Citation: *EM v Canada Employment Insurance Commission*, 2022 SST 1513

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	E. M.
Respondent:	Canada Employment Insurance Commission
Representative:	Julie Villeneuve

Decision under appeal:	General Division decision dated April 13, 2022 (GE-22-601)

Tribunal member:	Charlotte McQuade
Type of hearing:	Teleconference
Hearing date:	September 8, 2022
Hearing participants:	Appellant
Decision date:	December 21, 2022
File number:	AD-22-338

Decision

[1] The appeal is allowed. The General Division made several reviewable errors.

[2] I am returning the matter to the General Division for reconsideration.

Overview

[3] E. M. is the Claimant. She received Employment Insurance (EI) regular benefits while attending school full-time. On November 8, 2021, the Canada Employment Insurance Commission (Commission) decided that the Claimant was disentitled from receiving EI regular benefits from November 23, 2020, because the Claimant had not proven her availability for work. Upon reconsideration, the Commission modified its initial decision to disentitle the Claimant from November 23, 2020, to April 24, 2021, and from September 8, 2021, to December 18, 2021.

[4] The Claimant appealed the Commission's decision to the General Division. The General Division dismissed the appeal, finding the Claimant had not proven her availability for work.

[5] The Claimant appealed the General Division's decision. She argues that the General Division based its decision on important errors of fact. She also argues the General Division made an error of jurisdiction by not deciding whether the Commission exercised its discretion properly in reconsidering her claim when it had no new information about her schooling.

[6] I am allowing the appeal. The General Division made an error of fact and an error of law. Additionally, the General Division made an error of jurisdiction by not deciding an issue that was before it.

[7] I am returning the matter to the General Division for reconsideration.

Issues

[8] The issues in this appeal are:

a) Did the General Division base its decision on an important error of fact that the Claimant was only available for part-time work and was not carrying out a comprehensive job search for full-time work?

b) Did the General Division overlook important evidence that the Claimant had a history of working irregular hours with her full-time schooling?

c) Did the General Division make an error of jurisdiction by not considering whether the Commission exercised its discretion judicially when it retroactively reviewed the Claimant's entitlement to benefits?

Analysis

[9] The Claimant argues that the General Division based its decision on important errors of fact and made an error of jurisdiction.

[10] If established, either of these types of errors could allow me to intervene in the General Division decision.[1]

The General Division decision

[11] The Claimant was a full-time student.

[12] Claimants of regular benefits have to prove they are "capable of and available for work" but aren't able to find a suitable job.[2]

[13] The Commission decided the Claimant had not proven her availability for work, while attending school full time, from November 23, 2020, to April 24, 2021, and from

[1] See section 58(1) of the *Department of Employment and Social Development Act* (DESD Act).
[2] See section 18(1)(a) of the *Employment Insurance Act* (EI Act).

September 8, 2021, to December 18, 2021. So, she was disentitled from receiving benefits for these periods.

[14] The General Division had to decide whether the Claimant had proven her availability for work.

[15] The law says that full-time students are presumed to be unavailable for work.[3]

[16] There are two ways that a person can rebut that presumption. One is by showing they have a history of working full-time while also in school.[4] The other way is by showing they have exceptional circumstances.[5]

[17] If a person rebuts the presumption, that just means they are not assumed to be unavailable for work. However, they still must prove they actually are available for work.

[18] The law says that availability is assessed considering three factors. These are whether the person:[6]

- wanted to go back to work as soon as a suitable job was available.
- had made efforts to find a suitable job.
- didn't set personal conditions that might have unduly limited the person's chances of going back to work.

[19] When assessing these factors, a person's attitude and conduct are also important.[7]

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[3] See *Canada (Attorney General) v Cyrenne*, 2010 FCA 349.
[4] See *Canada (Attorney General) v Rideout*, 2004 FCA 304.
[5] See *Canada (Attorney General) v Cyrenne*, 2010 FCA 349.
[6] See *Faucher v Canada (AG)*, A-56-96.
[7] See *Canada (Attorney General) v Whiffen*, A-1472-92.

