[TRANSLATION]

Citation: *Canada Employment Insurance Commission v SL*, 2022 SST 556

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	Canada Employment Insurance Commission
Representative:	Jessica Grant
Respondent:	S. L.
Representative:	Anne-Marie Laprise

Decision under appeal:	General Division decision dated November 9, 2021 (GE-21-1682)

Tribunal member:	Jude Samson
Type of hearing:	Teleconference
Hearing date:	May 12, 2022
Hearing participants:	Appellant's representative Respondent's representative
Decision date:	June 27, 2022
File number:	AD-21-410

Decision

[1] The appeal is allowed in part. I find that the Claimant:

- isn't entitled to Employment Insurance (EI) benefits from October 26, 2020, to December 15, 2020
- is entitled to EI benefits from December 16, 2020, to January 17, 2021

Overview

[2] S. L. is the Claimant in this case. He is studying full-time at CEGEP. He is also honest and hard-working but seems to have fallen between the cracks of two government programs meant to help people through the COVID-19 pandemic.

[3] The Claimant says that he was hurt by the delay in processing his claim for EI regular benefits. The delay resulted in a large debt and prevented him from applying for the Canada Recovery Benefit (CRB). He argues that he should not have to pay back this debt of roughly $5,000, which has caused him and his family a great deal of stress.

[4] The Commission, on the other hand, says that the Claimant has to pay back the EI benefits he received from October 26, 2020, to December 27, 2020. The Commission argues that the Claimant isn't entitled to those benefits, since he wasn't available for work because he was in school full-time. The Commission points out that a change in the law involved modifying its operational approach during the pandemic.

[5] The General Division allowed the Claimant's appeal. Despite his being a full-time student and the presumption of non-availability that applies in that situation, the General Division decided that the Claimant was available for work. So, he was entitled to the benefits he had received.

[6] The Commission is now appealing the General Division decision to the Appeal Division. It argues that the decision is based on errors of law.

[7] I find that the General Division made an error of law in how it assessed the Claimant's availability. This allows me to give the decision the General Division should have given. I find that the Claimant wasn't entitled to EI benefits while in school.

Issues

[8] I have to decide the following issues:

a) Can I consider all of the Commission's submissions and new evidence?

b) Did the General Division make an error of law in how it considered the COVID-19 pandemic when it assessed the Claimant's availability?

c) If so, what is the best way to fix the General Division's error?

d) Was the Claimant available for work?

e) Can the Tribunal write off the Claimant's debt?

Analysis

I won't consider some of the Commission's documents

[9] To begin with, I have to decide whether I will consider some of the Commission's documents. These documents raise two main concerns:

- procedural fairness
- the general rule that the Appeal Division doesn't consider new evidence

[10] First, the parties have to submit their documents within a certain time frame. This promotes procedural fairness by giving the opposing parties the opportunity to look at and comment on those documents.

[11] Second, the Appeal Division's limited role normally prevents me from considering new evidence.[1] New evidence is evidence that the General Division didn't have in front of it when it made its decision.

[12] The law says that I must focus on whether the General Division made any of the relevant errors listed in the law.[2] And that assessment is usually based on the materials that the General Division had in front of it. I can't take a fresh look at the case and come to my own conclusions based on more recent and stronger evidence.

[13] There are exceptions to the general rule against considering new evidence.[3] For example, I can consider new evidence that provides general background information only or that describes how the General Division might have acted unfairly.

– I have considered George Rae's affidavit

[14] I accept the Commission's argument that George Rae's affidavit provides general background information that might assist me in understanding some of the changes that were made to the law because of the pandemic. But his affidavit doesn't add new evidence on the substantive issue, namely the Claimant's availability.

– I won't consider Deanne Field's affidavit and some of the Commission's post-hearing submissions

[15] At the hearing, I asked the Commission about the interpretation of section 153.161(2) of the *Employment Insurance Act* (EI Act). The Commission asked for more time to answer my questions in writing. I allowed more time despite the Claimant's objections.

[16] In the interests of fairness, I also gave the Claimant a few days to respond to any submissions the Commission might make.

