Citation: *CD v Canada Employment Insurance Commission*, 2023 SST 62

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	C. D.
Representative:	Mykelti St-Louis
Respondent:	Canada Employment Insurance Commission
Representative:	Melanie Allen

Decision under appeal:	General Division decision dated April 1, 2022 (GE-22-252)

Tribunal member:	Charlotte McQuade
Type of hearing:	Videoconference
Hearing date:	October 19, 2022
Hearing participants:	Appellant Appellant's representative Respondent's representative
Decision date:	January 25, 2023
File number:	AD-22-317

Decision

[1] The appeal is dismissed.

Overview

[2] C. D. is the Claimant. He was attending college full-time away from his hometown. He was working part-time as well. In March 2020 the Claimant was temporarily laid off his part-time job due to the pandemic. At the same time his classes were online. The Claimant moved back to his hometown and in July 2020 he began working at a car dealership, where he had previously been employed.

[3] On January 8, 2021, the Claimant quit his job at the car dealership, and he moved back to the city where he was attending college. He resumed in-person classes on January 11, 2021.

[4] The Canada Employment Insurance Commission (Commission) decided that the Claimant voluntarily left his job at the car dealership (chose to quit) without just cause so he was disqualified from Employment Insurance (EI) regular benefits from January 10, 2021. The Commission also decided the Claimant had not proven his availability for work, while studying full-time. So, he was disentitled to benefits while in school.

[5] The Claimant appealed the Commission's decisions to the Tribunal's General Division who dismissed his appeal. The Claimant is now appealing to the Appeal Division. He submits that the General Division breached procedural fairness, made errors of law, and based its decision on errors of fact.

[6] The Commission argues that the General Division did not make any errors. The Commission asks the Appeal Division to dismiss the Claimant's appeal.

[7] I am dismissing the appeal. The General Division did not make any reviewable errors.

Preliminary matters

[8] To raise an argument about the *Canadian Charter of Rights and Freedoms* (Charter*),* the Tribunal has a special process that must be followed.[1] A party first must file notice of the Charter issue with the Tribunal identifying the provision of the EI legislation in issue and providing submissions about the issue raised.[2]

[9] The Claimant had mentioned the Charter in his materials before the General Division. He said his section 7 Charter rights had been breached because the General Division would not require the Commission to provide him with certain information about his case, which he believed the Commission had.[3]

[10] The General Division member advised the Claimant at his hearing that if he wanted to raise a Charter argument, he would have to contact the Tribunal separately. The member explained that if the Claimant wanted to look into that, she would put his appeal in abeyance. The Claimant confirmed that he wished to proceed with the hearing.[4]

[11] The General Division noted in its decision noted that the Claimant wasn't raising a constitutional argument before it.[5]

[12] The Claimant raised the same Charter issue, however, in his submissions to the Appeal Division.[6] He said that the Commission breached his Charter rights by not providing him with full and fair disclosure. He said the General Division breached procedural fairness by not requiring the Commission to disclose information he had requested.

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[1] *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act,1982*, being Schedule B to the *Canada Act 1982 (UK),* c.11.
[2] This notice is required under section 20(1)(a) of the *Social Security Tribunal Regulations*.
[3] GD10-2.
[4] I heard this from the audio recording of the General Division hearing at approximately 0:22:00 to 0:23:13.
[5] See paragraph 14 of the General Division decision.
[6] AD6-4, paragraph 18.

[13] The Appeal Division normally will not exercise its discretion and consider a Charter argument for the first time on appeal if these arguments have not been raised or considered by the General Division.[7] One reason for this is that the Appeal Division is looking for reviewable errors the General Division may have made on the record before it. Raising a Charter argument isn't a separate ground of appeal.

[14] However, it is not necessary for me to decide whether the Claimant can make a Charter argument on appeal because, at the Appeal Division hearing, the Claimant's representative confirmed he was not pursuing a Charter argument.[8]

[15] As such, while I have considered the Claimant's argument that the General Division breached procedural fairness, I have decided that issue without consideration of the Charter.

Issues

The issues in this appeal are:

a) Did the General Division breach procedural fairness by not requiring the Commission to disclose the information the Claimant had requested the General Division obtain on his behalf?

Voluntary leaving without just cause

b) Did the General Division base its decision that the Claimant did not have just cause for quitting on a mistake of fact that his circumstances of leaving did not include a significant change to his work duties?

c) Did the General Division base its decision that the Claimant did not have just cause for quitting on a mistake of fact that his circumstances of leaving did

[7] See, for example, *CF v Minister of Employment and Social Development*, 2016 SSTADIS 86; See also *PT v Minister of Employment and Social Development*, 2016 SSTADIS 162 and *DF v Canada Employment Insurance Commission*, 2019 SST 194.
[8] Appeal Division hearing at 0:39:50.

not include a significant modification of the terms and conditions respecting wages or salary?

d) Did the General Division base its decision that the Claimant did not have just cause for quitting on a mistake of fact that his circumstances of leaving did not include the reasonable assurance of another job in the immediate future?

e) Did the General Division make an error of law by interpreting "immediate future" without having context to the impact of the pandemic?

f) Did the General Division base its decision that the Claimant did not have just cause for quitting without regard to the fact a Commission's agent had told him he could quit his job if he had reasonable assurance of another employment?

