Citation: *JS v Canada Employment Insurance Commission*, 2022 SST 1233

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	J. S.
Respondent:	Canada Employment Insurance Commission
Representative:	A. Fricker

Decision under appeal:	General Division decision dated March 22, 2022 (GE-22-403)

Tribunal member:	Jude Samson
Type of hearing:	Teleconference
Hearing date:	September 20, 2022
Hearing participants:	Appellant Respondent's representative
Decision date:	November 8, 2022
File number:	AD-22-274

Decision

[1] J. S. is the Claimant in this case. I'm dismissing her appeal.

Overview

[2] The Canada Employment Insurance Commission (Commission) paid Employment Insurance (EI) regular benefits to the Claimant for many months while she was studying.[1]

[3] The Claimant says that she provided the Commission with honest answers about her studies and availability for work. She also says that one of the Commission's agents confirmed that she was entitled to benefits, told her how to answer questions about her availability for work, and changed answers on some of her past reports.

[4] So, the Claimant was surprised when, in November 2021, she received a letter saying that she wasn't eligible for EI benefits that she had received since January 2021. According to the Commission, the Claimant's studies meant that she was unavailable for work, which is a requirement for getting EI benefits.

[5] The Claimant appealed the Commission's decision to the Tribunal's General Division. But it dismissed her appeal. It found that the Commission had the power to review the Claimant's case and that it had used its power judicially (appropriately). It also found that the Claimant hadn't made enough effort to find a new job and that she had set personal conditions that significantly affected her chances of returning to work.

[6] The Claimant is now appealing the General Division decision to the Tribunal's Appeal Division. She argues that the General Division decision contains numerous errors.

[7] I've considered all the Claimant's arguments in detail. While I have a lot of sympathy for her situation, I've nevertheless decided that I must dismiss her appeal.

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[1] Service Canada delivers the EI program for the Commission.

Issues

[8] The issues in this appeal are:

a) Did the General Division act unfairly towards the Claimant?

b) Did the General Division make an error by overlooking or misinterpreting relevant parts of the law?

c) Did the General Division make an error of law by misinterpreting its powers to oversee the quality of service the Commission provided to the Claimant?

d) Did the General Division decision base its decision on an important error about the facts of the case?

e) Did the General Division make a jurisdictional error?

Analysis

[9] The law provides a list of errors that I can consider.[2] I can intervene in this case only if the General Division made one of these errors.

[10] The Claimant alleges that the General Division made numerous errors. I considered all of the Claimant's allegations, even if I sometimes characterized them in a different way.

The General Division acted fairly towards the Claimant

[11] The Claimant alleges that the General Division acted unfairly towards her in the following ways:

- It concluded that the Claimant had no history of working and studying at the same time without confirming the truth of this statement;

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

- It relied heavily on documents that it knew were inaccurate; and
- It showed bias by concluding that the Claimant hadn't submitted enough job applications.

– The General Division did not need to confirm the accuracy of the Claimant's previous statements

[12] In its decision, the General Division concluded that the Claimant hadn't shown a history of working and studying at the same time.[3] The Claimant argues that the General Division should have confirmed whether this information was true. In fact, she says that she studied and worked from 2012 to 2015.

[13] On two training questionnaires, the Claimant told the Commission that she had never previously worked and studied at the same time.[4] The General Division didn't have to confirm the truth of all the Claimant's previous statements.

[14] If she had wanted to, the Claimant could have clarified her answers to these questions during the General Division hearing. But she never did.

– The General Division was entitled to consider the training questionnaires

[15] The Claimant argues that the General Division acted unfairly by relying on training questionnaires that she had submitted to the Commission.[5] The Claimant says that she told the General Division about the difficulties she encountered while responding to these questionnaires and that her answers were unreliable.

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[3] See paragraph 54 of the General Division decision.
[4] See the Claimant's answers on pages GD3-18 and GD3-29.
[5] The Claimant completed three training questionnaires. They start on pages GD3-13, GD3-19, and GD3-24.