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[1] The Appeal Division's role is mostly defined by sections 58 and 59 of the *Department of Employment and Social Development Act* (DESD Act).
[2] The relevant errors, formally known as "grounds of appeal," are listed under section 58(1) of the DESD Act.
[3] Although the context is somewhat different, the Appeal Division normally applies the exceptions to considering new evidence that the Federal Court of Appeal listed in *Sharma v Canada (Attorney General)*, 2018 FCA 48 at paragraph 8.

[17] Section 153.161(2) reads as follows:

> **Verification**
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> **(2)** The Commission **may**, at any point after benefits are paid to a claimant, **verify** that the claimant referred to in subsection (1) is entitled to those benefits **by requiring proof** that they were capable of and available for work on any working day of their benefit period.
>
> [emphasis added]

[18] I was mostly interested in whether that section applies in this case, since the Commission didn't need to require proof from the Claimant. Given his transparency, the Commission already had all the information it needed to decide his entitlement to EI benefits.

[19] But the Commission's answer goes far beyond what I asked.

[20] I expected the Commission to make additional submissions on how section 153.161 should be interpreted. I didn't expect it to submit more evidence in the form of an affidavit or to provide an overview of the entire EI Act.

[21] These materials were presented after the hearing. They go beyond the scope of what I asked and add very little to the arguments the Commission had already presented, including George Rae's affidavit. Also, the Claimant didn't have enough time to respond to these materials.

[22] So, for reasons of fairness and relevance, I haven't considered Deanne Field's affidavit or parts "A" and "B" of the Commission's May 19, 2022, letter.[4]

[4] See AD10 in the appeal record. Deanne Field's affidavit starts at AD10-43.

The General Division made an error of law

[23] I can intervene in this case only if the General Division made one or more of the relevant errors.[5] Based on the wording of the law, any error of law could trigger my powers to intervene.

– The General Division misapplied the legal test for availability

[24] The General Division made an error of law in how it considered the COVID-19 pandemic when it assessed the Claimant's availability.

[25] The Claimant was entitled to the EI benefits he had received only if he was "capable of and available for work."[6] A person's availability is determined based on three factors:[7]

- Did the Claimant want to go back to work as soon as a suitable job was available?
- Did the Claimant make efforts to find a suitable job?
- Did the Claimant set personal conditions that might have unduly limited his chances of going back to work?

[26] In addition, full-time students have to deal with a presumption of non-availability.[8] The Claimant can rebut the presumption by showing that there are exceptional circumstances.[9] Although there may be others, the most common exceptional circumstance is that of a person who can show that they have a history of holding full-time employment while studying.[10]

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[5] See footnote 2.
[6] See section 18(1)(a) of the *Employment Insurance Act* (EI Act).
[7] These factors are set out in *Faucher v Canada (Canada Employment and Immigration Commission)*, 1997 CanLII 4856 (FCA).
[8] See *Canada (Attorney General) v Cyrenne*, 2010 FCA 349.
[9] See *Canada (Attorney General) v Cyrenne*, 2010 FCA 349.
[10] See *Landry v Canada (Deputy Attorney General)*, [1992] FCJ No 965.

[27] This means that the test for availability focuses more on the person's particular circumstances than on purely external factors, like a global pandemic.

[28] But the General Division found that the COVID-19 pandemic was an exceptional circumstance that helped the Claimant rebut the presumption of non-availability. At paragraph 34 of its decision, it said:

> I am of the view that the Claimant has rebutted the presumption of non-availability because of exceptional circumstances. The pandemic made it harder for the Claimant to get a comparable job. If it weren't for the curfews, the available work schedules would have been suitable for the Claimant. The changes in how work was organized due to the pandemic are what prevented him from working, not his school hours.

[29] The General Division also found that the Claimant hadn't unduly limited his chances of going back to work. In making that finding, the General Division again relied on the exceptional circumstances created by the pandemic.[11]

[30] The General Division made an error of law by considering the pandemic in that way when it assessed the Claimant's availability.

