



Citation: *EL v Canada Employment Insurance Commission*, 2023 SST 80

## Social Security Tribunal of Canada Appeal Division

# Decision

**Appellant:** E. L.

**Respondent:** Canada Employment Insurance Commission  
**Representative:** Josée Lachance

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**Decision under appeal:** General Division decision dated June 16, 2022  
(GE-22-1032)

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**Tribunal member:** Charlotte McQuade

**Type of hearing:** Videoconference  
**Hearing date:** October 17, 2022  
**Hearing participants:** Appellant  
Respondent's representative

**Decision date:** January 27, 2023  
**File number:** AD-22-436

## Decision

[1] The appeal is allowed. The General Division made an error of jurisdiction.

[2] I am rescinding (cancelling) the General Division decision and returning the matter to the General Division for reconsideration.

## Overview

[3] E. L. is the Claimant. She was attending a full-time college program. She collected Employment Insurance Emergency Response Benefits (EI ERB) and on October 4, 2020, she was transitioned to Employment Insurance (EI) regular benefits.

[4] On November 15, 2021, the Canada Employment Insurance Commission (Commission) decided the Claimant was not entitled to EI regular benefits because she had not proven her availability for work from October 4, 2020. The Claimant appealed the Commission's decision to the Tribunal's General Division.

[5] The General Division decided the Claimant was not available for work because she didn't make enough efforts to find a job and her school obligations limited her chances of fully returning to the labour market.

[6] The Claimant appealed the General Division's decision to the Appeal Division. She argues that the General Division made an important error of fact and errors of law when it decided she wasn't available for work. She also says that the General Division made an error of jurisdiction by not deciding whether the Commission exercised its discretion properly in retroactively assessing an overpayment.

[7] The Commission submits that the General Division didn't make any errors when it decided the Claimant wasn't available for work. But the Commission agrees with the Claimant that the General Division made an error of jurisdiction.

[8] I accept that the General Division made an error of jurisdiction. I have decided to rescind the General Division decision and send the matter back to the General Division for reconsideration.

## **Post-hearing submissions**

[9] I allowed the Claimant to provide post-hearing submissions as she was unaware of how to access some of the case law in the Commission's submissions prior to the hearing. The Claimant provided post-hearing submissions, which I have considered.<sup>1</sup>

[10] The Commission was given an opportunity to reply to the Claimant's post-hearing submissions but had no additional representations.<sup>2</sup>

## **Issues**

[11] The issues in this appeal are:

- a) Did the General Division make an error of fact that the Claimant was only willing to work around her work schedule, given her testimony that her classes were recorded so she could have potentially worked during the day?
- b) Did the General Division make an error of law by not considering how the pandemic affected her ability to find work?
- c) Did the General Division make an error of law when it decided that by restricting her availability to evenings and weekends, the Claimant had not proven her availability for work?
- d) Did the General Division made an error of jurisdiction by not deciding whether the Commission had exercised its discretion judicially in deciding to retroactively disentitle the Claimant from benefits?

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<sup>1</sup> AD4.

<sup>2</sup> AD5-1.

## Analysis

[12] The Claimant argues that the General Division based its decision on an error of fact. She also submits the General Division made errors of law in how it interpreted what it means to be “available for work” under the EI Act and an error of jurisdiction by not deciding an issue it had to decide.

[13] If established, any of these types of errors would allow me to intervene in the General Division decision.<sup>3</sup>

### **The parties agree the General Division made an error of jurisdiction**

[14] The Commission submits that the General Division did not make any errors of fact or law when it decided the Claimant was not available for work.

[15] However, the Commission agrees with the Claimant that the General Division made an error of jurisdiction by not deciding whether it had exercised its discretion properly in verifying the Claimant’s entitlement and assessing an overpayment.

[16] An error of jurisdiction can arise if the General Division decides an issue that it didn’t have authority to decide or if it doesn’t decide an issue that it was required to decide.

[17] The Claimant says she answered all the questions on her reports truthfully and called the Commission multiple times to ask questions about how to complete the forms. She says she was never told she was not entitled to the benefits. The Claimant says it is unfair of the Commission to retroactively assess an overpayment in those circumstances.

[18] The Claimant says she raised this issue to the General Division, but the General Division did not decide whether the Commission had properly exercised its discretion in deciding to retroactively review her claim and assess an overpayment.

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<sup>3</sup> See section 58(1) of the *Department of Employment and Social Development Act* (DESD Act).

[19] The Commission submits that the General Division correctly referred to section 153.161 of the *Employment Insurance Act* (EI Act) which gives the Commission the authority to make a retroactive decision about the claimant's availability for work. The Commission says the General Division also correctly determined that this is a discretionary decision.

[20] However, the Commission points out, the General Division's jurisdiction required it to consider whether the Commission had the power to retroactively disentitle the Claimant and if so, whether the Commission should act and acted judicially when deciding to verify the claimant entitlement to benefits. The Commission submits that instead of deciding this, the General Division asked the Commission to consider whether this was an appropriate use of its discretionary power.

### **I accept that the General Division made an error of jurisdiction**

[21] I accept that the General Division overlooked an issue it had to decide.

[22] The Commission disentitled the Claimant from benefits from October 4, 2020, for reason she had not proven her availability for work.

[23] The Claimant argued before the General Division that she was available for work while attending school. She also objected to the Commission's retroactive disentitlement, over a year after her benefits started. She said she had truthfully declared her schooling to the Commission and called the Commission multiple times to make sure she was filling things out properly. She said she was never told she wasn't entitled to benefits.<sup>4</sup>

[24] The General Division decided the Claimant hadn't proven her availability for work from October 4, 2020, because she didn't make enough efforts to find a job and her school obligations limited her chances of fully returning to the labour market.

