



Citation: *RD v Canada Employment Insurance Commission*, 2022 SST 471

Social Security Tribunal of Canada Appeal Division

Decision

Appellant:	R. D.
Respondent: Representative:	Canada Employment Insurance Commission Gilles-Luc Bélanger
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Decision under appeal:	General Division decision dated January 17, 2022 (GE-21-2540)
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Tribunal member:	Janet Lew
Type of hearing:	Teleconference
Hearing date:	May 6, 2022
Hearing participants:	Appellant Respondent's representative
Decision date:	June 6, 2022
File number:	AD-22-76

Decision

[1] The appeal is dismissed. The Appellant, R. D. (Claimant), is disentitled from receiving employment Insurance benefits.

Overview

[2] This is an appeal of the General Division decision. The General Division found that the Claimant had not shown that he was available for work while in school. The General Division concluded that the Claimant was disentitled from receiving Employment Insurance benefits, from September 28, 2020.

[3] The Claimant argues that he did not get a fair hearing. He also argues that the General Division ignored evidence that showed that he was available for work. He says that I should accept this evidence, some of which is new. The Claimant argues that I should allow the appeal and find that he was entitled to receive Employment Insurance benefits.

[4] The Respondent, Canada Employment Insurance Commission (Commission), argues that the General Division did not make any procedural or factual errors. The Commission asks the Appeal Division to dismiss the Claimant's appeal.

Issues

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

- a) Did the General Division fail to follow rules of procedural fairness by going ahead with the hearing?
- b) Did the General Division ignore the Claimant's past work history?

Analysis

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

Did the General Division fail to follow rules of procedural fairness by going ahead with the hearing?

[7] The Claimant argues that General Division failed to follow rules of procedural fairness by going ahead with the hearing although he did not have a representative. He says that he did not get a fair hearing.

[8] The Claimant states that he was expecting the Social Security Tribunal (Tribunal) or General Division to provide him with a representative for the General Division hearing. He says that when he filed his appeal, someone from the Tribunal told him it would provide him with a representative. He also says that he may have simply misunderstood what that person told him.

[9] Either way, the Claimant says he relied on someone to represent him. He alleges that he told the General Division member that he was expecting to have a representative. He also alleges that this conversation took place before the hearing formally started. So, there is no audio recording of this conversation.

[10] The Claimant suggests that his case would have been far stronger if he had a representative for the hearing. And, he would have known to file a T4 slip that showed his earnings. He says the T4 slip would have helped prove his availability for work.

[11] The Claimant argues that, without a representative, he was unprepared for the hearing. He says that it was unfair that the hearing took place. Even if he did not have a representative, he suggests that the General Division should have given him more time so he could properly prepare and represent himself.

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

– **Communications with the Social Security Tribunal before the hearing took place**

[12] The General Division is an independent and impartial decision-maker. It does not act on behalf of any of the parties.

[13] But, the Tribunal tries to facilitate the appeals process for self-represented claimants. This includes making a client services officer (also known as a “navigator”) available to answer any questions from self-represented claimants, before any hearing takes place. The client services officer also helps claimants navigate the appeals process.

[14] There are no phone log notes on file that show what discussions, if any, took place at the General Division level between the Claimant and the Tribunal.

[15] I find it highly unlikely that anyone from the Tribunal would have suggested that it would provide a representative for the Claimant. The General Division has never provided representatives for any parties in any appeals. It has always been a party’s responsibility to get their own representation.

[16] For this reason, I prefer the Claimant’s other assertion that he probably misunderstood what the Tribunal told him about having a representative. I prefer it to his claim that the Tribunal told him it would provide him with a representative at the hearing.

– **The General Division hearing**

[17] The General Division member recorded the hearing.

[18] The Claimant never explicitly stated on the audio recording that he expected either the Tribunal or the General Division to provide him with a representative. The Claimant says that it would not have made any sense to repeat what he had just said “off the record” about having a representative once the General Division started the audio recording.²

² At approximately 1:09:11 of the audio recording of the Appeal Division hearing on May 6, 2022.

[19] So, when the General Division member asked him if he was ready to go ahead with the hearing, the Claimant responded that he was fine and would go ahead with the hearing.

[20] It did not occur to the Claimant that he could have spoken up and asked for an adjournment. He thought he had to go ahead with the hearing. He was under great stress. He felt pressured by the circumstances. He was on a break at work, sitting in his car at a X's drive-through. It was raining and "cars were flying by."³

[21] The following exchange took place between the member and the Claimant:

Member: I have [the Claimant] on the phone and there is no representative from the Commission presently.

So, Mr. [Claimant] you were asking kinds of question before I started the recording: How does this go? Do you represent yourself?

Essentially, I'm going to read some information into the background of the case. Then I'm going to, you know, explain what the Commission says it's done in terms of disentitling you from your benefits. And then essentially I'm going to ask you to tell me why you disagree with their decision.