Availability for work

g) Did the General Division base its decision that the Claimant had not proven his availability for work on important errors of fact about the efforts he was making to look for work?

h) Did the General Division make an error of law by not considering the impact of the pandemic when it decided the Claimant's job search efforts were insufficient?

i) Did the General Division decide that the Claimant had set a personal condition that unduly limited his chances of returning to the workforce without regard to the evidence of his experience in the auto industry?

j) Did the General Division misapply the legal test for availability under the *Employment Insurance Act* (EI Act) by confusing the Claimant's desire to find work with his efforts to find work?

Analysis

[16] The Claimant argues that the General Division breached procedural fairness, made errors of law, and based its decision on important errors of fact.

[17] If established, any of these types of errors would allow me to intervene in the General Division decision.[9]

The General Division did not breach procedural fairness

[18] The Claimant submits that the General Division breached procedural fairness by failing to require the Commission to provide him with certain information he requested.

[19] On February 2, 2022, the Claimant wrote to the Tribunal, asking the Tribunal to direct the Commission to provide him certain information. He asked for all handwritten notes and audio recordings from the first two Commission agents he spoke with. He also asked for a missing supplementary record of claim and handwritten notes from the Commission's reconsideration agent.[10]

[20] On February 10, 2022, February 14, 2022, and February 15, 2022, the Claimant reiterated his request that the Tribunal obtain the information he was seeking. He added a request that the Tribunal require the Commission to prove the audio recording and handwritten notes of a January 18, 2021, telephone call he had with an agent of the Commission.[11]

[21] On February 15, 2022, the General Division wrote to the Claimant advising it did not have the information the Claimant requested and could not compel the Commission to provide it. The General Division suggested the Claimant file a request under the *Access to Information and Privacy Act* and provided the Claimant with the website address where such a request could be made. The General Division asked that the

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[9] See section 58(1) of the *Department of Employment and Social Development Act* (DESD Act).
[10] GD5-1.
[11] GD7, GD8 and GD9-8.

Claimant to confirm whether he was pursuing this avenue, in which case his file would be put in abeyance until he had received a response to his request.[12]

[22] The Claimant responded on February 18, 2022, that it was improper for the General Division to request that he pursue an access to information request for the information. He submitted that it was fundamental to a proper process to ensure that he had disclosure of all relevant information in possession of the Commission. He said this was a breach of his section 7 Charter rights.[13]

[23] At the start of the Claimant's hearing, as a pre-hearing issue, the General Division member canvassed the disclosure issue with the Claimant. The General Division member explained to the Claimant that he could testify as to any inconsistencies in the Commission's information. The member also explained that she could adjourn the hearing if the Claimant wanted to pursue the access to information request to try to obtain the information he was seeking. The Claimant confirmed that he wanted to proceed with his hearing.[14]

[24] The Commission submits, in these circumstances, the General Division did not breach procedural fairness. The General Division gave the Claimant the option to pursue an access to information request, but he decided to go ahead with his hearing.

[25] The Claimant maintains that the General Division member agreed in its decision that the Commission provided incomplete or inconsistent evidence.[15] He says the missing information interfered with his ability to know the case he had to meet.

[26] Under the *Social Security Tribunal Regulations*, the Commission is required to file any documents in its possession that are relevant to the decision being appealed.[16] The Tribunal provides the material received from the Commission to other parties, which in this case was the Claimant.

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[12] GD6-1.
[13] GD10.
[14] I heard this from the audio recording of the General Division hearing at approximately 0:1:00 to 0:23:13.
[15] See paragraph 42 of the General Division decision.
[16] See section 30 of the *Social Security Tribunal Regulations*.

[27] The principles of natural justice include the right to a fair hearing. The right to a fair hearing before the Tribunal includes certain procedural protections such as the right to an unbiased decision maker and the right to notice of the hearing. It also includes the right of a party to know the case against them and to be given an opportunity to respond to the case.[17]

[28] However, procedural fairness does not include an obligation on the General Division to compel the Commission to provide documentation. While the General Division can refer a question to the Commission in relation to a claim for benefits for investigation and report, the General Division has no summonsing power.[18]

[29] The Claimant says his ability to know the case he had to meet was impaired due to the lack of disclosure, but he hasn't explained how that was. There is no indication that the Commission even had the information the Claimant was requesting. More significantly, the General Division did not base its decision on any information from the Commission that had not been provided to the Claimant.

[30] Where there was an inconsistency or gap in information from the Commission, the General Division preferred the Claimant's testimony. For example, the General Division's stated, "I agree with the Claimant's argument that the Commission provided incomplete or inconsistent evidence, as in its different descriptions of his study hours. So, I have given greater weight to his evidence on those issues."[19]

[31] With respect to the January 18, 2021, phone call, the General Division accepted the Claimant's testimony that a Commission agent told him that having reasonable assurance of another employment would allow him to quit and get EI benefits.[20]

[32] The Claimant was provided with the documentation the Commission was relying on and the Commission's representations in advance of the hearing.[21] These

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[17] See *Ruby v Canada (Solicitor General)*, 2002 SCC 75 (CanLII).
[18] See section 32 of the General Division decision.
[19] See paragraph 42 of the General Division decision.
[20] See paragraph 38 of the General Division decision.
[21] GD3 and GD4.

representations explained the Commission's position about why the Commission had disqualified and disentitled the Claimant from benefits.[22] So, the Claimant was aware of the case he had to meet.