[31] The availability provision didn't require the General Division to identify all the obstacles—or the main obstacle—to the Claimant's job search. Rather, the relevant question was how the Claimant's studies affected his availability for work. Also, had he set personal conditions that significantly limited his chances of going back to work?

[32] Otherwise, everyone would be considered available for work during a pandemic. In other words, the number of jobs available in the job market isn't relevant to the issue of whether the Claimant was available for work within the meaning of the law.

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[11] See paragraph 61 of the General Division decision.

I will give the decision the General Division should have given

[33] At the hearing before me, there were no objections to my giving the decision the General Division should have given.[12] The Claimant isn't arguing that it prevented him from presenting his case in any way.

[34] I agree. This means that I can decide whether the Claimant was available for work. If not, I have to decide whether I can write off his debt.

The Claimant wasn't available for work while in school

[35] In the above paragraphs, I set out the legal test for availability. I should add that the Claimant's availability has to be assessed for each working day of his benefit period.[13]

– The Claimant wasn't available for work from October 26, 2020, to December 15, 2020

[36] At the General Division hearing, the Claimant mentioned having a history of working while in school.[14] This means that he could rebut the presumption of non-availability that applies to full-time students.

[37] But, I find that the Claimant's studies are a personal condition that unduly limits his chances of going back to work. On this point, the following facts aren't in dispute:[15]

- The Claimant's classes took place between 8 a.m. and 4 p.m., Monday to Friday, and he could not change his schedule.
- He spent 20 to 35 hours per week on his studies.
- He was obligated to attend scheduled classes.

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[12] Sections 59(1) and 64(1) of the DESD Act give me the power to fix the General Division's errors in this way. Also, see *Nelson v Canada (Attorney General)*, 2019 FCA 222 at paragraphs 16 to 18.
[13] See section 18(1) of the EI Act and *Canada (Attorney General) v Cloutier*, 2005 FCA 73 at paragraph 7.
[14] Listen to the audio recording of the General Division hearing at 0:10:45.
[15] See GD3-6 to GD3-9, GD3-19, and GD3-23 to GD3-29.

- He would continue his studies even if he was offered full-time work.

[38] In short, the Claimant was available for only part-time work, specifically in the evening and on weekends.

[39] The Federal Court of Appeal has previously decided a similar case. It found that a student whose availability for work was limited to evenings and weekends alone wasn't available for work within the meaning of the law.[16] I have no choice but to follow such a decision by the Federal Court of Appeal.

[40] The Claimant acknowledges that he wasn't entitled to EI benefits while in school.[17] He expected to get denied. But he needed this to happen before applying for the CRB, a benefit he was later deemed eligible for.

[41] Since he wasn't available for work, the Claimant wasn't entitled to benefits during that period.

– The Claimant was available for work from December 16, 2020, to January 17, 2021

[42] The Commission's arguments focus on the Claimant's availability while in school. But the Claimant's winter break lasted a month.[18] During that time, he had no school hours limiting his availability for work.

[43] Based on the Claimant's testimony, the General Division found that the Claimant wanted to go back to work and made efforts to find a suitable job.[19] Specifically, he looked for a job as a clerk, such as in a convenience store, grocery store, or warehouse. The Commission doesn't dispute these findings.

[44] As a result, I find that the Claimant was available for work and was entitled to benefits from December 16, 2020, to January 17, 2021.

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[16] See *Canada (Attorney General) v Primard*, 2003 FCA 349.
[17] Listen to the audio recording of the General Division hearing at 0:09:20 and 0:11:05.
[18] See the appeal record, especially GD3-7, GD3-22, and GD3-23.
[19] See the General Division decision at paragraphs 37 to 51.

The Tribunal can't write off the Claimant's debt

[45] The Claimant's main argument relates to this issue. I sympathize with his situation. But the Tribunal doesn't have the authority to write off his debt.

[46] When he applied, the Claimant didn't expect to get EI regular benefits. It was more of a step he had to take before applying for the CRB. In short, he had to first apply for EI benefits, get denied by the Commission, and then apply for the CRB.

