



Citation: *FG v Canada Employment Insurance Commission*, 2022 SST 1522

## Social Security Tribunal of Canada Appeal Division

# Decision

**Appellant:** F. G.  
**Representative:** P. A.

**Respondent:** Canada Employment Insurance Commission  
**Representative:** Angèle Fricker

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**Decision under appeal:** General Division decision dated May 27, 2022  
(GE-22-858)

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**Tribunal member:** Janet Lew

**Type of hearing:** Videoconference  
**Hearing date:** October 26, 2022  
**Hearing participants:** Appellant  
Appellant's representative  
Respondent's representative

**Decision date:** December 22, 2022  
**File number:** AD-22-397

## Decision

[1] The appeal is allowed. The matter will go back to the General Division for reconsideration before a different member.

## Overview

[2] The Appellant, F. G. (Claimant), a home support worker, is appealing the General Division decision. The General Division found that the Claimant took a voluntary leave of absence from her employment. The General Division also found that the Claimant did not have just cause and that she had reasonable options to remain employed. The General Division concluded that the Claimant was disentitled<sup>1</sup> from receiving Employment Insurance benefits.

[3] The Claimant says the General Division made an important factual mistake. In particular, she argues that it failed to consider the fact that she stopped working because of a shortage of work. She denies that she initially sought a leave of absence and says the leave was prompted by her employer. She also denies that she stopped working because of any health concerns. She asks the Appeal Division to allow her appeal and to find that she was not disentitled from receiving Employment Insurance benefits.

[4] The Respondent, the Canada Employment Insurance Commission (Commission), denies that the General Division overlooked any of the evidence, or that it made any reviewable errors. The Commission argues that the General Division considered the relevant evidence, and properly weighed and made findings consistent with that evidence. The Commission asks the Appeal Division to dismiss the Claimant's appeal.

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<sup>1</sup> The General Division found that the Claimant's leave met the criteria in section 32 of the *Employment Insurance Act* because the Claimant's leave was approved by her employer and both the Claimant, and the employer agreed upon a return date. Under section 32, a claimant is disentitled from receiving benefits, rather than disqualified from receiving them. However, at para 44, the General Division concluded that the claimant was disqualified from receiving benefits.

## Issue

[5] The issue is: Did the General Division ignore some of the evidence about why the Claimant stopped working?

## Analysis

[6] The Appeal Division may intervene in General Division decisions if there are jurisdictional, procedural, legal, or certain types of factual errors.<sup>2</sup>

[7] For factual errors, the General Division had to have 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.

### **Did the General Division ignore some of the evidence about why the Claimant stopped working?**

[8] The Claimant argues that the General Division failed to consider some of the evidence about why she had stopped working. She claims that there was not enough work. She claims that she asked her employer for more work, but her employer told her nothing was available. She claims that her employer directed her to go on a leave of absence because there was not enough work.<sup>3</sup>

[9] So, the primary reason she went on a leave was because of a shortage of work. She says that health concerns were a secondary factor for her leave of absence.

[10] The Claimant says that, if the General Division had not overlooked this evidence that there was a work shortage, it would have accepted that she had not voluntarily left her employment. And, if she had not voluntarily left her employment, then she would not have been disentitled from receiving Employment Insurance benefits.

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<sup>2</sup> Section 58(1) of the *Department of Employment and Social Development Act*.

<sup>3</sup> See Claimant's Application to the Appeal Division – Employment Insurance, filed June 26, 2022, at AD 1-4. The Claimant stated that she trusted her employer to guide her through the Employment Insurance process. She wrote that she “decided to apply for [Employment Insurance] firstly, due to shortage of work and secondly due to increased health concerns”.

– **The General Division decision**

[11] The General Division noted that the Claimant disagreed that she voluntarily took a leave of absence.

[12] The General Division set out the Claimant's evidence as follows:

- The Claimant decided she would significantly scale back her acceptance of shifts. This was because of health and safety concerns during the pandemic. She stated that she wanted to minimize her risk of contracting the virus.<sup>4</sup>
- When she contacted Service Canada, she learned that she would need a record of employment. Her employer refused to provide one at first because she was not separated from her employment. The employer offered that if the Claimant went on "hold" (a leave of absence), it would issue her a record of employment. The Claimant agreed with this arrangement.<sup>5</sup>
- The Claimant was unaware of the consequences of being placed on "hold". She only agreed to it because her employer would not give her a record of employment otherwise.<sup>6</sup>

[13] The General Division also noted the Commission's evidence. The Commission said that the Claimant initially stated that she lost her employment because there was not enough work for her. Then she stated that she took a leave to establish an Employment Insurance claim. Then, finally, she claimed to have taken a leave because of her fear of contracting COVID-19.<sup>7</sup>

– **The evidence in the hearing file**

[14] The evidence consists of the following:

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<sup>4</sup> General Division decision, at para 12.