[16] The General Division acknowledged the Claimant's arguments about the training questionnaires.[6] Nevertheless, it was entitled to consider and weigh all the evidence, both oral and written.[7]

[17] Although the General Division gave more weight to the training questionnaires than the Claimant would have liked, that doesn't mean that the General Division acted unfairly towards her.

– **The Claimant has not shown that the General Division was biased**

[18] The Claimant was entitled to a decision from a fair and impartial decision maker. She argues that the General Division member's personal views about the number of job applications she submitted shows bias.

[19] Allegations of bias are serious and members are presumed to be impartial.[8] As a result, the legal test for proving bias is high. The Claimant needs evidence to prove bias; suspicion isn't enough.[9]

[20] The Claimant's allegations don't meet the high bar needed to prove bias. An informed person viewing the matter realistically and practically would not conclude that the General Division member decided the case unfairly because she mentioned the number of applications the Claimant had submitted while receiving benefits. The Claimant's efforts to find a new job were relevant to the issue the General Division was deciding.

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[6] See paragraph 82 of the General Division decision.
[7] People claiming EI benefits have to provide honest information to the Commission: see the Claimant's list of responsibilities starting on page GD3-6, along with sections 38 and 135 of the *Employment Insurance Act* (EI Act).
[8] The Supreme Court of Canada discussed bias in the decision *Committee for Justice and Liberty et al* v *National Energy Board et al*, 1976 CanLII 2.
[9] See *SM* v *Minister of Employment and Social Development*, 2015 SSTAD 1050 at paragraph 17.

The General Division considered and correctly interpreted relevant parts of the law

[21] The main issue the General Division had to decide was whether the Claimant was "capable of and available for work" but unable to find a suitable job.[10] The law doesn't define "available"; however, the Tribunal uses the following factors (known as the *Faucher* factors) to assess a person's availability:[11]

- Does the person want to go back to work as soon as a suitable job is available?
- Has the person made reasonable efforts to find a suitable job?
- Has the person set personal conditions that might unduly (overly) limit their chances of going back to work?

[22] In the end, the General Division was satisfied that the Claimant wanted to return to work. However, it decided that the Claimant didn't make enough efforts to go back to work and that she set personal conditions that overly limited her chances of finding a new job.

– The General Division did not overlook relevant regulations

[23] The Claimant argues that the General Division overlooked section 9.001 of the *Employment Insurance Regulations* (EI Regulations). I disagree.

[24] Section 9.001 of the EI Regulations is connected to section 50(8) of the *Employment Insurance Act* (EI Act), which says that the Commission can ask a person to prove that they were making reasonable and customary efforts to find suitable work. In turn, section 9.001 lists criteria used for deciding that issue.

[25] The General Division concluded that it didn't need to consider section 50(8) of the EI Act because it wasn't among the provisions that the Commission relied on to

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[10] This requirement is set out in section 18(1)(a) of the EI Act.
[11] This is a plain language summary of the factors described by the Federal Court of Appeal in *Faucher v Canada (Employment and Immigration Commission)*, 1997 CanLII 4856.

create the Claimant's overpayment.[12] Based on that conclusion, the General Division didn't need to expressly consider section 9.001 of the EI Regulations either.

[26] Regardless, I recognize that there is overlap between the second *Faucher* factor and the need to make reasonable and customary efforts to find suitable work under section 50(8) of the EI Act. And in that context, the General Division acknowledged many of the factors falling under section 9.001 of the EI Regulations.[13]

[27] So, it's irrelevant whether the General Division was assessing the Claimant's availability under section 18 or her reasonable and customary efforts to find suitable work under section 50(8) of the EI Act. In both cases, the General Division was able to consider the number of applications the Claimant submitted as a measure of whether she met the legal requirements for receiving EI benefits.

[28] Unlike what the Claimant is alleging, the General Division based its assessment on all the circumstances of the case, and not on a minimum number of applications that the Claimant needed to submit to receive EI benefits.