[33] The Claimant also had full opportunity to respond to the case he had to meet. The Claimant was given the option, both before the hearing, and at the hearing, to adjourn his hearing to make an access to information request to the Commission. He chose not to pursue this option but to proceed with his hearing.

[34] The Claimant testified at the hearing. He, therefore, had the opportunity to explain any dispute he had with the content of the Commission's notes and what was said for phone calls with the Commission's agents, where no notes were provided. The Claimant also had the opportunity to provide written submissions to the General Division both before and after the hearing.[23]

[35] I find, therefore, that the General Division did not breach procedural fairness.

The General Division made no reviewable errors when it decided the Claimant voluntarily left his job without just cause

[36] The Commission disqualified the Claimant from benefits from January 8, 2021, because it decided he voluntarily left his job on that date without just cause. The Claimant appealed that decision to the General Division.

[37] The *Employment Insurance Act* (EI Act) says a claimant is disqualified from benefits if they voluntarily leave their employment without just cause.[24]

[38] There was no dispute that the Claimant voluntarily left his job on January 8, 2021.

[39] The General Division had to decide whether the Claimant had just cause for leaving his employment when he did.

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[22] GD3 and GD4
[23] GD9, GD10, and GD12.
[24] See section 30(1) of the *Employment Insurance Act* (EI Act).

[40] To show just cause, the Claimant must show that, having regard to all the circumstances, including those set out by law, that he had no reasonable alternative to leaving his job.

[41] The Claimant argued that his circumstances of leaving included some of the circumstances set out in the law. He said he quit his job because he had significant changes to his wages and his work duties and a reasonable assurance of another job in the immediate future with the employer who had laid him off.[25] He maintained these were the reasons he quit and returning to in-person learning at college was a secondary reason for quitting his job.

[42] The General Division decided that the Claimant's circumstances of leaving did not include a significant change to his work duties or a significant modification to the terms and conditions respecting wages of salary. The General Division also found that the Claimant did not have the reassurance of another job in the immediate future when he quit.

[43] The General Division found as a fact that the circumstance in which the Claimant quit his job was to resume his studies. The General Division found, having regard to that circumstance, the Claimant had the reasonable alternative of staying employed. So, the General Division concluded that the Claimant had not shown he had just cause for quitting his job.

[44] The Commission maintains that the General Division did not make any errors when it decided this. The Commission submits that the General Division applied settled law to the facts and its decision was supported by the evidence.

[45] The Commission points out that the Claimant told the Commission that he quit his job to return to travel to resume his in-class training at college in another city.[26] The Commission contends that this was the main reason why the Claimant needed to move. The Commission maintains the General Division's decision that a personal decision with

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[25] See section 29(c)(vii) and section 29(c)(ix) of the EI Act; See also section 29(c)(vi) of the EI Act.
[26] GD3-15 to GD3-19.

only a promise of potential work from his previous employer is not considered just cause, within the meaning of the law. The Claimant did not demonstrate before the General Division that he had no other reasonable alternative than leaving.

The General Division did not base its decision on any important errors of fact

[46] The Claimant argues that the General Division based its decision that he didn't have just cause for quitting on errors of facts about what his circumstances of leaving were.

[47] The Appeal Division can intervene only in certain kinds of errors of fact. The law says I can intervene only if 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.[27]

[48] A perverse or capricious finding of fact is one where the finding squarely contradicts or is unsupported by the evidence.[28]

[49] 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.[29]

No significant changes in work duties

[50] The Claimant submits that the General Division made an incorrect finding of fact a significant change in work duties was not a circumstance in which he quit.[30]

[51] The General Division found as a fact that the Claimant's circumstances of leaving did not include a change in work duties. The General Division acknowledged that the pandemic caused significant changes to many claimants' work situations. The General

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[27] See section 58(1)(c) of the DESD Act.
[28] See *Garvey v Canada (Attorney General),* 2018 FCA 118; See also *Walls v Canada (Attorney General)*, 2022 FCA 47 (CanLII).
[29] See *Walls v Canada (Attorney General),* 2022 FCA 47 (CanLII) at paragraph 41.
[30] See section 29(c)(ix) of the EI Act.

Division noted that the Claimant said these changes were in place when he started working in July 2020. The General Division concluded that meant the Claimant had not shown that there was a change to his duties during this work contract that forced him to quit.[31]

[52] The General Division also commented that even if there had been a change in work duties, it was more likely than not that the employer would have expected students to work wherever they were needed, on whatever tasks were considered essential at the time under COVID-19 rules.[32]

[53] The Claimant argues the General Division mistakenly assumed that reduced hours were the reason for his reduced earnings whereas the reduction in earnings was, in fact, the result of a significant change in the Claimant's work duties.