<sup>5</sup> General Division decision, at para 13.

<sup>6</sup> General Division decision, at para 14.

<sup>7</sup> See Commission's Representations to the Social Security Tribunal – Employment Insurance Section, filed March 25, 2022, at GD 4-3.

### **The Claimant's evidence**

- The Claimant had been working five to six days a week for over 20 years until the pandemic began. When she applied for Employment Insurance benefits, the Claimant stated that she last worked on October 1, 2021. She was no longer working because of a shortage of work.<sup>8</sup>
- When the Claimant spoke with the Commission about her application, she clarified that she was still working, but only two to three hours per week then.<sup>9</sup>
- The Claimant explained her separation from work was due to a shortage of work. She denied that she wanted to go on a leave of absence. She had asked for a record of employment, but her employer did not want to issue one until she stopped working altogether. "Therefore, [her employer] stopped giving her any shift[s]."<sup>10</sup>
- The Claimant stated her employer had less work available. She insisted that there was a shortage of work.<sup>11</sup>
- When the Claimant asked the Commission to reconsider its initial decision denying her application, the Claimant stated that her employer told her that there was not enough work and that she should apply for Employment Insurance benefits. The Claimant wrote, "Essentially, they reduced my work hours to the point that I was not working and there was no work anymore... I have also tried to contact my employer about being put on the schedule but informed that there are no available hours".<sup>12</sup>
- The Claimant denied the employer's statements that there was no work shortages.<sup>13</sup>

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<sup>8</sup> See Claimant's Application for Employment Insurance benefits, at GD 3-8.

<sup>9</sup> See Action item obtained on November 3, 2021, at GD 3-23.

<sup>10</sup> See Supplementary Record of Claim, dated December 14, 2021, at GD 3-32.

<sup>11</sup> See Supplementary Record of Claim, dated December 14, 2021, at GD 3-33.

<sup>12</sup> See Claimant's request for reconsideration, dated December 29, 2021, at GD 3-39.

<sup>13</sup> See Supplementary Record of Claim, dated January 28, 2022, at GD 3-40 to GD 3-41.

- When she filed a Notice of Claim with the General Division, the Claimant explained that she had concerns about working during a pandemic, given the risk of exposure to COVID-19. She wanted to minimize her risk of exposure.<sup>14</sup>

The Claimant did say that she looked for other work within the company that did not involve directly working with patients. But her employer said there was “no other work available”.<sup>15</sup>

- At the General Division hearing, the Claimant testified that she had concerns about COVID-19.<sup>16</sup> The General Division member told the Claimant that her employer said that she could pick up more shifts if she wanted.<sup>17</sup> The Claimant said that she was cautious because of her age and her spouse’s age. She also testified that if her employer had offered shifts, she would have accepted them. She testified that she never refused any shifts that her employer offered.

### **The employer’s evidence**

- The employer stated that the Claimant was a casual employee. That meant that she could decide whether to work any shifts that were offered to her. The employer considered her an active employee, so was unable to issue a record of employment.<sup>18</sup>
- The employer provided a Record of Employment that indicated the Claimant was on a leave of absence.<sup>19</sup>
- The employer stated that the Claimant decided to go on a leave of absence. The Service Canada agent asked whether the employer issued the record of

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<sup>14</sup> See Notice of Appeal to the General Division. Filed March 2, 2022, at GD 2-5 and GD 2-9.

<sup>15</sup> See Notice of Appeal to the General Division, at GD 2-9.

<sup>16</sup> Starting at approximately 7:58 of the audio recording of the General Division hearing.

<sup>17</sup> At approximately 22:34 of the audio recording of the General Division hearing.

<sup>18</sup> See Supplementary Record of Claim, dated October 22, 2021, at GD 3-29.

<sup>19</sup> See Record of Employment dated November 2, 2021, at GD 3-20.

employment with the leave of absence due to a shortage of work. The employer responded that there was no shortage of work.