– **The General Division correctly interpreted Federal Court of Appeal decisions**

[29] The Claimant argues that the General Division misinterpreted the Federal Court of Appeal's decision in *Canada (Attorney General) v Cyrenne*.[14] I disagree.

[30] There's no dispute that full-time students are presumed to be unavailable for work.[15] However, the presumption doesn't apply to students with exceptional circumstances, including those who have a history of working and studying at the same time.

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[12] See paragraphs 37 to 42 of the General Division decision.
[13] See, for example, paragraph 69 of the General Division decision.
[14] The full citation for this decision is *Canada (Attorney General) v Cyrenne*, 2010 FCA 349.
[15] The Federal Court of Appeal established this presumption in decisions like *Canada (Attorney General) v Gagnon*, 2005 FCA 321.

[31] The General Division interpreted the *Cyrenne* decision correctly. However, the Claimant disagrees with the way that it was applied in her case. So, the Claimant is raising mixed errors of fact and law, which isn't something that I can consider.[16]

[32] The Claimant is also alleging that, when assessing the special circumstances in her case, the General Division based its decision on important mistakes about the facts of her case. I will consider those arguments below.

– **The General Division did not have to follow other Tribunal decisions**

[33] The Claimant alleges that the General Division made an error by not following the decision in *AP v Canada Employment Insurance Commission*.[17]

[34] I disagree. The General Division doesn't have to follow other Tribunal decisions. Plus, the General Division highlighted differences between the two cases to explain why it wasn't following the *AP* decision.

[35] The Claimant doesn't seem to be saying that the General Division misinterpreted the *AP* decision. Instead, she's arguing that the two cases are near identical and that the General Division was only able to identify differences because of important mistakes it made about the facts of her case.

[36] I will consider the Claimant's alleged errors of fact below.

The Tribunal has limited powers to oversee the quality of service the Commission provided to the Claimant

[37] The Claimant argues that the Commission had a duty to provide her with accurate information about her claim for EI benefits.[18] She says that one of the Commission's agents confirmed that she was entitled to benefits, told her how to

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[16] See paragraphs 7 to 9 of the Federal Court of Appeal's decision in *Garvey v Canada (Attorney General)*, 2018 FCA 118.
[17] The full citation for this decision is *AP v Canada Employment Insurance Commission*, 2021 SST 690.
[18] In support of her arguments, the Claimant relies on new evidence that I can't consider: see *Sibbald v Canada (Attorney General)*, 2022 FCA 157 at para 39. Also, I'm not convinced the legal provisions the Claimant is citing are relevant in this case: see page AD4-7. However, the Claimant's application form contains a summary of the Commission's responsibilities, including a duty to provide prompt and courteous service, along with accurate information about a claim: see page GD3-6.

complete her biweekly reports so that she would keep receiving benefits, and even changed some of the answers on her past reports.

[38] The Claimant also argues that the Commission used a discretionary power to reopen her claim, but that it didn't use its discretionary powers judicially in her case. Specifically, the Claimant argues that the Commission reviewed her training questionnaire and approved her claim. The Commission shouldn't then be able to change its mind and demand a repayment based on the same information.

[39] In short, the Claimant argues that the Commission should take responsibility for providing her with misinformation and making wrong decisions.

[40] I agree that the Commission provided the Claimant with poor service in this case. However, the Tribunal must follow decisions from the Federal Court of Appeal. This includes decisions saying that misinformation and poor service from the Commission can't change the requirements of the law or relieve a person from having to repay benefits that they should not have received.[19]

[41] The General Division correctly interpreted the law on this subject.[20]

[42] I also have to recognize that the law gives the Commission broad powers to reconsider a person's availability.[21]

[43] The Commission admits that it didn't assess all the evidence about the Claimant's availability when she first provided it. Instead, the Commission adopted a modified operational approach, meaning that it delayed doing a thorough review of a person's availability in some cases.[22] Whatever the wisdom of that approach, the Commission felt it was needed as part of its response to the COVID-19 pandemic.