[47] But the Commission points out that a change in the law, specifically section 153.161 of the EI Act, involved modifying its operational approach during the pandemic. In accordance with this new approach, the Commission says that it first considered whether the Claimant **qualified** for EI benefits. In other words, it had to decide whether the Claimant met certain minimum qualifying conditions, such as having enough hours of insurable employment in his qualifying period.

[48] Since the answer to that question was "yes," the Commission paid the Claimant benefits.

[49] But the Commission argues that the issue of whether the Claimant was **entitled** to benefits remained to be considered. For example, it had to decide whether the Claimant was capable of and available for work.

[50] The Commission says that, before the pandemic, it would have considered this issue before paying benefits. But its modified operational approach meant that it was able to decide this issue after it had paid the benefits.[20]

[51] The Claimant says that this new approach caused delays in processing his file and resulted in a debt of nearly $5,000. In his view, the Commission had all the information it needed to deny his claim from the start.

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[20] See section 153.161(2) of the EI Act, set out above.

[52] The Claimant's situation can be summarized as follows:[21]

- The Commission removed some filters from its file processing system and did presume that the Claimant was available for work. So, it approved the Claimant's claim and paid him benefits from October 2020.
- On his application for benefits and multiple times after that, the Claimant transparently provided the Commission with all the information requested concerning his studies.[22]
- The Commission suspended the Claimant's benefit payments in December 2020. At the same time, the Commission started assessing the Claimant's availability, which affected his entitlement to the benefits he had already received.
- On March 3, 2021, the Commission issued its denial decision.[23]
- So, the Claimant turned to the CRB, which was granted, with a retroactive payment of up to 60 days.

[53] As a result, the Claimant was entitled to the CRB from October 2021, but the Commission's delays prevented him from receiving this benefit for several months. Instead, the Claimant was able to receive the CRB only as of January 25, 2021, and he is left with a debt to the Commission.[24] It is a fairly large debt for someone his age and a major source of stress and anxiety.

[54] I understand the Claimant's (and his family's) disappointment over this difficult situation. But my authority is limited to the question of whether he was entitled to receive EI benefits. The answer to that question isn't really in dispute.

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[21] See the Claimant's reconsideration request at GD3-33 to GD3-36 in the appeal record.
[22] See GD3-19 to GD3-30 in the appeal record.
[23] The Commission's letter is at GD3-30 in the appeal record.
[24] See GD3-38 in the appeal record.

[55] At the hearing, the Claimant disputed the fact that section 153.161 of the EI Act is being used against him when he didn't even know about it. But I have to apply the law equally and consistently, regardless of whether the provision is well known.

[56] The Commission was clearly in a position to consider and reconsider the Claimant's availability.[25] Unfortunately, the Tribunal can't address the criticisms of how the Commission handled the Claimant's file, or make a decision about writing off his debt.[26]

[57] Applying the law can sometimes give rise to some harsh results that appear to be at odds with the government's objectives. But the Tribunal can't rewrite or circumvent the law, even in very sympathetic situations or cases of misinformation from the Commission.[27]

[58] During the pandemic, the government quickly created programs to help as many people as possible, including the Claimant. The Commission has a wider range of discretionary powers. I can only urge it to try to find a solution for this young man, who, through no fault of his own, could not get the government support he was entitled to.

Conclusion

[59] I am allowing the appeal in part. The General Division made an error of law. This means that I can give the decision the General Division should have given. I find that the Claimant:

- isn't entitled to EI benefits from October 26, 2020, to December 15, 2020
- is entitled to EI benefits from December 16, 2020, to January 17, 2021

Jude Samson
Member, Appeal Division

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[25] The Commission has this authority under either section 52 or section 153.161 of the EI Act.
[26] See *Faullem v Canada (Attorney General)*, 2022 FCA 29.
[27] See *Canada (Attorney General) v Shaw*, 2002 FCA 325; *Canada (Attorney General) v Knee*, 2011 FCA 301; and *Nadji v Canada (Attorney General)*, 2016 FC 885.