[20] The General Division decided the presumption applied to the Claimant. The General Division said the Claimant could rebut the presumption by proof of exceptional circumstances.[8]

[21] The General Division decided the Claimant had not shown exceptional circumstances to rebut the presumption because she stated her focus was on her studies rather than being available for work and she stated she was not available for full-time work and only part-time work.[9]

[22] Even though the General Division found the presumption had not been rebutted, the General Division also considered whether the Claimant had proven her availability for work. The General Division decided the Claimant did not meet any of the three factors required to prove availability.

[23] The General Division decided the Claimant had not shown a desire to return to the labour market as soon as a suitable job was available because she was attending school in excess of 20 hours per week, and her class schedule was set so she could only work around the class schedule. As well, the General Division said there was no evidence that the Claimant was carrying out a comprehensive job search that would lead to full-time employment. Rather, the General Division decided, the Claimant sought out part-time jobs that would not interfere with her class schedule.

[24] The General Division also decided the Claimant had not met the second factor. The General Division reasoned there was no evidence the Claimant was carrying out a comprehensive job search with the goal of finding full-time employment and she had restricted her job search to work that would not interfere with her class schedule. So, the General Division decided that the Claimant's job search activity could not be considered a reasonable and customary job search as per section 9.002(1) of the EI Regulations.[10]

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[8] See paragraph 5 of the General Division decision.
[9] See paragraphs 28 and 32 of the General Division decision.
[10] See paragraphs 19 to 24 of the General Division decision.

[25] The General Division decided further that the Claimant had set a personal condition which unduly limited her chances of returning to the labour market. The General Division said this was because the Claimant was spending 20 plus hours per week on her program of studies and chose not to carry out a reasonable job search.

[26] The General Division also relied on case law from the Federal Court of Appeal that says that a claimant who restricts her availability and is only available for employment outside her course schedule has not proven her availability for work within the meaning of the EI Act.[11] The General Division pointed out that by itself, a mere statement of availability was not enough to discharge the burden of proof.

[27] So, the General Division concluded the Claimant had not proven her availability for work.

The General Division made an error of fact

[28] The Claimant submits that the General Division made several factual errors. She submits it was an error of fact that she was only available for part-time work around her schooling, and an error of fact that she had not conducted a comprehensive job search for full-time work.

[29] The Claimant says she made repeated statements to the Commission that her intention was to find full-time work around her schooling. She also provided job search information.

[30] The Claimant submits that these errors of fact impacted the General Division's decision about whether she had rebutted the presumption that full-time students are not available for work and whether she had proven her availability for work.

[31] The Commission argues that there was evidence before the General Division upon which it could base its conclusion that the Claimant failed to prove her availability

[11] The General Division referred to the cases of *Duquet v Canada (AG)*, 2008 FCA 313 and *Canada (AG) v Gauthier*, 2006 FCA 40.

for work while attending training. The Commission submits the General Division's findings of fact were consistent with the evidence it accepted.

[32] Specifically, the Commission points out that the Claimant said in training questionnaires that she was not prepared to leave her course to accept full-time employment and she would accept full-time employment if she could delay the start until after she finished her course.[12] The Commission says the Claimant confirmed this when speaking with the Commission on November 8, 2021. The Claimant reiterated that she was looking to work full-time hours but around school time. She said she was not able to take a 9-5 job until school was done and she was not willing to drop school for a job either.[13]

[33] The Commission points out that on January 14, 2022, the Claimant confirmed that she had to look for a job that would not interfere with her course schedule since she was not able to change it. She had to attend online classes as they were with a live professor in real time.[14]

[34] The Commission submits that the Federal Court of Appeal has said that a claimant who restricts her availability and is only available for employment outside of her course schedule has not proven availability for work within the meaning of the EI Act.[15]

[35] The Appeal Division can intervene only in certain kinds of errors of fact. The Appeal Division can intervene where the General Division based its decision on an erroneous finding of fact that it made perversely, capriciously, or without regard for the material before it.[16]

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[12] See GD3-14 to GD3-15; See also GD3-16 to GD3-21. See also GD3-22 to GD3-28.
[13] GD3-29.
[14] GD3-35.
[15] The Commission refers to *Duquet v Canada (AG)*, 2008 FCA 313 and *Canada (AG) v Gauthier* 2006 FCA 40.
[16] See section 58(1)(c) of the DESD Act.