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[19] 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.
[20] See paragraph 92 of the General Division decision.
[21] The Commission's reconsideration powers are set out under sections 52 and 153.161 of the EI Act. The latter was temporarily added to the EI Act and applies specifically to students like the Claimant.
[22] The Explanatory Note to Interim Order No. 10 mentions this modified operational approach: see Part II of the *Canada Gazette*, volume 154, number 21 at pages 2423 to 2424.

[44] The Commission recognizes that its modified operational approach has put the Claimant in a difficult situation. However, it says that her claim was initially approved based on an incomplete review of conflicting information that she provided about her availability. Due to the demands of the COVID-19 pandemic, the Commission delayed its detailed review of that information until November 2021, when it concluded that the Claimant wasn't available for work.

[45] In this situation, and especially given the Commission's broad powers along with its modified operational approach, I can't find an error in the General Division's conclusion that the Commission used its discretionary powers judicially in this case.

The General Division did not base its decision on any serious errors about the facts of the case

[46] I can't intervene just because the General Division made a mistake about a minor detail in the case. Instead, the law only allows me to intervene if the General Division "based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it."[23]

[47] This means that I can consider the following questions about the findings (facts) that the General Division relied on to reach its decision:[24]

- Does the evidence squarely contradict the General Division's findings?
- Is there no evidence that could rationally support the General Division's findings?
- Did the General Division overlook critical evidence that contradicts its findings?

[23] This is in section 58(1)(c) of the DESD Act.
[24] This is a summary of the Federal Court of Appeal's decision in *Walls v Canada (Attorney General)*, 2022 FCA 47 at paragraph 41.

[48] In this case, the Claimant alleges that the General Division based its decision on numerous errors. I have considered them all. However, none meets the criteria above in a way that would allow me to intervene in her case.

[49] The Claimant overly limited her chanced of returning to work. This is a key finding in the General Division decision.[25] And here is a summary of the Claimant's most serious allegations about how the General Division misunderstood the evidence around her availability for work:

General Division's Key Findings	Alleged Errors
The Claimant limited herself to jobs that could fit around her course schedule.	The Claimant's course schedule was no obstacle to finding work: she could listen to her classes in the background and work at the same time.
If she had found a suitable job, the Claimant would have delayed its start until after the end of her program.	If she had found a suitable job, the Claimant would have quit her program, as she'd done before.
The Claimant only looked for jobs in the marketing and legal fields.	The General Division failed to appreciate the limits on the Claimant's job search efforts and why retail jobs were unsuitable for her.

[50] I agree that the General Division could have expressed itself better in places. However, it didn't need to mention every piece of evidence. Plus, there's evidence to support the General Division's findings, and it acknowledged important contradictions in the evidence.[26] As a result, I have no power to intervene in this case.

[51] Briefly, the Claimant's evidence at the General Division hearing was very different from the answers she had previously given to the Commission on training questionnaires and over the phone. The General Division was entitled to assess all the

[25] See the General Division decision at paragraphs 76 to 86.
[26] See, for example, paragraph 82 of the General Division decision.

evidence and decide which version it preferred. It was also entitled to decide whether the Claimant's evidence was strong enough to prove her availability for work.

[52] On her first training questionnaire, the Claimant said that she was available to work on Mondays and weekends only. She said that she wasn't as available for work as she had been before starting her course. She noted that in her previous job she worked regular hours from Monday to Friday, and that she wouldn't be able to work those hours again until the end of her program. The Claimant also said that if she found a job, she would accept it as long as she could delay the start until the end of her program.[27]

[53] On her second training questionnaire, the Claimant said that she had classes in the morning and afternoon from Monday to Friday, except Thursdays when her classes were in the morning only. This time, the Claimant said that she was as available for work as she had been before starting her course. However, she said that she would finish her course if it conflicted with a new job.[28]

[54] On her third training questionnaire, the Claimant said that she was available to work on weekends only. Like on the first questionnaire, she said that she wasn't as available for work as she had been before starting her course because her classes were during regular hours, just as her previous job had been. The Claimant also said that if she found a job, she would accept it as long as she could delay the start until the end of her program.[29]