[54] The Claimant also argues that the General Division's incorrectly assumed that the Claimant was hired as a "student" to work in the more mundane aspects of the business, despite the fact the Claimant had acquired multiple years of experience in the automotive industry and was recognized as an expert in consumer needs in this industry.

[55] The General Division's conclusion was consisted with the evidence.

[56] The ROE on file shows the Claimant was employed from July 27, 2020, to January 8, 2021.[33]

[57] The Claimant's testimony reflects that he was hired to do different duties than when he had previously worked with the same employer. The Claimant testified that he had worked for the car dealership previously managing the car lot. But, when he was

[31] See paragraph 31 of the General Division decision.
[32] See paragraph 32 of the General Division decision.
[33] GD3-13.

rehired in July 2020, he was working in parts department and doing reception. He testified that these new duties began in July 2020.[34]

[58] The Claimant had provided a letter dated February 2, 2022, from the car dealership. The letter explained that the Claimant had been employed at the car dealership from May 2018 to January 2021. The letter provided that the Claimant was working with a reduction in hours because of the COVID-19 pandemic. The letter said that the Claimant was rehired in a temporary capacity in July 2020. The letter provided further that the dealership had experienced numerous government lockdowns due to the fact that automotive sales were recognized as non-essential. The letter also noted that the dealership was subjected to reduced operating hours and supplier shortages had also resulted in a change in his work duties. It was noted the Claimant's work hours were reduced considerably.

[59] The General Division did not mention this letter, but it did not have to. This letter was not contrary to its findings. Although the letter refers to a change in job duties, it does not say when those occurred. So, the letter is not inconsistent with the General Division's finding that there was no significant change in work duties from July 2020 to January 8, 2021.

[60] It is not relevant that the Claimant was performing different job duties when he previously worked with the same employer. The General Division correctly interpreted this circumstance as only including a significant change in work duties occurring during the specific term of employment from July 27, 2020, to January 8, 2021.

[61] I accept that the General Division may have incorrectly assumed the Claimant was hired as a "student." But that finding of fact had not bearing on the outcome. The General Division's finding rested on the fact the Claimant's work duties had not changed significantly from July 27, 2020, to January 8, 2021.

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[34] I heard this from the audio recording of the General Division hearing at approximately 0:34:39 to 0:36:00.

No significant modification to terms and conditions respecting wages or salary

[62] The Claimant says the General Division made an error of fact when it decided a significant modification to the terms and conditions respecting wages or salary was not a circumstance in which he quit.

[63] The General Division found as a fact that there was no significant change to the Claimant's wages.

[64] In that regard, the General Division pointed out that the ROE showed some fluctuations between pay periods. But it did not show a significant reduction overall during his employment.[35]

[65] The General Division also noted that the Claimant reported that he had been hired at reduced hours in July 2021, which would have meant reduced wages from the start.

[66] The General Division rejected the Claimant's assertion that the Commission should have contacted his employers and provided ROEs from his pre-March 2020 employment on the basis that the Claimant's hours and pay at previous jobs were not relevant to his circumstances when he quit.

[67] This circumstance in the law relates to a situation where "terms and conditions respecting wages or salary" are changed during the term of employment. In other words, where there has been a significant modification to the agreed upon wages or salary.

[68] This circumstance does not address situations where a person has been re-employed at a lower rate of pay than when previously employed. So, the General Division correctly concluded that ROEs from prior employment were not relevant.

[69] In any event, there was no evidence before the General Division that the employer had altered the agreed upon terms and conditions respecting wages or salary.

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[35] See ROE at GD3-13.

Rather, the evidence was, as the General Division noted, that there was a reduction in operating hours which resulted in overall less pay.

[70] In that regard, the Claimant testified that the reduction in operating hours due to the pandemic meant reduced pay.[36]

[71] Further, the letter from the car dealership explains that the Claimant was working with a reduction in hours because of the COVID-19 pandemic.[37]

[72] The General Division's decision that a significant modification of terms and conditions respecting wages or salary was not a circumstance of leaving was supported by the evidence.

No reasonable assurance of employment in the immediate future.

[73] The Claimant submits that the General Division incorrectly decided that a reasonable assurance of employment in the immediate future was not a circumstance in which he quit his job.

[74] The Claimant says, in making that finding the General Division failed to attach sufficient weight to the letter from the employer confirming he had been expecting a recall in January 2021.

[75] The Claimant also submits that the General Division made an error of law when it interpreted "immediate future" without having regard to the impact of the pandemic.

[76] The Claimant provided the General Division with a letter from the General Manager of his employer dated February 2, 2022.[38] The letter provided that the employer intended an immediate recall of the Claimant's employment in January of 2021. The letter went on to say that due to the ongoing COVID-19 pandemic his recall

[36] I heard this from the audio recording of the General Division hearing at approximately 0:34:39 to 0:36:00.
[37] GD9-6.
[38] GD9-5.

had been delayed due to lack of inventory, reduced sales and general slowdown in business and they were actively awaiting to recall the Claimant currently.