[36] A perverse or capricious finding of fact is one where the finding squarely contradicts or is unsupported by the evidence.[17]

[37] Factual findings being made without regard to the evidence would include circumstances where there was no evidence to rationally support a finding or where the decision maker failed to reasonably account at all for critical evidence that ran counter to its findings.[18]

[38] I can assume that the General Division considered all the evidence, even if it didn't refer to every piece of it. However, the General Division must address important pieces of evidence, especially evidence that is counter to its findings.[19]

[39] But addressing the evidence means more than just referring to it. The General Division must analyze the evidence in a meaningful way. If it doesn't do so, that can amount to an error of law.[20]

– The General Division overlooked important evidence

[40] The General Division found as a fact that the Claimant was only available for part-time work and there was no evidence the Claimant was carrying out a comprehensive job search that would lead to full-time employment.[21]

[41] The Claimant points to evidence on file showing she told the Commission on several occasions that her intention was to find full-time employment while taking her course.[22]

[42] The Claimant says she also gave information to the Commission about her job search. The Claimant points to the Commission's notes of January 12, 2022.[23]

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[17] See *Garvey v Canada (Attorney General),* 2018 FCA 118; See also *Walls v Canada (Attorney General)*, 2022 FCA 47 (CanLII).
[18] See *Walls v Canada (Attorney General),* 2022 FCA 47(CanLII) at paragraph 41.
[19] See *Simpson v Canada (Attorney General)*, 2012 FCA 82.
[20] See *Bellefleur v Canada (Attorney General),* 2008 FCA 13.
[21] See paragraphs 16, 20 and 28 of the General Division decision.
[22] GD3-14 and GD3-45.
[23] GD3-35.

[43] The notes provide that the Claimant explained to the Commission's agent that she was looking for and available for full-time work. The Claimant said that her intention was to obtain full-time work and take her course at the same time. She said she was unable to change her course schedule. However, she had always worked while going to school. The Claimant described that she was looking for full-time work online. She described that she was receiving email alerts from the job bank. She was networking with family, friends, co-workers, and looking out for help wanted and hiring signs. She asked in the shops and other places she went to. She said most places were already at capacity, and she didn't think any stores took her resume.

[44] The notes indicate that the Claimant explained that she was looking for barista jobs mainly because that was her major experience, but she also looked for positions as a cashier, hostess, server, clerk, and minimum-wage service jobs. The Claimant said she also asked her boss for additional hours every week. The Claimant mentioned she had joined an Instagram group which was like a local job bank for metro Halifax. She explained positions rarely came up because of the severe cutbacks caused by the COVID lockdowns, but she kept looking.

[45] The Claimant says she also testified as to her job search efforts. The Claimant acknowledged in her testimony that she could only work around her school schedule. However, she testified that when she lost her job, she was always looking for work. She said she signed up for job bank notifications, and on Indeed and other job search websites and she talked to people she knew for work.[24]

[46] The Claimant says the General Division did not address any of this evidence when it decided she was only available for part-time work and had not conducted a comprehensive job search.

[47] I agree. There was evidence before the General Division that ran counter to its finding of fact that the Claimant was only available for part-time work and its finding of fact that there was "no evidence" the Claimant was carrying out a comprehensive job

[24] I heard this from the audio recording of the General Division hearing at 0:12:21.

search that would lead to full-time employment. But the General Division did not acknowledge or assess this evidence in any way, either to accept it or reject it.

[48] This evidence was critical to the issues concerning whether the Claimant had overcome the presumption of non-availability and whether she had proven her availability for work. So, it was important evidence for the General Division to address.