[55] In a conversation on January 18, 2022, the Claimant told one of the Commission's agents said that she was looking for part-time jobs at around 8 to 16 hours per week, depending on her class schedule. She also said that she wasn't available to work on weekends, when she did some volunteer work and caught up on her studies. The Claimant recognized that she wasn't available for work while studying, but said that she should be able to keep the benefits she had received because one of

[27] The Claimant's first training questionnaire, dated February 7, 2021, starts on page GD3-13.
[28] The Claimant's second training questionnaire, dated May 7, 2021, starts on page GD3-19.
[29] The Claimant's third training questionnaire, dated September 13, 2021, starts on page GD3-24.

the Commission's agents had told her to report being available regardless of her class schedule.[30]

[56] Despite the Claimant's explanations, it's not exactly clear why the Claimant found the training questionnaires so hard to complete. Nor did she seriously challenge the accuracy of the notes taken by the Commission's agent following their conversation on January 18, 2022.

[57] In addition, the Claimant is now trying to explain how her health prevented her from applying for retail jobs. However, it remains true that the Claimant initially focused on finding a marketing job, even though she admitted to lacking the qualifications for most of those jobs.

[58] The Claimant's allegations don't justify my intervention in this case. The law requires that I give some leeway to the General Division's findings of fact.

The General Division did not make any jurisdictional errors

[59] The Claimant argues that the General Division failed to decide whether she was entitled to a reduced amount of benefits based on the days when she was available for work.

[60] I recognize that the law contemplates this possibility.[31] However, it's unclear that the Claimant ever asked the General Division to consider this situation.

[61] Plus, the General Division found that the Claimant's patchwork availability seriously limited her chances of finding a suitable job.[32] In the circumstances, the

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[30] Written notes from the January 18, 2022, conversation start on page GD3-37. On page GD2-9, the Claimant acknowledged again that she wasn't available for work on days when she had class.
[31] See section 20(2) of the EI Act.
[32] The Federal Court of Appeal has decided several cases about student availability. However, I'm not aware of any in which a person was paid benefits for one or two days per week based on their class schedule.

General Division didn't have to consider whether the Claimant was entitled to benefits on the weekdays when she didn't have classes.[33]

[62] The Claimant also argued that the General Division didn't have jurisdiction to use the number of job applications she had submitted when deciding the adequacy of her efforts to find a new job.

[63] I disagree. As described above, the number of applications that the Claimant submitted while receiving benefits was clearly relevant to the General Division's assessment of the second *Faucher* factor.

Conclusion

[64] The Claimant has advanced her arguments capably and professionally. I have a lot of sympathy for her situation. However, I have not found an error that would allow me to intervene in this case. As a result, I have to dismiss the Claimant's appeal.

[65] Before closing, I want to recognize the Claimant's legitimate complaints about the quality of information and service that the Commission provided to her. Although the Claimant didn't meet all the legal requirements for getting EI benefits, the Commission has the power to write-off (cancel) overpayments in some situations.[34] Should the Claimant make such a request, I hope that the Commission will consider it seriously.

[66] It was reasonable for the Claimant to rely on advice from one of the Commission's agents. And it should come as no surprise that she will struggle to repay the significant amount that the Commission is claiming from her.

[67] If she hasn't already done so, the Claimant could also contact the Canada Revenue Agency to ask if some or all of her debt could be written off because it's

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[33] Saturdays and Sundays are not included when assessing a person's availability: see section 32 of the *Employment Insurance Regulations* (EI Regulations).
[34] See section 56 of the EI Regulations.

causing her serious financial hardship.[35] Alternatively, the Claimant and the Canada Revenue Agency might be able to agree to a reasonable repayment plan.

Jude Samson
Member, Appeal Division

[35] See section 56 of the EI Regulations. The Canada Revenue Agency's Debt Management Call Centre can be reached at 1-866-864-5823.