was available for work

[25] The Claimant's evidence shows that she had a desire to return to the labour market as soon as a suitable was offered. Her ability to apply for jobs in the restaurant industry was limited by restrictions imposed by the pandemic. The Claimant's post-hearing submissions to the General Division outline her job search activities beginning April 5, 2021. This document shows that the Claimant made sufficient efforts to find a suitable job.

[26] The Claimant has shown that she was available for work as of April 5, 2021.

Conclusion

[27] The appeal is allowed. The Claimant was available for work as of April 5, 2021.

Melanie Petrunia
Member, Appeal Division