Now, there's a lot of information that can be adduced. Either you kind of tell me all that I need to know and I say thank you very much, 'That's all I need,' or, if I think there's more, I'm going to ask you some questions and focus in on some areas and have you give me more about that.

So essentially, yes, you're representing yourself as you don't have anyone else doing it, but I am here not to represent you so much as to just facilitate in ensuring you get your case in its wholeness presented.

Does that make sense?

Claimant: Yep.

Member: So, Mr. [Claimant] is anyone else going to join you today?

Claimant: Pardon me?

Member: Is there anyone else with you today? Is anyone going to speak...?

³ At approximately 1:09:35 of the audio recording of the Appeal Division hearing on May 6, 2022.

Claimant: No. No, it's just myself.

Member: So, I just have a little more general information. It is important for you to know that I'm independent from the Canada Employment Insurance Commission. I don't work for them.

My role is to take a fresh look at the evidence today and to make a decision that is fair, unbiased, and in accordance with the law.⁴

[22] The member then reviewed the documents in the hearing file. The member briefly identified the issues and then invited the Claimant to give evidence and make submissions.⁵

– **Whether it was reasonable and fair for the General Division to go ahead with the hearing**

[23] Before the hearing started, the Claimant clearly had questions about the appeals process at the General Division. As the General Division member stated at the beginning of the hearing, the Claimant raised some questions before the member started the recording of the hearing. The General Division member confirmed that the Claimant had asked about the process. He also asked whether anyone would be representing him at the hearing.

[24] However, it is unlikely that the Claimant also told the General Division member that he expected there would be a representative from the Tribunal for him, or words to that effect. Nothing in the member's opening statements suggest that the member understood the Claimant to say that he expected the Tribunal to provide him with a representative.

[25] When the General Division member described the process, he confirmed that the Claimant would be representing himself, as he did not have anyone else present with him. The member confirmed that he would not be acting for the Claimant. The member then asked whether that made sense to the Claimant.

⁴ At approximately 0:45 to 2:19 of the audio recording of the General Division hearing.

⁵ At approximately 5:35 of the audio recording of the General Division hearing.

[26] Had the Claimant told the General Division member that he had expected the Tribunal to provide him with a representative, it would have been logical or reasonable for the General Division member to ask the Claimant whether he needed an adjournment so he could actually find a representative to act for him. Or, at the very least, the member would have asked the Claimant whether he needed any extra time to prepare for the hearing.

[27] Instead, the General Division member asked the Claimant whether anyone else was going to be joining him for the hearing. The General Division member also asked whether anyone was going to speak on the Claimant's behalf.

[28] These two particular questions from the member suggest that the Claimant did not tell the member that he expected a representative from the Tribunal to act for him.

[29] The Claimant responded that he would be acting on his own. If he actually believed that the Tribunal would be providing him with a representative, it is unreasonable that he would not have responded that he thought the Tribunal would be providing him with a representative.

[30] There was no indication from the Claimant that he was unprepared or unable to go ahead with the hearing because he might have thought the Tribunal would provide a representative for him.

[31] There was nothing to signal to the General Division member that the Claimant realistically expected to have someone represent him at the hearing. On top of that, the Claimant never objected to the hearing going ahead.

[32] Even if the Claimant mistakenly believed that the Tribunal would be providing a representative for him, he still had an obligation to raise this matter with the General Division and to seek an adjournment of the hearing at the appropriate time.

[33] As it does not appear that the Claimant told the General Division member that he might have understood that the Tribunal would be providing a representative, surely the

General Division member could not have expected to have known that the Claimant held this belief.

[34] Without knowing whether the Claimant believed the Tribunal would be providing him with a representative, the General Division member did not breach any rules of procedural fairness by going ahead with the hearing. It was reasonable and fair for the General Division to go ahead with the hearing.

Did the General Division ignore the Claimant's past work history?

[35] The Claimant argues that the General Division ignored his evidence about his past work history. The Claimant says the evidence showed that he been working full-time while attending school on a full-time basis. The Claimant relies on a T4 slip that he says shows that he earned \$7,000 for 2019.

[36] He claims that, if the General Division had considered this evidence, it would have accepted that he was available for work while attending school on a part-time basis. After all, if he could work full-time while going to school on a full-time basis, then it should have been apparent that he was available to work full-time if he was going to school on just a part-time basis.

[37] The Claimant also notes that the pandemic meant his school schedule was flexible. He claims he could have done his schooling around his schoolwork.

– The Commission's arguments

[38] The Commission argues that the Claimant's past work history is irrelevant. The Commission says that the work history was relevant only if the Claimant had been a full-time student. For full-time students, there is a general presumption that they are unavailable for work. But, in this case, the Claimant was a part-time student. The Commission says that there is no general presumption for part-time students.

[39] But, even without a general presumption, the Commission argues that the Claimant still had to prove that he was available for work.