[77] The General Division did not overlook the employer's letter. It was specifically referred to in its decision. The General Division noted the Claimant's testimony that when the employer laid him off in March 2020 due to the pandemic, it assured him that it would rehire him as soon as it could. The General Division referred to the letter from the employer dated February 22, 2022, confirming that this had been a continuing commitment.[39]

[78] The General Division referred to case law from the Federal Court of Appeal which said that to show that he had reasonable assurance of returning in the immediate future, the Claimant had to meet three requirements: He had to show that when he quit, he knew he would have the other job. He also had to know what that job would be and when in the future it would start.[40]

[79] The General Division decided that the Claimant only met the second requirement: he knew who the employer would be and the type of job. However, when the Claimant quit in January 2021, the General Division decided that the Claimant had no real assurance of a return to his old job in the immediate future. The General Division pointed out that the Claimant did not have even a tentative return date. The General Division accepted that the employer hoped to rehire him but assurances in March 2020 did not mean that he had a job to rely on in January 2021.[41]

[80] In other words, the General Division was not satisfied, on the evidence before it, that the Claimant had a reasonable assurance of a return to his old job in the immediate future, at the time he quit.

[81] The General Division also was not satisfied that the reasonable assurance of a job was a reason the Claimant quit his job. Rather, the General Division decided that it

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[39] See paragraph 37 of the General Division decision.
[40] See paragraph 36 of the General Division decision. The General Division referred to the case of *Canada (Attorney General) v Bordage*, 2005 FCA 155.
[41] See paragraph 37 of the General Division decision.

was more likely than not that the Claimant's reason for quitting his job was to return to school.

[82] In reaching this conclusion, the General Division relied on the reason documented in the ROE as "Quit/Return to School."

[83] The General Division acknowledged the Claimant's testimony that he said the course was secondary but didn't accept that. The General Division said that the reality was that the Claimant had no job to return to at the time and he was in the middle of a college course that he wanted to finish.

[84] The General Division also noted that the college course had returned to in-person learning in January 2021 so continuing with that course meant returning to the city where the college was. The General Division also relied on the fact that the Claimant stated clearly and unequivocally on his reconsideration request that, "I relocated to return to (city name) to return to school … for my fifth semester."

[85] The General Division gave more weight to the Claimant's statement in his reconsideration request than his later declarations that he moved back to the city where the college was located, to work there. The General Division said this was because initial spontaneous statements are generally given more weight than statements after benefits are refused.

[86] I have listened to the audio recording from the General Division hearing. The Claimant said he had good assurances before he left his employment at the car dealership that he would be re-employed by his other employer in January 2021. He said his employer intended a recall in January 2021, but it was delayed due to the pandemic.[42]

[87] However, the Claimant did not testify that a start date had been confirmed by his employer prior to quitting his job and there is no documentary evidence on file to suggest that.

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[42] I heard this from the audio recording of the General Division hearing at approximately 0:32:20.

[88] Rather, the evidence was that the Claimant was advised by his employer on or around March 9, 2020, that his lay-off was temporary and that he would be recalled to work.[43] He told the Commission that he had no firm date of re-employment at the time he quit his job.[44]

[89] The General Division is entitled to weigh the evidence before it. In this case there was evidence to support its conclusion that the circumstance in which the Claimant quit his job was to return to school and the circumstances of leaving did not include a reasonable assurance of employment in the immediate future.

[90] The Claimant also argues that the General Division misinterpreted what the "immediate future" means. He says the General Division failed to allow for an interpretation that considered the challenges and realities that the Claimant was facing. The Claimant argues, due to the pandemic, "immediate future" was uncertain for many businesses.

[91] The General Division noted that "immediate future" is not defined in the legislation and it did not mean that the Claimant had to have an "imminent" recall date.[45] The General Division decided, however, that the plain interpretation of the word "immediate" did not apply to a delay of close to a year, from March 2020 when the Claimant was laid off and promised a recall, to January 2021 when he was still waiting to be recalled.

[92] I understand the General Division to mean that "immediate future" did not mean an indefinite or uncertain period of time.

[93] The General Division correctly described and applied the test set out by the Federal Court of Appeal to show a "reasonable assurance of another employment in the immediate future." As the General Division stated, the test requires, at the time a person decides to quit a job, they must know they would have employment, what that

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[43] GD2-5 and GD3-39 and GD3-43.
[44] GD3-41.
[45] See paragraph 35 of the General Division.

employment will be with what employer and at what moment in the future they would have that employment.[46]

[94] The General Division's conclusion rested on the fact the Claimant did not know specifically when he would be recalled at the time he quit, not that the start date was not in the "immediate future." The case law from the Federal Court of Appeal requires a claimant to have at the very least, some specific information about their future employment situation at the time of leaving their current employment.

[95] I cannot interfere with the General Division's conclusion where the General Division correctly applies settled law to the facts.[47] I also cannot interfere with the General Division's weighing of the evidence, even if I might have weighed the evidence differently or come to a different conclusion.[48]

The telephone call of January 18, 2021, wasn't a circumstance of quitting

[96] The Claimant says the General Division made an error of fact when it decided his phone conversation with an agent of the Commission on January 18, 2021, where he was told having a reasonable assurance of employment would allow him to quit, was not a circumstance in which he left his job.

[97] The Claimant submits that General Division member adversely "found it more likely" that the agent did not have all the facts and provided poor advice to the Claimant, to his own detriment without the General Division having any details of that conversation.

