



Citation: *Canada Employment Insurance Commission v RB*, 2022 SST 1350

Social Security Tribunal of Canada Appeal Division

Decision

Appellant: Canada Employment Insurance Commission
Representative: A. Fricker

Respondent: R. B.
Representative: K. B.

Decision under appeal: General Division decision dated April 13, 2022
(GE-22-793)

Tribunal member: Melanie Petrunia

Type of hearing: Teleconference

Hearing date: September 7, 2022

Hearing participant: Appellant's representative

Decision date: November 22, 2022

File number: AD-22-287

Decision

[1] The appeal is allowed. I returning the matter to the General Division for reconsideration.

Overview

[2] The Respondent, R. B. (Claimant) established a claim for employment insurance (EI) benefits effective October 4, 2020. The Appellant, the Canada Employment Insurance Commission (Commission), decided that she was disentitled from receiving benefits from October 5, 2020 because she did not prove her availability for work.

[3] The Claimant requested a reconsideration and the Commission maintained its decision. The Claimant successfully appealed to the General Division. The General Division found that the Claimant had proven that she was available for work. This means that she was not disentitled from receiving benefits.

[4] The Commission now appeals the General Division decision to the Appeal Division. The Commission argues that the General Division erred in law and made an important error of fact.

[5] I have decided that the General Division erred in law. I am sending the matter back to the General Division for reconsideration.

Preliminary matters

[6] The Claimant and her representative did not attend the hearing. Three days after the hearing, the Claimant's representative wrote to the Tribunal and asked to have the matter rescheduled. He said he made a mistake and thought the hearing was scheduled for a different day.¹

[7] The Claimant's representative received the Notice of Hearing and spoke with a navigator at the Tribunal a few days before the hearing. During that conversation he

¹ AD3

was reminded of the hearing date and confirmed that he did not require an interpreter.² For these reasons, I proceeded to hold the hearing on the scheduled date despite the Claimant not attending.

[8] Because the hearing had already been conducted, I denied the request to reschedule the matter. The Claimant's representative was sent a copy of the recording of the hearing and given an opportunity to provide representations in writing.³ The Claimant did not submit any further representations.

Issues

[9] The issues in this appeal are:

- a) Did the General Division err in law by misapplying the legal test for availability?
- b) Did the General Division base its decision on an important error of fact when it disregarded the evidence?
- c) If so, how should the error be fixed?

Analysis

[10] I can intervene in this case only if the General Division made a relevant error. So, I have to consider whether the General Division:⁴

- failed to provide a fair process;
- failed to decide an issue that it should have decided, or decided an issue that it should not have decided;
- misinterpreted or misapplied the law; or

² Telephone log dated August 31, 2022

³ AD4

⁴ The relevant errors, formally known as "grounds of appeal," are listed under section 58(1) of the *Department of Employment and Social Development Act* (DESD Act).

- based its decision on an important mistake about the facts of the case.

Background

[11] The Claimant established a claim for benefits effective October 4, 2020. The Claimant said in her weekly reports that she was not available for work. The Commission decided that she was disentitled to benefits.

[12] In the request for reconsideration, the Claimant wrote that she made a mistake in filling out the EI forms. She said that she was available to work the whole time. She said that she mistakenly believed that she wasn't available for work because she wasn't fully vaccinated.⁵ The Commission wasn't able to reach the Claimant for more information and maintained its decision that she was not available.

– The General Division decision

[13] The General Division allowed the Claimant's appeal. It found that she had shown she was available for work. The General Division found that the Claimant made reasonable and customary efforts to find work because her representative explained that she looked for maintenance jobs but could not find one⁶, and she eventually found a job in October 2021.⁷

[14] The General Division also found that the Claimant proved that she wanted to go back to work as soon as a suitable job was available. It relied on the Claimant's representative's submission that she wanted to go back to work even though she was unvaccinated.⁸

[15] The General Division found that the Claimant made enough efforts to find a suitable job because she searched for maintenance jobs and work in general. It also found that the Claimant did not set personal conditions that might have unduly limited her chances of going back to work. The General Division relied on the representative's

⁵ GD3-22

⁶ General Division decision at para 19.

⁷ General Division decision at para 20.

⁸ General Division decision at para 24.

submission that the Claimant wanted to go back to work despite initially being unvaccinated.⁹

The General Division made errors of law

[16] The Commission argues that the General Division erred in law by misapplying the legal test and failing to impose the burden of proving availability on the Claimant. It says that the General Division misinterpreted the criteria that constitute the legal test for availability.

[17] It also argues that the General Division decision that the Claimant has shown that she was available for work was made without regard for the evidence. It says that the General Division relied on unspecific hearsay evidence and there was no admissible evidence that the Claimant made sustained efforts to find suitable employment.

[18] I find that the General Division's findings are not supported by the evidence. The General Division failed to meaningfully analyze the evidence, which is an error of law.

[19] To be considered available for work, a claimant must show that she is capable of, and available for work and unable to obtain suitable employment.¹⁰

[20] Availability must be determined by analyzing three factors:

- (1) the desire to return to the labour market as soon as a suitable job is offered,
- (2) the expression of that desire through efforts to find a suitable job, and
- (3) not setting personal conditions that might unduly limit the chances of returning to the labour market.¹¹

⁹ General Division decision at para 32.

¹⁰ See section 18(1)(a) of the *Employment Insurance Act*.

