



Citation: *LB v Canada Employment Insurance Commission*, 2022 SST 404

## Social Security Tribunal of Canada Appeal Division

# Decision

**Appellant:** L. B.  
**Representative:** Kelly Curtis

**Respondent:** Canada Employment Insurance Commission  
**Representative:** Isabelle Thiffault

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**Decision under appeal:** General Division decision dated December 30, 2021  
(GE-21-2150)

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**Tribunal member:** Janet Lew

**Type of hearing:** Teleconference

**Hearing date:** May 17, 2022

**Hearing participants:** Appellant's representative  
Respondent's representative

**Decision date:** May 18, 2022

**File number:** AD-22-27

## Decision

[1] The appeal is allowed. The matter will go back to the General Division for reconsideration on the issue of the availability of the Appellant, L. B. (Claimant), for the periods January 11, 2021 to April 20, 2021, and from September 2, 2021, indefinitely.

## Overview

[2] The Claimant is appealing the General Division decision. The General Division found that the Claimant was not available for work from January 11, 2021 to April 20, 2021, and from September 2, 2021, indefinitely. The General Division found that the Claimant was attending university on a full-time basis and that she set personal conditions that restricted her availability to work. As a result, the Claimant was disentitled from receiving Employment Insurance benefits for these periods.

[3] The Claimant argues that the process at the General Division was unfair. She also argues that the General Division made several legal and factual errors.

[4] The Respondent, the Canada Employment Insurance Commission (Commission), accepts that the General Division made factual and legal errors over the issue of the Claimant's availability. However, the parties disagree on the appropriate remedy to correct that error.

[5] The Claimant asks me to set aside the General Division decision and to give the decision that she says the General Division should have made. The Claimant argues that the General Division should have found that she was available for work and therefore entitled to receive Employment Insurance benefits.

[6] The Commission submits that the evidence is incomplete on the availability issue. Therefore, the Commission urges me to return the matter to the General Division for a redetermination.

## Issues

[7] The issues in this appeal are as follows:

- a) Did the General Division make any legal or factual errors regarding whether the Claimant set any personal conditions on her availability to work?
- b) If so, how should the error be fixed?

## Analysis

[8] The Appeal Division may intervene in General Division decisions if there are jurisdictional, procedural, legal, or certain types of factual errors.<sup>1</sup>

### **Did the General Division make a legal or factual error regarding whether the Claimant set any personal conditions on her availability to work?**

[9] The Claimant argues that the General Division made erroneous assumptions about the nature of the jobs for which she had been applying. The Claimant argues that, if the General Division had not made these assumptions, it would have accepted that she was available for work during regular business hours.

[10] The General Division found that, because the Claimant limited her job applications to server and bartending jobs, she set personal conditions that unduly limited her chances of returning to the labour market fully. The General Division found that these types of jobs were primarily available afternoons, evenings and weekends,<sup>2</sup> or after “typical business hours”.<sup>3</sup> In other words, because the Claimant applied for only server and bartending jobs, it found that she could not have been available during regular hours.

[11] Given the evidence before it, the Commission accepts that the General Division made a perverse or capricious finding. The Commission says that there was no

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<sup>1</sup> See section 58(1) of the *Department of Employment and Social Development Act*.

<sup>2</sup> See General Division decision, at para 42.

<sup>3</sup> See General Division decision, at para 72.

evidence to suggest that the Claimant was available only outside of typical business and normal school hours. The Commission accepts that the General Division misinterpreted the evidence and therefore came to a finding without the evidence to support it.

[12] I agree with the parties that the General Division did not have a sufficient evidentiary basis to support its conclusions regarding server and bartending jobs. As the Claimant also indicates, the evidence shows that she held these positions in past, and had worked during regular hours and throughout the day.

[13] So, by applying for these types of jobs, the Claimant may not have necessarily restricted her hours of work to afternoons, evenings and weekends.

[14] Furthermore, the Commission also notes that the Claimant had not given any evidence about the days and hours she was available for work.

[15] The Commission argues that the General Division should have examined the Claimant about the days and hours she was available for work. Otherwise, this represents an error of law as well, because it meant that the General Division could not have properly assessed whether the Claimant met the requirements under section 18(1)(a) of the *Employment Insurance Act*.

[16] Under that section, a claimant:

is not entitled to be paid benefits for a working day in a benefit period for which the claimant fails to prove that on that day the claimant was capable of and available for work and unable to obtain suitable employment.

[17] Without any evidence about the days and hours the Claimant was available for work, the Commission argues that the General Division was unable to make any findings about which days the Claimant was available for work.

[18] As the Commission says, the General Division should have but did not make any findings on this point.

[19] The Claimant argues that the General Division made other errors. As I have already determined that the General Division erred, it is unnecessary to address these other arguments.

## **Remedy**

[20] The Commission urges me to return the matter to the General Division for a redetermination. The Commission claims that the evidentiary record is incomplete. The Commission notes that there is no evidence that shows what days and hours the Claimant was available to work.

[21] The Claimant argues that there is sufficient evidence that would enable me to find that she was available for work. For instance, she says that there was evidence that showed she worked from 11 a.m. to 3 a.m. She notes that the Commission accepted her evidence on this point.

[22] The Claimant also says that there was evidence that showed that her classes were asynchronous. In other words, her classes were flexible and she could attend them when it was convenient for her. So, her classes did not interfere with her availability to work.

[23] The Claimant also argues that one can infer from the evidence that she sought as much work as possible at anytime, whether it was part-time or full-time work.

[24] The Claimant acknowledges however that she has more evidence, which would reinforce what already exists.

[25] The Commission does not deny that the Claimant gave this evidence. However, the Commission notes that the Claimant's evidence that she worked from 11 a.m. to 3 a.m. related to her past employment. In addition, this evidence may not have necessarily reflected the Claimant's availability from January 11, 2021 to April 20, 2021, and from September 2, 2021, indefinitely. Further, the Commission argues that, although the Claimant had asynchronous classes, this does not automatically mean that she was available.

[26] The Claimant acknowledges that the evidence does not explicitly state when she was available,<sup>4</sup> but claims that her availability during the disentitlement periods was similar to her past availability. This is an insufficient basis to make a determination on the Claimant's availability.

[27] It is evident that there are gaps in the evidence on the issue of the Claimant's availability. The Commission has identified these gaps.

[28] Given the gaps in the evidence, it is appropriate to return this matter to the General Division for a redetermination on the issue of the Claimant's availability.

[29] To be clear, the only issue that requires redetermination is whether the Claimant set personal conditions that might have unduly limited her chances of returning to the labour market.

[30] The parties do not take any exception to the General Division's findings that the Claimant otherwise established:

- a. that she showed she had made reasonable and customary efforts to find suitable work,
- b. that she held a desire to return to the labour market as soon as a suitable job was available, and
- c. that that desire was expressed through efforts to find a suitable job.

[31] These findings should not be disturbed on re-determination.

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<sup>4</sup> At approximately 13:46 of the audio recording of the Appeal Division hearing.

## **Conclusion**

[32] I am allowing the appeal and returning this matter to the General Division for a redetermination on the availability issue, and, in particular, on the issue of whether the Claimant set personal conditions that might have unduly limited her chances of returning to the labour market.

Janet Lew  
Member, Appeal Division