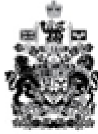

Citation: *Canada Employment Insurance Commission v KT*, 2022 SST 994

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	Canada Employment Insurance Commission
Representative:	Dani Grandmaître
Respondent:	K. T.

Decision under appeal:	General Division decision dated April 11, 2022 (GE-22-605)

Tribunal member:	Jude Samson
Type of hearing:	Teleconference
Hearing date:	September 20, 2022
Hearing participant:	Appellant's representative
Decision date:	October 7, 2022
File number:	AD-22-275

Decision

[1] I'm allowing this appeal in part and sending the appeal back to the General Division to reconsider one issue.

Overview

[2] K. T. is the Claimant in this case. The Canada Employment Insurance Commission (Commission) paid her Employment Insurance (EI) regular benefits while she was at university.[1] The Claimant contacted the Commission several times about her entitlement to benefits and provided the Commission with information about her studies.

[3] Several months later, the Commission decided that the Claimant wasn't entitled to EI benefits during her university studies. According to the Commission, the Claimant wasn't available for work while studying full time.[2]

[4] The Claimant appealed the Commission's decision to the Tribunal's General Division. It decided that the Commission acted in bad faith when it changed its earlier decision to pay benefits to the Claimant from January 12, to April 30, 2021. As a result, the General Division concluded that the Claimant could keep the benefits she received during that period.[3]

[5] The Commission is now appealing the General Division decision to the Tribunal's Appeal Division. It argues that the General Division made errors of law, along with important mistakes about the facts of the case.

[1] My decision refers to the Commission, even though the Claimant was dealing with Service Canada. The law gives the Commission the power to make decisions about the EI program, but Service Canada delivers the EI program for the Commission.
[2] Section 18(1)(a) of the *Employment Insurance Act* (EI Act) says that a person has to be available for work to get EI benefits.
[3] The General Division also decided that the Claimant wasn't entitled to benefits from September 7, 2021, to April 8, 2022. The Claimant brought a separate appeal from that part of the General Division decision: see file AD-22-260.

[6] The General Division based its decision on important errors about the facts of the case when it found that the Commission acted in bad faith. These errors allow me to intervene in this case.

[7] The Commission wasn't acting in bad faith when it decided that the Claimant needed to repay some of the benefits that she had received. So, a question remains about whether the Claimant was available for work from January 12, to April 30, 2021. I'm returning the appeal to the General Division to reconsider this issue.

The hearing was held without the Claimant

[8] The Tribunal sent the notice of hearing to the Claimant by email on June 22, 2022. Nothing in the Tribunal's record suggests that these emails failed to send properly. I assume, then, that she received the notice of hearing the next day.[4]

[9] Tribunal staff also called the Claimant and left voice mails reminding her about her hearing. These calls were made in the days before the hearing and on the day of the hearing itself.

[10] Regardless, the Claimant didn't join the hearing and didn't ask for it to be rescheduled.

[11] In the circumstances, I was satisfied that the Claimant had notice of the hearing, and continued the hearing without her.

Issues

[12] The issues in this appeal are:

a) Did the General Division base its decision on an important mistake about the facts of the case when it found that Commission acted in bad faith?

b) If so, how should I fix the General Division's error?

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[4] Section 19(2) of the *Social Security Tribunal Regulations* allows me to make this assumption.

Analysis

[13] I can intervene in this case if the General Division based its decision on an important mistake about the facts of the case.[5]

[14] This means that the General Division must rely on evidence to support the important facts in its decision. The General Division doesn't have to refer to every piece of evidence. Instead, I can presume that it considered all the evidence.[6]

[15] However, I can intervene if the evidence squarely contradicts or cannot support an important fact in the General Division decision. I can also intervene if the General Division overlooks critical evidence that contradicts its conclusions.[7]

The General Division based its decision on important mistakes about the facts of the case

– I don't need to decide whether the Commission was reviewing a past decision

[16] The General Division started its decision by considering whether the Commission's December 2021 decision was an initial decision about the Claimant's entitlement to benefits or whether the Commission was reviewing a past decision.

[17] The General Division decided this issue because there are limits on the Commission's power to review past decisions. Specifically, the Commission's power to review an earlier decision is discretionary.[8] And discretionary powers have to be used judicially (properly).[9] For example, the Commission cannot use its discretionary powers in bad faith.