The agent also asked whether the employer provided fewer shifts to the Claimant because of a shortage of work. The employer responded that it could not confirm whether the Claimant chose to work fewer shifts. The Claimant was a casual employee and so could choose shifts based on her own availability.<sup>20</sup>

- The employer stated that the Claimant was working as a casual employee and could pick shifts based on her own availability. The employer stated that the only time it had a shortage of work was during the first wave of the pandemic. After September 10, 2020, there were no work shortages. There was enough work to provide the casual employee full-time hours.<sup>21</sup>
- The employer stated that the Claimant could have gone up to full-time hours (40 hours per week) as there was plenty of work available. But, as a casual employee, the Claimant had the flexibility to choose shifts based on her own availability.<sup>22</sup>
- The employer stated that they are in high demand in the community and work is always available, but it is up to the employee whether they want to accept work. The employer stated that the Claimant asked to be placed on hold for personal reasons. The Claimant had asked for a record of employment, but as work was available, they could not issue one for a shortage of work.<sup>23</sup>

**– There was conflicting evidence in the hearing file**

[15] There was conflicting evidence between the Claimant and her employer. On the one hand, evidence from the Claimant showed that there a shortage of work. On the

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<sup>20</sup> See Supplementary Record of Claim, dated December 13, 2021, at GD 3-30.

<sup>21</sup> See Supplementary Record of Claim, dated December 14, 2021, at GD 3-31.

<sup>22</sup> See Supplementary Record of Claim, dated December 14, 2021, at GD 3-34.

<sup>23</sup> See Supplementary Record of Claim, dated February 2, 2021, at GD 3-42.

other hand, evidence from the employer showed that there was ample work. There was also other evidence that could reasonably explain why the Claimant stopped working.

[16] The General Division was entitled to prefer some of the evidence and to reject other pieces of evidence, as long as it addressed any conflicting evidence and explained why it preferred or was giving more weight to some of the evidence over others.

– **The General Division had to have been aware of the Claimant’s assertions that there was a shortage of work**

[17] The General Division had to have been aware of the Claimant’s assertions that she had stopped working because of a shortage of work. After all, the General Division referred to the Commission’s arguments.<sup>24</sup> The Commission argued that the Claimant’s story changed over time, that initially she said she stopped working because of a work shortage, then later, said she feared contracting COVID-19.

[18] The General Division rejected the Commission’s arguments that the Claimant’s health and safety concerns were not credible. The General Division accepted the Claimant’s statements that she was concerned for her health during the pandemic.<sup>25</sup> Even so, the General Division found the Claimant’s concerns did not amount to just cause for taking a leave of absence from her employment. The General Division found that the Claimant had reasonable alternatives.

– **The Claimant’s position**

[19] The Claimant says the General Division failed to turn its mind to the Claimant’s earlier assertions that she had stopped working because of a shortage of work. Indeed, the General Division does not directly refer to the Claimant’s early statements to the Commission that she stopped working because of a work shortage.

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<sup>24</sup> See General Division decision, at paras 16 and 30.

<sup>25</sup> See General Division decision, at para 31.



– **The Commission’s position**

[20] The Commission argues that it is clear from the General Division’s decision that it rejected the Claimant’s assertions that there were work shortages. The Commission says it is evident that the General Division considered this issue, from the following:

- The General Division recognized the Claimant and the Commission disagreed on whether the Claimant’s leave of absence was voluntary;<sup>26</sup> The Commission suggests that, if the Claimant’s leave had been voluntary, that would necessarily mean that there was work available for her.
- The General Division referred to the evidence showing the Claimant spoke with her employer about her health concerns, and the Claimant agreed to be placed on hold. That way, she could get a Record of Employment.<sup>27</sup> The Commission suggests that the fact that the Claimant agreed to be placed on hold so she could get a Record of Employment meant that there was work available.
- The General Division referred to the Claimant’s testimony that she accepted being placed on hold because it was the only way she could get a Record of Employment.<sup>28</sup> The Commission argues that this implies and supports the fact that there was at least some work available. But the Claimant wanted to be off work completely so she could get a Record of Employment.
- The General Division wrote that it was clear from the submissions and the Claimant’s testimony that “she wanted to either stop working or significantly reduce her hours during the pandemic.” The General Division noted that the employer offered her an option to place her on “hold” which meant it would no longer offer her any shifts.<sup>29</sup> The Commission says this passage shows that

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<sup>26</sup> See General Division decision, at para 9.