[49] I find, therefore, that the General Division based its decision on errors of fact that the Claimant only was available for part-time work and that there was no evidence that she had conducted a comprehensive job search for full-time employment. These findings of fact were made without regard to the material before it.

The General Division made an error of law

[50] The Claimant says the General Division also overlooked important evidence that she had a history of combining work at irregular hours with full-time schooling when it decided she had not rebutted the presumption of non-availability and that she had not proven her availability for work.

[51] The Claimant points out that she explained in her Notice of Appeal that she has worked in the hospitality industry in the past few years, working a variety of hours, including mornings, evenings, and weekends. She explained that her hours had varied slightly over time, but she has always worked 20 to 30 hours per week in order to support her financial obligations such as rent, food and other expenses.[25]

[52] The Claimant says that she submitted various Record of Employments (ROEs) with her Notice of Appeal, evidencing her work history.[26]

[53] The Claimant also testified that she had always worked while in school. She said she felt like she worked a fair amount up to 35 hours and had never placed any sort of restrictions on her hours.[27]

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[25] GD2-5.
[26] GD2-10 to GD2-15.
[27] I heard this from the audio recording at the General Division hearing at approximately 0:10:45.

[54] The General Division noted the Claimant's testimony that she had always worked while in school. The General Division said that the Claimant confirmed her present employment was part-time as was her second job as a restaurant server. The General Division noted that the Claimant said that she works all hours available to her but also confirmed her class schedule is set and cannot be changed so her work hours must be outside her class schedule.[28]

[55] Since the General Division acknowledged the Claimant's evidence about her history of combining work and school, it did not overlook this evidence. However, I find the General Division made an error of law by not meaningfully analyzing this evidence.

[56] As above, a claimant can rebut the presumption of non-availability by showing a history of full-time employment with full-time schooling or by showing exceptional circumstances.

[57] However, there is no indication in the General Division decision that the General Division considered the Claimant's evidence of a history of working irregular hours along with her full-time schooling, when it decided the Claimant had not shown exceptional circumstances to rebut the presumption.

[58] The General Division also did not analyze this evidence to determine whether the Claimant had a sufficient history of combining full-time hours with full-time school to rebut the presumption in that manner. I note that there was at least one ROE on file which showed the Claimant had worked from June 4, 2019, to December 31, 2019, on a biweekly basis hours ranging from 32.40 hours to 69.97 hours.[29]

[59] Further, the General Division did not meaningfully analyze the Claimant's evidence of a history of work at irregular hours with her schooling, when it decided the Claimant had unduly restricted her Claimant's chances of returning to the workforce by only being available for work around her schooling.

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[28] See paragraph 14 of the General Division decision.
[29] GD2-13.

[60] The General Division relied on case law from the Federal Court of Appeal that said a claimant who restricts her availability and is only available for employment outside of her course schedule has not proven availability for work.

[61] However, case law cannot be applied without having regard to the specific facts of the case being applied and the specific facts of the case before the General Division. The evidence of the Claimant's history of working at irregular hours along with her schooling was relevant to the question of whether the Claimant had unduly limited her chances of returning to the workforce.

[62] However, the General Division did not meaningful analyze this evidence. It did not consider whether this evidence made the Claimant's fact situation different from the cases it was applying in any significant way.

[63] I find, therefore, the General Division made an error of law by failing to meaningful analyzing the evidence concerning the Claimant's history of working irregular hours while attending school.

The General Division made an error of jurisdiction

[64] The Claimant said in her Notice of Appeal that she disagreed with the Commission's decision to retroactively assess her entitlement after she had been approved for benefits. She said that the Commission was aware of her enrollment in university and continued to pay her benefits even as she submitted biweekly reports stating her enrollment. She said the Commission's decision came months later and was not based on any new information, but rather information that had been supplied for the duration of the claim.[30]

[65] The Claimant said at her hearing before the Appeal Division that she doesn't dispute that the Commission has the authority to retroactively reconsider claims. However, she says the Commission should not have gone back and retroactively disentitled her without any new information about her schooling. She says she told the

[30] GD2-5.