[98] The General Division accepted the Claimant's sworn testimony that a Commission agent told him that having reasonable assurance of another employment would allow him to quit and get EI benefits. The General Division found it more likely than not, however, that the agent was unaware that the Claimant had already been

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[46] See *Canada (Attorney General) v Bordage*, 2005 FCA 155 (CanLII).
[47] See *Garvey v Canada (Attorney General),* 2018 FCA 118.
[48] See *Sherwood v Attorney General of Canada*, 2019 FCA 166.

waiting close to ten months for a recall. The General Division said that even if the agent gave him incorrect or incomplete information, the law still had to be applied.[49]

[99] I agree with the Claimant that the General Division's conclusion about what the agent understood when the agent gave the Claimant information was made without any evidence as to the agent's understanding of the Claimant's situation. However, what the agent knew about the Claimant's situation is not relevant. The General Division accepted the Claimant's testimony that he had been told by the agent that he could quit if he had a reasonable assurance of another employment.

[100] In any event, no matter what the Claimant was told in this call, it wouldn't have changed the General Division's decision, as this call occurred on January 18, 2021, after the Claimant quit on January 8, 2021.

[101] Only the circumstances at the time a person quits their job are relevant, not what happens after.[50]

[102] The General Division decided that having regard to the circumstance in which the Claimant quit his job, which was to return to school, the Claimant had the reasonable alternative of staying employed until he had secured another job. The General Division's conclusion is consistent with the case law from the Federal Court of Appeal that says claimants who quit their job to go to school have not shown just cause.[51]

[103] I have not found any reviewable errors that would allow me to intervene in the General Division's decision that the Claimant did not have just cause for quitting his job on January 8, 2021.

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[49] See paragraph 38 of the General Division decision.
[50] See *Canada (Attorney General) v Lamonde*, 2006 FCA 44.
[51] See *Canada (Attorney General) v Lamonde*, 2006 FCA 44; See also *Canada (Attorney General) v Lessard*, 2002 FCA 469 and *Canada (Attorney General) v Beaulieu*, 2008 FCA 133.

The General Division made no reviewable errors when it decided the Claimant had not proven his availability for work

[104] Claimants of regular benefits must prove they are capable of and available for work but are unable to find suitable employment.[52]

[105] On November 2, 2021, the Commission disentitled the Claimant from receiving regular benefits from January 11, 2021, to August 31, 2021, and from September 7, 2021, because he was taking a training course on his own initiative and had not proven that he was available for work.

[106] The Claimant appealed the Commission's decision to the Tribunal's General Division.

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

[108] The law says that full-time students are presumed to be unavailable for work.[53]

[109] 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.[54] The other way is by showing they have exceptional circumstances.[55]

[110] 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. The law says that availability is assessed considering three factors. These are whether the person:[56]

- wanted to go back to work as soon as a suitable job was available.
- expressed that desire through efforts to find a suitable job.

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[52] See section 18(1)(a) of the *Employment Insurance Act* (EI Act).
[53] See *Canada (Attorney General) v Cyrenne*, 2010 FCA 349.
[54] See *Canada (Attorney General) v Rideout*, 2004 FCA 304.
[55] See *Canada (Attorney General) v Cyrenne*, 2010 FCA 349.
[56] See *Faucher v Canada (AG)*, A-56-96.

- didn't set personal conditions that might have unduly limited the person's chances of going back to work.

[111] There was no dispute that the Claimant was a full-time student.[57]

[112] The General Division decided the Claimant had shown exceptional circumstances to rebut the presumption of non-availability. The General Division reasoned that the part-time nature of the Claimant's previous job and his demonstrated ability to maintain at least that level of employment while studying full time is an exceptional circumstance. So, the General Division went on to consider whether the Claimant met the availability test.

[113] The General Division accepted that the Claimant had a sincere desire to return to the workforce.

[114] However, the General Division decided the Claimant had not made enough efforts to find work. In that regard, the General Division noted that the Claimant's job search did not reflect a daily motivation to find work while he was expecting a recall. The General Division decided that waiting for a recall is not the same as wanting to get back to the labour market any way you can. Rather, it was a personal preference.[58]

[115] In particular the General Division focused on the fact that the Claimant had not applied to any jobs throughout the period he had received EI benefits.

[116] The General Division also concluded that taking his course was not a personal condition that limited the Claimant's chances of returning to work as he had previously been able to work part-time while going to school.

[117] However, the General Division decided that the Claimant's job search showed a marked preference for jobs in the auto sector where he said there were no jobs available in the city in which he was attending school.[59] The General Division found it

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[57] See paragraph 61 of the General Division decision.
[58] See paragraph 84 of the General Division decision.
[59] See paragraph 90 of the General Division.

more likely than not that this personal condition limited his chances of securing other suitable jobs.

[118] The Commission says the General Division did not make any reviewable errors when it decided that the Claimant had not demonstrated his availability for work.

[119] The Commission submits that the General Division reviewed the evidence and concluded that the claimant's efforts were not sufficient and sustained to fulfill the second availability factor.