¹¹ *Faucher v Canada Employment and Immigration Commission*, A-56-96

[21] In addition, availability is determined for each working day in a benefit period for which the claimant can prove that, on that day, they were capable of and available for work and unable to find a suitable job.¹²

[22] The Claimant did not attend the hearing at the General Division. Her representative, who is also her son, was in attendance. The General Division found that the Claimant had proven her desire to return to the labour market as soon as a suitable job was offered because her representative said she wanted to work and tried to find a job. It also relied on the fact that the Claimant eventually found work, one year later in October 2021.¹³

[23] The General Division also found that the Claimant made enough efforts to find a suitable job. In support of this finding, the General Division relied on the representative statement that the Claimant looked for work but couldn't find a job.¹⁴ There was no other evidence before the General Division to support the Claimant making any efforts to find a job.

[24] Finally, the General Division determined that the Claimant did not set personal conditions that might have unduly limited her chances of going back to work. It relied again on the representative stating that the Claimant wanted to work despite initially being unvaccinated.¹⁵ The General Division did not consider the Claimant's prior statements to Commission, or the statements made in her Notice of Appeal.

[25] In her Notice of Appeal, the Claimant stated that she was eligible for EI benefits from November 2020. She states that she submitted her weekly reports and that she could not work because of the Covid-19 pandemic. She was not vaccinated so she said that she wasn't available because of the Covid-19 pandemic, but she was fit for work.

¹² *Canada (Attorney General) v Cloutier*, 2005 FCA 73

¹³ General Division decision at para 24.

¹⁴ General Division decision at para 27.

¹⁵ General Division decision at para 32.

After she was vaccinated on July 1, 2021, the Claimant indicated on her reports that she was available for work.¹⁶

[26] In the record before the General Division, there are notes of a conversation between the Claimant and a Service Canada agent which states: "Claimant is uncomfortable attending work due to COVID 19. She is worried she may catch this due to her age."¹⁷

[27] I have listened to the hearing before the General Division. At the hearing, the General Division member stated that the Claimant's representative did not want to be a witness.¹⁸ The General Division said that it would not be swearing the representative in as a witness because he would be providing submissions only.¹⁹ Despite this, the General Division asked the representative questions about the Claimant's circumstances and accepted his responses as evidence.

[28] The representative told the General Division that the Claimant submitted her reports but couldn't work until June 2021 when she was vaccinated.²⁰ He stated that she was available to work but concerned about Covid.²¹

[29] The General Division asked the representative if the Claimant really wasn't available from October 2020 until June 1, 2021.²² The representative confirmed that she was not vaccinated during that time. He said that she wanted to work but it was not safe to work outside.²³ The representative explained that she reported that she was not available for work, and chose "other" meaning the pandemic. After June, the representative said that the Claimant reported that she was available.²⁴

¹⁶ GD2-6

¹⁷ GD3-17

¹⁸ Recording of hearing before General Division at 3:10.

¹⁹ Recording of hearing before General Division at 3:30.

²⁰ Recording of hearing before General Division at 8:00.

²¹ Recording of hearing before General Division at 11:00.

²² Recording of hearing before General Division at 11:40.

²³ Recording of hearing before General Division at 11:50.

²⁴ Recording of hearing before General Division at 12:45.

[30] When the General Division member asked again for clarity about the period from October to June, the representative said that it was not safe to work outside so we said not available.²⁵ The representative then stated: “I think she should get money from October 2020 because she couldn’t work because of the pandemic.”²⁶

[31] The General Division does not address any of these statements in its decision. It also did not consider the Claimant’s statements in her Notice of Appeal. I find that the General Division did not meaningfully analyze the evidence when it concluded that the Claimant had proven her availability for work.

[32] The General Division also failed to consider the many statements by the Claimant and her representative regarding her concerns about not being vaccinated, and whether this was a personal condition that might have unduly limited her chances of going back to work.

[33] I find that the General Division erred in law by failing to meaningfully analyze the evidence and misapplying the legal test.

Remedy

[34] The Commission argues that the record is complete and the Claimant had an opportunity to attend the hearing before the General Division but chose not to. Its position is that I should make the decision that the General Division should have made: that the Claimant has not proven her availability for work.

[35] The Claimant and her representative did not attend the hearing, or file submissions, as discussed above. After listening to the hearing before the General Division, I am not satisfied that the Claimant knew the case that she had to meet at the General Division. Despite the Claimant not wanting to be sworn as a witness, the General Division asked questions and elicited evidence from the representative that it then relied on in its decision.

²⁵ Recording of hearing before General Division at 15:40.

²⁶ Recording of hearing before General Division at 16:30.

[36] As the Commission raised in its submissions, the General Division also stated that the Commission disentitled the Claimant from October 5, 2020 to June 30, 2021. However, the disentanglement was for an indefinite period starting on October 5, 2020.

[37] The Claimant provided a date of vaccination of July 1, 2021 in her Notice of Appeal, and stated that she was available for work after that date. In its decision, the General Division indicated that the Claimant was fully vaccinated at the start of June 2021. I find that the evidence is unclear regarding the Claimant's date of vaccination, which may impact on her availability.

[38] For these reasons, I am returning the matter to the General Division for reconsideration.

Conclusion

[39] The appeal is allowed. The General Division made errors of law. I am returning the matter to the General Division for reconsideration.

Melanie Petrunia
Member, Appeal Division