Commission about her full-time studies as early as February 2021, when she spoke to an agent, but they did not disentitle her until many months later.[31]

[66] The Commission made no representations to the General Division about what section of the EI Act it was relying on to reconsider the Claimant's entitlement or what factors it considered in doing so. All it said was "While the Commission empathizes with the claimant that the decision was retroactive, legislation states that one is not entitled to benefits, especially when that information has not been provided."[32]

[67] The Commission submits to the Appeal Division that it could verify at any time that the Claimant was entitled to EI benefits even after the Claimant received EI benefits under section 153.161 of the EI Act, which was in effect from September 27, 2020, to September 25, 2021.

[68] The Commission says the General Division considered section 153.161 of the EI Act, when it rendered its decision, even though the General Division did not explicitly name this provision. The Commission maintains that the General Division considered all the Claimant's arguments about her availability for the period under review and considered that the Commission could verify the Claimant's entitlement to the benefits received.

[69] Section 52(1) of the EI Act says the Commission may reconsider a claim for benefits within 36 months after the benefits have been paid or payable.

[70] Section 153.161(2) of the EI Act says that the Commission may, at any point after benefits are paid to a claimant attending a non-referred course, program of instruction or training, very that the claimant is entitled to those benefits by requiring proof that they were capable of and available for work on any working day of their benefit period.

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[31] GD3-15.
[32] GD4-6.

[71] Both these provisions are discretionary decisions. This mean that although the Commission has the power to seek verification of entitlement and to reconsider a claim, it does not have to do so.

[72] The law says that discretionary powers must be exercised in a judicial manner. Exercising a discretionary power in a judicial manner means not acting in bad faith or for an improper purpose or motive, and not taking into account an irrelevant factor or ignoring a relevant factor or acting in a discriminatory manner.[33]

[73] The General Division decided the Commission had the authority to retroactively review the Claimant's availability and impose a retroactive or current disentitlement. But the General Division did not consider whether the Commission had exercised its discretion judicially in reconsidering the Claimant's entitlement.[34]

[74] The issue about whether the Commission had exercised its discretion properly in reconsidering the claim was raised by the Claimant in her Notice of Appeal. By not deciding this issue, the General Division made an error of jurisdiction.

Remedy

[75] Since the General Division has made reviewable errors, I can intervene in the case.[35]

[76] To fix the General Division's error, I can either refer the matter back to the General Division for reconsideration or I can give the decision the General Division should have given.[36]

[77] The Commission wants me to dismiss the appeal. The Commission says the General Division made no reviewable errors.

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[33] See *(Attorney General) v Purcell*, 1995 CanLII 3558 (FCA).
[34] See paragraph 34 of the General Division decision.
[35] See section 58(1) of the DESD Act.
[36] See section Sections 59(1) of the DESD Act.

[78] The Claimant wants me to allow the appeal. She wants me to substitute my decision for that of the General Division. She says the facts show she has proven her availability for work. She says she presented all her evidence to the General Division.

[79] I understand the Claimant doesn't want to go through another hearing and prolong this matter further. However, I am not satisfied that the record is complete enough to allow me to substitute my decision.

[80] In that regard, the General Division hearing was very brief. There was very little discussion about the Claimant's job search efforts, or her actual hours of availability, or her prior work history. In my view, there is insufficient evidence in the record before the General Division to allow me to decide whether the Claimant had rebutted the presumption of non-availability and if so, whether she has proven she was available for work.

[81] Further, since the Commission did not explain in its representations to the General Division what provisions of the EI Act it was relying on to reconsider the Claimant's entitlement or the factors it relied on in exercising its discretion, the Claimant did not have a chance to properly respond to the Commission's position on that issue.

[82] Since the Appeal Division cannot accept new evidence and the record is not complete, I have decided to return this matter to the General Division for reconsideration.

Conclusion

[83] The appeal is allowed.

[84] The General Division made several reviewable errors. The matter is to be returned to the General for reconsideration.

Charlotte McQuade
Member, Appeal Division