[120] The Commission submits the General Division's conclusion was consistent with the case law from the Federal Court of Appeal that says a claimant cannot restrict his re-employment to his former or existing employer and cannot simply wait to be called back. The Claimant must actively seek employment.[60]

[121] The Commission also maintains the General Division properly determined on the evidence that the Claimant set a personal condition limiting his chances of securing suitable jobs.

[122] The Commission says the Claimant is asking the Appeal Division to reweigh the evidence, which the Appeal Division cannot do. The Commission submits that the General Division appropriately weighed the evidence, and its reasons clearly explain its decision.

The General Division did not make factual errors

Job search efforts were insufficient

[123] The Claimant argues that the General Division made a number of factual errors which impacted its conclusion that he was not making enough efforts to find a suitable job.

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[60] The Commission refers to *Attorney General of Canada v Cornelissen-O'Neill, A-652-93* and *DeLamirande v Canada (Attorney General), 2004 FCA 311.*

[124] The Claimant submits:

- The General Division makes references to “entries blacked out” in the job search but these were personal Google searches that were not relevant.
- The General Division made an incorrect finding of fact that he was restricting his re-employment to his former employer and was waiting to be called back there.
- The General Division member stated that repetitive entries on the same date and multiple repetitive visits to the same site, AutoIQ does not show that the claimant looked regularly for work. However, the General Division also stated claimant made single visits to the Air Canada, FedEx, and MAG Aerospace sites.
- The General Division made the adverse assumption without clarifying with the Claimant that the website he used for job searching, “AutoIQ” was only for one dealership whereas it included postings for a network of car dealerships over Ontario including both in-person and virtual work options.
- The General Division member states, “the search history does not show that the Claimant looked at sites in the food and beverage industry” and then referred to his job search at a hotel. The Claimant submits that a significant amount, if not the majority, of hotels, serve food and drinks.
- The General Division overlooked that the Claimant had been actively monitoring industries including aviation, hotel (which may reasonably imply customer service and food and beverage industry), web services, financial services, and recreation.
- The General Division incorrectly labelled the Claimant as a “student,” completely disregarding his prior specialized employment history in the automotive industry.
- The General Division overlooked the impact of the pandemic on all industries across Canada.

[125] The General Division reviewed the Claimant's job search evidence in detail, and the General Division meaningfully analyzed that evidence.[61]

[126] The General Division was not satisfied, based on the job search evidence, that the Claimant had demonstrated sufficient efforts to meet the second availability factor. The General Division concluded this was because the Claimant's job search was passive and did not involve applying for any jobs throughout the months he received EI benefits.

[127] The General Division did not overlook the Claimant's evidence that he was reviewing online jobs in industries other than the auto industry. The General Division referred to the fact that the majority of the Claimant's searches were in the auto industry but on a few occasions, he looked for online jobs, work in aviation or as a recreational aide. On one occasion he looked at a job in a hotel.[62]

[128] The Claimant says the General Division incorrectly labelled the Claimant as a "student," completely disregarding his prior specialized employment history in the automotive industry.

[129] However, the General Division's comment that he was a student related specifically to two jobs in the Claimant's job search history. These were jobs for a Managing Partner and Financial Services Manager at a dealership. The General Division noted that there was no evidence that his skills and qualifications as a student matched these positions.[63] The General Division was focusing specifically on the fact there was no evidence the Claimant had experience for these two particular jobs.

[130] The General Division did note that various job search entries were blacked out. But nothing turns on this. At issue was the sufficiency of the Claimant's job search efforts.

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[61] See paragraphs 74 to 84 of the General Division decision.
[62] See paragraph 78 of the General Division decision.
[63] See paragraph 79 of the General Division decision.

[131] The General Division commented that the Claimant had multiple repeat visits to the same site, AutoIQ. The Claimant says that the General Division didn't clarify that AutoIQ was included postings for a network of car dealerships over Ontario including both in-person and virtual work options.

[132] I have reviewed the audio recording from the General Division and the record. I see no evidence provided that this site reflected a network of dealerships. Rather, I note that the Claimant identified AutoIQ as relating to his two former employers.[64] The General Division cannot have failed to consider evidence that was not provided to it.

[133] The General Division did not mistakenly find that the Claimant's only job search activity was awaiting recall. The General Division noted the Claimant's testimony that he believed waiting for a recall was enough job search activity based on the advice the Commission gave him. The General Division said that as the weeks progressed with still no recall, the Claimant had failed to show that he conducted an intensive job search on every day for which he was claiming benefits.[65]

[134] In other words, the General Division was not satisfied that the Claimant was making enough job search efforts while awaiting recall. It did not decide awaiting recall was his only effort.

[135] The General Division acknowledged the Claimant's comments that the pandemic and government shutdowns limited the job market, which made it difficult to find work. But the General Division pointed out that the willingness to work and having the time to work is not the same as making real efforts to find work. The General Division pointed out that claimants still have to apply for jobs. The General Division decided passive research was not enough and even though a claimant might think it might be hard to get a job, they still have to show they tried.[66]

[136] This finding was consistent with the law. As the Commission pointed out, the Federal Court of Appeal has made clear that no matter how little chance of success a

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[64] GD12-1.
[65] See paragraph 82 of the General Division decision.
[66] See paragraph 83 of the General Division decision.

claimant may feel a job search would have, they still must be actively seeking work to prove their availability.[67]

[137] The General Division's finding was also consistent with the evidence. The evidence does not show a sustained effort to find employment, given no job applications at all were made over a period of a number of months. The General Division was entitled to reach the conclusion, on the evidence before it, that the Claimant's job search efforts did not show that he wanted to go back to work as soon as a suitable job was available.