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[5] The errors I can consider, also known as "grounds of appeal," are listed under section 58(1) of the *Department of Employment and Social Development Act* (DESD Act).
[6] The Federal Court of Appeal discussed these points in *Sibbald v Canada (Attorney General)*, 2022 FCA 157 at paragraph 46.
[7] The Federal Court of Appeal discussed relevant errors of fact in *Walls v Canada (Attorney General)*, 2022 FCA 47 at paragraph 41.
[8] Section 52 of the EI Act says that the Commission **may** reconsider a claim for benefits within certain timelines.
[9] Cases like *Canada (Attorney General) v Purcell*, 1995 CanLII 3558 (FCA) describe what it means for a discretionary power to be exercised judicially.

[18] At the General Division level, the Commission argued that it paid benefits to the Claimant because she **qualified** for benefits. In other words, because she met the basic legal requirements to establish a claim for benefits.[10] Even though it had paid benefits to the Claimant for many months, the Commission denied making a decision about her **entitlement** to benefits until December 2021, when it assessed whether she met the availability requirement.

[19] The General Division disagreed. Instead, it found that the Commission was reviewing a past decision, meaning that it needed to act judicially.[11]

[20] The Commission argues that there are errors in this part of the General Division decision. However, I don't need to decide this issue because, whether or not the Commission was reviewing a past decision, the General Division made an error when it found that the Commission acted in bad faith.

– **The General Division's errors of fact**

[21] The General Division concluded that the Commission acted in bad faith because it reversed its previous decision on a whim.[12] Specifically, it found that the Commission reviewed information about the Claimant's schooling and approved her claim. Later, a different person reviewed the same information, disliked the result, and reversed the previous decision.[13]

[22] It seems logical that the Commission would review all the information it had about the Claimant's availability before paying her benefits. However, the evidence says just the opposite.

[23] The Claimant gave the Commission conflicting information about her availability. In one place, she said that she was "ready, willing and capable of working each day,

[10] Section 7 of the EI Act says that a person qualifies for benefits if they've had an interruption of earnings from employment and have accumulated enough hours of insurable employment in their qualifying period.
[11] The Commission provided some support for this conclusion, including when it said that it had used its review powers under section 52 of the EI Act: see, for example, pages GD4-4, GD6-2, and GD6-3 of the appeal record.
[12] See paragraph 73 of the General Division decision.
[13] See paragraphs 60 to 61 and 70 to 74 of the General Division decision.

Monday through Friday."[14] But in another, she said that she had classes Monday to Thursday, in the morning and afternoon. Plus, given all her commitments, she reported only being available to work Sunday afternoons.[15]

[24] Normally, the Commission would have assessed this information before paying benefits to the Claimant. But the Commission explained that it adopted a modified operational approach as part of its response to the COVID-19 pandemic.[16] Under that new approach, "the availability issue [for students] was not immediately reviewed by an officer, but rather was automatically allowed by the automated claims processing system."[17]

[25] The Commission took a closer look at the Claimant's availability when she reported being in university on her report submitted September 12, 2021.[18] At that point, the Commission told the Claimant that it was suspending her payments until it could review information about her studies.

[26] As part of the Commission's process, it asked the Claimant to complete another training questionnaire, and spoke to the Claimant on the phone.[19] In December 2021, the Commission decided that the Claimant hadn't been eligible for the benefits it had paid her since January 2021.[20] The Commission changed its decision somewhat on reconsideration, and decided that the Claimant was entitled to the benefits she had received over the summer months, when she was studying part-time.[21]

[27] The Claimant wasn't alone. Rather, the Commission's modified operational approach applied to all students applying for EI benefits. Plus, this new approach was accompanied by changes to the law, which reinforced the Commission's power to verify

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[14] See, for example, pages GD3-20 and GD3-33.
[15] The training questionnaire that the Claimant completed on January 16, 2021, starts on page GD3-23.
[16] The Explanatory Note to Interim Order No. 10 mentions this modified operational approach: see pages GD6-4 to GD6-5.
[17] See page GD4-5.
[18] See pages GD3-55 and GD4-2.
[19] See pages GD3-56 to GD3-65.
[20] See pages GD3-56 to GD3-66.
[21] See pages GD3-74 to GD3-77.

whether students met the availability requirement, even after the Commission had paid them benefits.[22]

[28] This evidence squarely contradicts the following conclusions on which the General Division based its decision:

- The Commission revisited the Claimant's case on a whim.
- Nothing informed the Commission's decision to go back and change the decision other than an apparent dislike of the original decision.[23]

[29] Instead, the Commission was following procedures it had adopted to help it cope with its increased workload during the COVID-19 pandemic and acting on new information the Claimant had provided.