<sup>27</sup> See General Division decision, at para 13.

<sup>28</sup> See General Division decision, at para 14.

<sup>29</sup> General Division decision, at para 17.

the General Division did not accept the Claimant's assertions that she stopped working because of a shortage of work.

- The General Division found that the option of a leave of absence was not forced on the Claimant. The employer presented the leave of absence as an option. The Commission argues that the leave of absence was the mechanism by which the Claimant could get a Record of Employment.<sup>30</sup> The Commission argues that this shows that there was work available, as otherwise the Claimant would not have had any option about accepting the "hold".
  - The General Division concluded that the Claimant's leave of absence was entirely voluntarily.<sup>31</sup> The Commission says that, if the leave of absence was voluntary, this meant that there had to have been work available.
- Whether the General Division considered the Claimant's assertions that there was a shortage of work**

[21] The fact that the General Division made certain factual findings does not establish or show that it analyzed whether the Claimant had stopped working because of a work shortage.

[22] If the General Division had considered the Claimant's earlier assertions that she had stopped working because of a work shortage, surely it would have at least acknowledged the Claimant's assertions that she had stopped working because of a shortage of work. This does not mean that the General Division would have accepted these assertions, but rather, that it was aware of the Claimant's position.

[23] And, if the General Division had considered and analyzed this issue, surely it would have referred to the employer's statements to the Commission. The employer's statements were the strongest pieces of evidence that indicated that there were no work shortages.

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<sup>30</sup> General Division decision, at para 20.

<sup>31</sup> General Division decision, at para 21.

[24] The employer denied any work shortages after September 2020.<sup>32</sup> The employer also stated that the Claimant had asked to be removed from scheduling between the second week of September 2021 to the end of November 2021.<sup>33</sup>

[25] But the Record of Earnings could be seen as supportive of the Claimant's allegations that she was already getting few hours of work from her employer. The employer last paid the Claimant on October 13, 2021.

[26] For the Claimant's last 12 pay periods before she stopped working, her earnings were much lower than they had been, compared to the previous pay periods. There were several pay periods in the last 24 weeks when she earned \$34.<sup>34</sup> In other words, the Claimant was already barely earning anything before the second week of September 2021—before she reportedly asked to be on "hold".

[27] The General Division asked the Claimant about these earnings. The Claimant explained that she was getting fewer hours because patients (clients) were fearful of contracting COVID. The patients (clients) asked her employer not to send support workers to their homes.<sup>35</sup>

[28] The employer did not say anything about the Claimant's pre-September 2021 earnings and shifts, although the employer stated that casual employees like the Claimant had flexibility. They could pick and choose which shifts they wanted.<sup>36</sup>

[29] The Claimant consistently stated that she was getting few hours. The General Division did not challenge the Claimant on this evidence.

[30] The General Division asked the Claimant about her employer's statement to the Commission. The employer told the Commission that the Claimant had the option to

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<sup>32</sup> See Supplementary Record of Claim, dated December 14, 2021, at GD 3-31.

<sup>33</sup> See Supplementary Record of Claim, dated December 14, 2021, at GD 3-34.

<sup>34</sup> The Record of Employment shows earnings for bi-weekly pay periods. On the Record of Employment, in Box 6, the employer recorded that the type of pay period was bi-weekly. See GD 3-20.

<sup>35</sup> At approximately 17:30 to 19:14 of the audio recording of the General Division hearing.

<sup>36</sup> See Supplementary Record of Claim, dated December 14, 2021, at GD 3-34.

pick up shifts whenever she wanted. The Claimant responded that, “they didn’t tell me that. They told me that like, after what is ...”<sup>37</sup>

[31] The Claimant had already returned to work when the General Division hearing took place. She had resumed working for perhaps two months. She resumed working after the Commission denied her claim for Employment Insurance benefits and her employer called her back.<sup>38</sup>

[32] The General Division revisited its question about the employer’s statement suggesting that work was available and that there were no work shortages. The member asked, “[Your employer] says that you can pick up more shifts if you want. What do you say to that?” The Claimant responded, “This time, if they call me for more shifts, I’m okay, but these days, I’m 65, my husband is 67, my kids and grandkids were getting through COVID, and even myself, I got COVID, so I am cautious”.<sup>39</sup>

[33] When the Claimant stated, “This time, if they call me for more shifts, I’m okay,” this suggested that the employer had offered shifts to the Claimant before, but that she turned them down. However, the Claimant later also testified that whenever her employer offered any shifts to her, she never turned anything down.<sup>40</sup>

[34] The General Division did not discuss these considerations about whether there was a shortage of work. The General Division focused on whether the Claimant stopped working because of health and safety concerns related to COVID-19 exposure. This was not unreasonable. After all, the Claimant had focused on health and safety concerns in her Notice of Appeal to the General Division, and in her testimony at the General Division.