[40] The Commission says that a past work history would not necessarily reflect a claimant's availability in future. The Commission argues that to prove availability, the Claimant would have had to prove that he was looking for suitable work, as well as prove that he did not set any personal conditions. The Commission says, for instance, if full-time employment became available, the Claimant would have had to show that he had been willing to immediately accept that employment "without demanding anything more ... in terms of type of work, wages or salary, hours of work and other working conditions."⁶

[41] The Commission argues that availability is determined based on one's willingness to work, personal efforts to find work and any restrictions that reduces one's chances of finding employment. So, if a claimant imposes any restrictions on their availability, then they are not available for work and therefore not entitled to benefits.

– **Decisions of the Federal Court of Appeal on the issue of availability**

[42] I will review cases from the Federal Court of Appeal to see if the Court has set down any legal principles that I have to follow.

[43] In a case called *Primard*,⁷ the evidence showed that the claimant Primard's availability for work was limited to evenings and weekends because of her course schedule. The Court of Appeal found that this showed that Primard was placing personal conditions that might unduly limit the chances of returning to the labour market.

[44] New facts later emerged that there was the possibility that Primard could take her courses part-time, in the evening, three evenings a week, if she found a job. But, the Court found that this was, at best, a possible availability, which was also conditional upon her finding a job. It found that she was otherwise unavailable.

⁶ See Commission's representations to the Social Security Tribunal-Appeal Division, at AD4-4.

⁷ See *Canada (Attorney General) v Primard*, 2003 FCA 349.

[45] In another case called *Duquet*,⁸ the Court of Appeal found that, because of his university courses, the claimant Duquet was only available at certain times on certain days, which restricted his availability and therefore limited his chances of finding employment.

[46] In another case, which does not involve a student, the claimant Bertrand was only available evenings from four to 10 pm, or midnight, five days a week. She had been unable to find a reliable babysitter during the day.

[47] The Court of Appeal found that, although Bertrand was available to work 30 to 40 hours per week during evening hours, she was not available for work for the purposes of the *Employment Insurance Act*.⁹

[48] It is clear from this line of decisions from the Court of Appeal that a decision-maker has to consider whether a claimant has set any conditions that could limit their chances of returning to the labour market.

– **Whether the General Division had to consider the Claimant’s past work history**

[49] If a claimant has to show that they did not set any personal conditions, or that they were trying to look for suitable work to prove availability, their past work history is irrelevant to these considerations.

[50] The Claimant says that he has a T4 slip to prove his availability. The T4 slip shows his past work employment and earnings. Therefore, the T4 slip was also irrelevant. It is immaterial that the Claimant did not file a copy of the T4 slip with the General Division. It would not have changed the outcome at the General Division.

[51] The General Division did not make a factual error when it did not consider the Claimant’s past work history and whether it proved his availability.

⁸ See *Duquet v Canada (Employment Insurance Commission and Attorney General of Canada)*, 2008 FCA 313.

⁹ See *Canada (Attorney General) v Bertrand*, 1982 CanLII 3003 (FCA).

[52] The Claimant still maintains that he was available for work, but he is essentially asking me to re-evaluate the evidence and come to my own decision on whether he was available for work. However, a reassessment is not a basis upon which an appeal can be made.¹⁰

Other factors

[53] Even if past work history had been a relevant consideration, the Claimant would have had to address the General Division's other findings. These include whether the Claimant wanted to go back to work, had made sufficient efforts to find a suitable job, and set personal conditions that might have unduly limited his chances of going back to work.

[54] The General Division found, for instance, that the Claimant did not have a sustained job search for suitable employment. The General Division wrote, "Over a period of an entire year, his efforts do not amount to much effort to find suitable employment."

[55] Unless there are any errors relating to these types of findings, I cannot conduct a reassessment and come to my own conclusions about whether the Claimant had been available for work. Otherwise, I might have found that the Claimant had not set personal restrictions after September 2021, when he was available from Mondays to Fridays from 10:30 am to midnight.

[56] The Claimant does not challenge the General Division's other findings. I also do not readily see any errors. I would not disturb these types of findings, as I have to defer to the General Division on these types of findings.

¹⁰ See section 58(1) of the *Department of Employment and Social Development Act*.

The Claimant's options

[57] The General Division did not fail to follow the rules of procedural fairness by going ahead with the hearing. The General Division also did not make a factual error when it did not consider whether the Claimant's past work history proved his availability.

[58] The Claimant was disentitled from receiving Employment Insurance benefits. As he received benefits to which he was not entitled, this leaves him with an overpayment. I note that the Claimant stated at the General Division that he is facing financial hardship.

[59] Neither the General Division nor the Appeal Division have any authority to provide any relief to the Claimant. In terms of any potential relief, the Claimant has two options:

- i. He can ask the Commission to consider writing off the debt because of undue hardship. If the Claimant does not like the Commission's response, his option then is to file an application for judicial review with the Federal Court, or
- ii. He can contact Canada Revenue Agency's Debt Management Call Centre at 1-866-864-5823 about writing off the debt or about a repayment schedule, if repayment would result in undue hardship.

Conclusion

[60] The appeal is dismissed.

Janet Lew
Member, Appeal Division