[30] These errors allow me to intervene in this case.

The best way to fix the General Division's errors

[31] Since the General Division made errors, I can give the decision the General Division should have given or send the appeal back to the General Division for reconsideration.[24]

– The Commission used its discretionary powers judicially

[32] On this issue, the Commission argued that the record is complete and that I have all the information needed to give the decision the General Division should have given. I agree.

[33] Whether the Commission was assessing or reassessing the Claimant's availability for work in December 2021, the Claimant hasn't met the high bar required to

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[22] See Interim Order No. 10, which is reflected in section 153.161 of the EI Act.
[23] See paragraph 76 of the General Division decision.
[24] Sections 59(1) and 64(1) of the DESD Act give me the power to fix the General Division's error in these ways. Also, see *Nelson v Canada (Attorney General)*, 2019 FCA 222 at paragraphs 16–18.

show that the Commission acted in bad faith. Specifically, the Claimant would have to show that the Commission acted arbitrarily or for an improper purpose.[25]

[34] At the General Division hearing, the Claimant alleged that the Commission acted in bad faith by not warning her sooner about concerns around her availability. The Claimant says she spoke to several of the Commission's agents, but none mentioned any potential problems.

[35] Unfortunately, there's no record of exactly what was said during these conversations. Plus, the courts have already decided that misinformation and poor service from the Commission cannot change the requirements of the law or relieve a person from having to repay benefits that they should not have received.[26]

[36] I sympathize with the Claimant's difficult circumstances and acknowledge that the Commission's actions contributed to her problems.

[37] However, I cannot find that the Commission acted in bad faith in her case. Instead, I also have to recognize that the Commission has broad powers to reconsider a person's availability. Plus, it was using a modified operational approach that, whatever its wisdom, the Commission felt was needed because of the COVID-19 pandemic.[27]

[38] In the circumstances, I cannot find that the Commission acted arbitrarily or for an improper purpose. In fact, part of the Commission's role is to recover benefits from people who weren't entitled to receive them.[28]

– **The Claimant's availability from January 12, to April 30, 2021**

[39] The Commission argued that I don't have enough information to decide this issue and that the General Division needs to reconsider it. I agree.

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[25] See, for example, *Roncarelli v Duplessis*, 1959 CanLII 50 (SCC), *Carpenter Fishing Corp. v Canada*, 1997 CanLII 6391 (FCA) and *Black's Law Dictionary*.
[26] See decisions like *Canada (Attorney General) v Shaw*, 2002 FCA 325, *Lanuzo v Canada (Attorney General)*, 2005 FCA 324, and *Faullem v Canada (Attorney General)*, 2022 FCA 29 at paragraphs 43-48.
[27] The Commission's reconsideration powers are set out under sections 52 and 153.161 of the EI Act.
[28] See, for example, sections 43, 44, 47, and 52 of the EI Act.

[40] The Tribunal assesses a person's availability using three factors, all of which need to be considered.[29] It can't do this assessment in the abstract. The focus is on whether the person made enough efforts to find a **suitable job**, which can depend on the person's usual occupation, personal circumstances, past earnings, and working conditions.[30]

[41] Here, the General Division hearing was quite short. It focused heavily on whether the Commission had used its discretionary powers judicially. The General Division gathered little information about the Claimant's work history and efforts to find work. As a result, there's not enough information for me to assess her availability. So, I have to send the appeal back to the General Division for it to get more evidence and reconsider this issue.

Conclusion

[42] I'm allowing the Commission's appeal in part.

[43] I'm intervening in this case because the General Division based its decision on important mistakes about the facts of the case. In my view, the Commission didn't act in bad faith when, in December 2021, it assessed or reassessed the Claimant's availability for work.

[44] I'm returning the appeal to the General Division for it to reconsider whether the Claimant was available for work from January 12 to April 30, 2021.

Jude Samson
Member, Appeal Division

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[29] These factors were set out in *Faucher v Canada (Employment and Immigration Commission)*, 1997 CanLII 4856 (FCA).
[30] See sections 6(4) and 50(8) of the EI Act along with section 9.002 of the *Employment Insurance Regulations*.