[35] At the General Division hearing, the Claimant confirmed that she was concerned about the dangers of COVID-19 and the risk to her and her family. She confirmed being

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<sup>37</sup> At approximately 14:17 of the audio recording of the General Division hearing.

<sup>38</sup> At approximately 20:25 to 22:34 of the audio recording of the General Division hearing.

<sup>39</sup> At approximately 22:35 to 23:30 of the audio recording of the General Division hearing.

<sup>40</sup> At approximately 25:55 to 26:15 of the audio recording of the General Division hearing.

placed on a “hold” so she could get a Record of Employment from her employer, and then get Employment Insurance benefits.<sup>41</sup>

[36] It was likely because of the Notice of Appeal and the Claimant’s testimony that the General Division did not analyze the evidence that supported or undermined the Claimant’s assertions that a shortage of work led to her separation.

[37] At the very least, the General Division should have determined whether the Claimant was continuing to say that she stopped working because of a shortage of work, or whether she was now abandoning that position. After all, when the Claimant asked the Commission to reconsider its initial decision, she wrote:

There seems to be a misunderstanding with respect to the reason for separation. Namely, my employer began to drastically reduce my hours of work to the point that it was not enough to sustain my living expenses. When I approached them about this, they indicated that there is not enough work for me and that I should apply for EI.<sup>42</sup>

[38] The issue about the shortage of work was an issue for the Claimant as recently as the reconsideration stage but also arguably at the leave to appeal stage as well. In her Application to the Appeal Division (the Notice of Appeal), the Claimant wrote:

From my standpoint, . . . once the pandemic hit, **I was left with no work**, safety concerns and failed by a system implemented to assist in times of need. **I tried my best to obtain more work from my employer** to support myself and my husband, **in receiving scarce work** and risking my well being I was not receiving sufficient income and unable to make necessary payments.<sup>43</sup>

(Emphasis added)

[39] If the Claimant did not say that the shortage of work was an issue, I would have deferred to the General Division. But the General Division focused on the issue of the Claimant’s health and safety concerns without considering or analyzing whether the

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<sup>41</sup> At approximately 8:00 to 11:26 of the audio recording of the General Division hearing.

<sup>42</sup> See Claimant’s Request for Reconsideration, at GD 3-37.

<sup>43</sup> See Claimant’s Application to the Appeal Division – Employment Insurance, filed June 26, 2022, at AD 1-9.

Claimant had stopped working because of a shortage of work when she had made it an issue.

## Remedy

[40] How can I fix the General Division's error? I have two choices.<sup>44</sup> I can substitute my own decision, or I can refer the matter back to the General Division for a redetermination. If I substitute my own decision, this means I may make findings of fact.

[41] The General Division did not turn its mind to the issue about the shortage of work. This in part led to some gaps in the evidence. The parties should be given the opportunity to address or explain these gaps. For that reason, it is appropriate to return the matter to the General Division.

[42] This will allow the parties to get additional information to explain some of those gaps. For instance, the parties can get any employment records that might show if there were any weeks within the last 12 pay periods when she did not work,<sup>45</sup> or why the Claimant had so few hours in the last 12 pay periods before she stopped working.

[43] The employer also indicated that, at one point, the Claimant removed her company client. In other words, she was no longer being offered shifts to support this client. It is unclear if this happened sometime in the last 12 pay periods, when the Claimant's hours dropped, but employment records may answer this question.

## Conclusion

[44] The appeal is allowed, and the matter returned to the General Division for a redetermination by a different member.

Janet Lew  
Member, Appeal Division

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<sup>44</sup> See section 59 of the *Department of Employment and Social Development Act*.

<sup>45</sup> It is unclear whether the Claimant worked each week when she received less than \$35 bi-weekly.