Personal condition unduly limiting chances of returning to the workforce

[138] The Claimant maintains the General Division's finding of fact that the Claimant's focus on jobs in the automotive sector was a personal condition that unduly limited his chances of securing other suitable jobs was inconsistent with its finding that claimants had to search for jobs they could get and was also inconsistent with the Claimant's experience in the auto industry.

[139] The General Division found that the Claimant had set personal conditions of waiting for recall and preferring jobs in the auto sector.[68]

[140] The General Division decided that the Claimant's job search showed a marked preference for jobs in the auto sector, where he had said there were no jobs available in the city where he was residing to attend college. So, it concluded it was more likely than not that this was a personal condition that limited his chances of securing other suitable jobs.[69]

[141] I see no error of fact in this conclusion. The evidence was consistent with that finding. The job searches the Claimant provided are primarily auto-sector related.[70]

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[67] See *Attorney General of Canada v Cornelissen-O'Neill*, A-652-93; See also *DeLamirande v Canada (Attorney General)*, 2004 FCA 311.
[68] See paragraphs 89 and 90 of the General Division decision.
[69] See paragraph 90 of the General Division decision.
[70] GD12.

[142] The General Division's finding that limiting searches to the auto industry was unduly limiting had to do with evidence from the Claimant that there were no jobs in that industry in the city where he was residing. The General Division's finding did not reflect a misunderstanding about his experience in the auto-industry.

The General Division did not misapply the legal test for availability

[143] The Claimant says that the General Division erred in law in how it applied the availability test.

[144] The Claimant submits that the General Division decided the Claimant had the willingness to work and that the Claimant's course requirements did not limit his chances of managing both work and studying, but then concluded that his willingness was not a real effort to find work.

[145] The Claimant submits that the desire to work versus the active efforts to find work are two different aspects of the availability test. The Claimant submits the General Division's decision confused the Claimant's willingness to work with his concrete efforts.

[146] The General Division was aware that the desire to work and the efforts to find work were different parts of the availability test and applied those parts of the test separately.

[147] The General Division clearly considered the Claimant's efforts to work when considering assessing the second availability factor. The General Division reviewed the Claimant's job search records and his job search activities when it concluded his efforts were insufficient.

The pandemic is not relevant to job search efforts

[148] The Claimant also argues that the General Division erred in law by failing to adequately consider the Claimant's limited ability to look for jobs in light of the COVID-19 pandemic. The Claimant submits that fewer job fairs were offered, and the Claimant had to revert to online searches and the few other avenues that were at his disposal.

[149] The General Division did not make an error of law by not considering the impact of the pandemic on the Claimant's job search.

[150] Although not binding, the *Employment Insurance Regulations* provide some guidance in deciding whether a claimant's efforts have demonstrated a desire to return to the labour force as soon as a suitable job is available.

[151] The criteria for determining whether a claimant is making reasonable and customary efforts to find suitable employment are that the efforts must be sustained and include activities such as assessing employment opportunities, preparing a resume or cover letter, registering for jog search tools or with electronic job bank and employment agencies, attending job search workshops or job fairs, networking, contacting prospective employers, submitting job applications, and attending interviews.[71]

[152] This criteria tells me that the question of whether a claimant has made enough efforts to show he had a sincere desire to return to the workforce as soon as a suitable job is available has to do with a claimant's efforts to find work, not external factors, such as the pandemic. What is relevant are the types of activities a claimant is undertaking to find suitable work and that the efforts are sustained.

[153] As above, the case law from the Federal Court of Appeal says no matter how little chance of success a claimant may feel a job search would have, they still must be actively seeking work to prove their availability.

[154] In this case, the General Division was not satisfied the Claimant's limited efforts were enough to show a sincere desire to return to the workforce as soon as a suitable job was available. The General Division found the Claimant's efforts to be passive and not to reflect an active job search.

[155] The Claimant has not shown that the General Division made any reviewable errors when it decided he was not available for work.

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[71] See section 9.001 of the EI Regulations.

No reviewable errors have been made

[156] I recognize the Claimant will find this result disappointing. However, having regard to the Claimant's arguments, I have not found any reviewable errors made by the General Division. Unfortunately, this means the overpayment remains.

[157] The Claimant's counsel explained that the Claimant is experiencing financial hardship. As the General Division pointed out in its decision, the Claimant can request that the Commission write off his debt. He can also request that the Canada Revenue Agency write off the debt or enter into a payment plan.[72] If the Claimant hasn't done so, he may wish to pursue those options.

[158] I have no authority to direct these agencies to write-off of a debt, but I would ask that the Commission and/or the Canada Revenue Agency give consideration to the Claimant's request.

Conclusion

[159] The appeal is dismissed. The General Division did not make an error that falls within the permitted grounds of appeal.

Charlotte McQuade
Member, Appeal Division

[72] See paragraphs 93 and 94 of the General Division decision.