



[TRANSLATION]

Citation: *CB v Canada Employment Insurance Commission*, 2022 SST 1504

Social Security Tribunal of Canada Appeal Division

Decision

Appellant: C. B.
Representative: Jérémie Dhavernas

Respondent: Canada Employment Insurance Commission
Representative: Rachel Paquette

Decision under appeal: General Division decision dated
August 12, 2022 (GE-21-1895)

Tribunal member: Pierre Lafontaine

Type of hearing: Teleconference

Hearing date: December 1, 2022

Hearing participants: Appellant
Appellant's representative
Respondent's representative

Decision date: December 21, 2022

File number: AD-22-646

Decision

[1] The Claimant's appeal is allowed.

[2] The Claimant's entitlement should not be verified under section 153.161(2) of the *Employment Insurance Act* (EI Act) for the periods from September 28 to December 18, 2020, and from January 13, 2021, to April 26, 2021.

Overview

[3] The Respondent (Commission) decided that the Appellant (Claimant) was not entitled to Employment Insurance (EI) regular benefits from September 28 to December 18, 2020, and from January 13 to April 26, 2021, because he was taking unauthorized training and was not available for work.

[4] The General Division found that the Commission acted in bad faith and did not act in a judicial manner when it reviewed the Claimant's claim under section 153.161(2) of the EI Act. The General Division decided that it could intervene because the Commission had not acted judicially.

[5] When it intervened, the General Division considered the Claimant's availability. It found that the Claimant wanted to go back to work but did not make enough effort to find a job while in school. It also found that the Claimant was limiting his chances of finding a job. The General Division decided that the Claimant was not available for work during the relevant periods.

[6] The Appeal Division granted the Claimant leave to appeal the General Division decision. He argues that the General Division made an error of law by considering his availability after finding that the Commission had not exercised its review authority in a judicial manner.

[7] I have to decide whether the General Division made an error of law by considering the Claimant's availability after finding that the Commission had not exercised its review authority in a judicial manner.

[8] I am allowing the Claimant's appeal.

Issue

[9] Did the General Division make an error of law by considering the Claimant's availability after finding that the Commission had not exercised its review authority in a judicial manner?

Analysis

Appeal Division's mandate

[10] The Federal Court of Appeal has established that the Appeal Division's mandate is conferred to it by sections 55 to 69 of the *Department of Employment and Social Development Act* (DESD Act).¹

[11] The Appeal Division acts as an administrative appeal tribunal for decisions made by the General Division and does not exercise a superintending power similar to that exercised by a higher court.

[12] So, unless the General Division failed to observe a principle of natural justice, made an error of law, or 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, I must dismiss the appeal.

Did the General Division make an error of law by considering the Claimant's availability after finding that the Commission had not exercised its review authority in a judicial manner?

[13] The Claimant argues that, after finding that the Commission had acted in bad faith when reviewing his entitlement under section 153.161(2) of the EI Act, the General Division verified his availability when it should not have.

¹ *Canada (Attorney General) v Jean*, 2015 FCA 242; *Maunder v Canada (Attorney General)*, 2015 FCA 274.

[14] The Claimant says that the facts that led the General Division to disagree with the Commission's reviewing the Claimant's file remain unchanged, and there was no basis for the General Division to do its own review of the Claimant's file. He says that the only way the General Division could intervene under section 54(1) of the DESD Act was by rescinding the Commission's decision in whole.

[15] Because of the evidence on file, the Commission agrees with the General Division that it did not exercise its discretion judicially. However, it says that, under section 54(1) of the DESD Act, the General Division could give the decision that the Commission should have given.

[16] The Commission says that the General Division considered all the evidence before it and made a decision in accordance with the legislation and case law. The Commission takes the view that the General Division made no error in dismissing the Claimant's appeal.

[17] I find it important to note that, in this case, the Commission agrees that it did not exercise its discretion judicially when it reviewed the Claimant's claim for benefits under section 153.161(2) of the EI Act.

[18] It is well established that, when the Commission does not exercise its authority in a judicial manner, the Tribunal has the power to give the decision that the Commission should have given.

[19] The only issue before me is how the Tribunal could intervene in this case.

[20] Case law has mainly looked at two types of discretion under the EI Act: the discretion to determine the amount of a penalty and the discretion to extend the time to request an administrative review.

[21] In these situations, after finding that the Commission did not exercise its discretion judicially, the Tribunal may give the decision that the Commission should have given. That is, it may grant an extension of time or, in the case of a penalty, reduce its amount because of extenuating circumstances.

[22] Section 153.161(2) of the EI Act allowed the Commission to verify that the Claimant was entitled to benefits by requiring proof that he was capable of and available for work on any working day of his benefit period.

[23] Section 153.161 of the EI Act—which is part of the Temporary Measures to Facilitate Access to Benefits—implicitly acknowledges that, during the pandemic, it may not have been possible to verify entitlement when benefits were initially paid. And it allows for a later verification, even after the benefits have ended.

[24] The Commission acknowledges that it made a decision about the Claimant's availability for the relevant period and that the Claimant was verbally notified of this decision. The Commission also acknowledges that he was not sent a written notice to confirm the decision and that the decision is not in the system.²

[25] In my view, the Tribunal cannot use its discretion to review the Claimant's availability. To do so, it would have to ignore the purpose of section 153.161(2), implemented during the pandemic. Also, in doing so, the Tribunal was allowing the Commission to do indirectly what it cannot do directly under section 153.161 of the EI Act, that is, retroactively change its decision about the Claimant's availability.

[26] So, I find that the General Division made an error of law by reviewing the Claimant's availability after finding that the Commission had not exercised its review authority in a judicial manner under section 153.161(2) of the EI Act.

[27] This means that I am justified in intervening.

Remedy

[28] The Commission acknowledges that it did not exercise its discretion judicially when it reviewed the Claimant's claim for benefits under section 153.161(2) of the EI Act.

² See the Commission's written submissions at AD4-5.

[29] It is well established that, when the Commission does not exercise its authority in a judicial manner, the Tribunal has the power to give the decision that the Commission should have given.

[30] In my view, the Tribunal cannot use its discretion to review the Claimant's availability. To do so, it would have to ignore the purpose of section 153.161(2), implemented during the pandemic. Also, in doing so, the Tribunal was allowing the Commission to do indirectly what it cannot do directly under section 153.161 of the EI Act, that is, retroactively change its decision about the Claimant's availability.

[31] I find that the Claimant's appeal should be allowed. The Claimant's entitlement should not be verified under section 153.161(2) of the EI Act.

Conclusion

[32] The Claimant's appeal is allowed.

[33] The Claimant's entitlement should not be verified under section 153.161(2) of the EI Act for the periods from September 28 to December 18, 2020, and from January 13, 2021, to April 26, 2021.

Pierre Lafontaine
Member, Appeal Division