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<sup>4</sup> GD2-9.

[25] The General Division decided section 52(1) of the EI Act gives the Commission very broad powers to revisit any of its decisions about EI benefits.

[26] The General Division noted that section 153.161(2) of the EI Act specifically gives the Commission the power to review students' availability for work even if it already paid EI benefits.

[27] The General Division decided the Commission had acted within the allowed 36 months after benefits were paid to reconsider the claim. In that regard, the Commission had reconsidered the Claimant's claims for benefits, made a decision, calculated the overpayment, and notified the Claimant of the decision all within 36 months of the date it originally paid the benefits.<sup>5</sup>

[28] The General Division pointed out that the Commission's authority to make a retroactive decision that creates an overpayment is a discretionary decision.

[29] However, the General Division did not decide whether the Commission exercised its discretion in a judicial manner. Instead, the General Division asked the Commission to consider if this was an appropriate use of its discretionary power.<sup>6</sup>

[30] Section 153.161 of the EI Act was added to the EI Act in the extraordinary circumstances of the pandemic. It was only in force from September 27, 2020, to September 25, 2021, although, it continued to apply to benefit periods beginning between September 27, 2020, and September 25, 2021.<sup>7</sup>

[31] Section 153.161(1) of the EI Act provides that, for the purpose of applying paragraph 18(1)(a) of the EI Act, a claimant who attends a non-referred course, program of instruction or training is not entitled to be paid benefits for any working day in a benefit period for which the claimant is unable to prove that on that day they were capable of and available for work.

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<sup>5</sup> See paragraph 11 of the General Division decision. See also section 52 (1) of the EI Act which sets out the time limits on reconsideration by the Commission.

<sup>6</sup> See paragraph 14 of the General Division decision.

<sup>7</sup> See section 333 of the *Budget Implementation Act, 2021*, No. 1 (S.C. 2021, c. 23).

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

[33] Section 52(1) of the EI Act provides the Commission with a discretion to reconsider a claim for benefits within 36 months after benefits have been paid or payable. Section 52(2) says that if the Commission decides that a person has received money by way of benefits for which the person was not qualified, or to which the person is not entitled, the Commission must calculate the amount of the money and notify the claimant of its decision.

[34] Together, section 52 and section 153.161 of the EI Act give the Commission the power to retroactively verify a claimant's entitlement and to assess an overpayment, if appropriate.

[35] However, the Commission's powers under sections 52 and 153.161(2) of the EI Act are discretionary. This means that the Commission may verify a person's entitlement to benefits they have already received and may reconsider a claim, but it doesn't have to.

[36] Discretionary powers must be exercised in a judicial manner. This means when the Commission decides to verify entitlement or to reconsider a claim, it can't:<sup>8</sup>

- act in bad faith
- act for an improper purpose or motive
- take into account an irrelevant factor
- ignore a relevant factor, or

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<sup>8</sup> See *Canada (Attorney General) v Purcell*, 1995 CanLII 3558 (FCA).

- act in a discriminatory manner.

[37] The Claimant raised the issue of the Commission's exercise of discretion to the General Division, given her arguments about the fact she had truthfully declared her schooling all along and spoke to the Commission multiple times without being told she was not entitled to benefits.

[38] The Commission cannot review its own exercise of discretion. That is something the General Division is required to do. By not making its own decision about whether the Commission had exercised its discretion judicially when it decided to retroactively disentitle the Claimant and assess an overpayment, respectfully, the General Division made an error of jurisdiction.

[39] The Claimant submits that the General Division also made other reviewable errors. However, I don't need to consider whether the General Division made other errors. It is enough to show one reviewable error has been made.

[40] Since the General Division has made an error of jurisdiction, I can intervene in the decision.<sup>9</sup>

## **Remedy**

[41] To fix the General Division's error, I can refer the matter back to the General Division for reconsideration, or I can give the decision the General Division should have given.<sup>10</sup>

[42] The Commission asks that I dismiss the Claimant's appeal on the availability issue. The Commission maintains that the General Division made no reviewable errors when it decided the Claimant hadn't proven her availability for work.

[43] However, the Commission says I should send the issue about whether the Commission exercised its discretion properly in reviewing the claim and assessing an overpayment back to the General Division for reconsideration. The Commission says

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<sup>9</sup> See section 58(1) of the DESD Act.

<sup>10</sup> See section 59(1) of the DESD Act.



this is because the parties did not have a chance to properly present their case regarding this issue.

[44] The Claimant, on the other hand, wants me to allow her appeal. She wants me to decide that the General Division made an error of fact or errors of law when it decided she wasn't available for work and substitute my decision for that of the General Division to find she was available for work.

[45] However, the Claimant agrees that, if I were to find no errors in the General Division decision or decide myself that she wasn't available for work, then I should send the issue of whether the Commission exercised its discretion properly in retroactively reviewing the claim and assessing an overpayment back to the General Division for reconsideration.

**I am sending all issues back to the General Division for reconsideration**

[46] I have decided to rescind the General Division decision and send all issues back to the General Division for reconsideration.

[47] I am not satisfied that the parties had a full opportunity to provide evidence and submissions about whether the Commission had exercised its discretion judicially when it decided to retroactively review the Claimant's entitlement and assess an overpayment.

[48] Although the Commission referred to section 153.161 in its submissions to the General Division, it did not explain what factors it had considered when it exercised its discretion to retroactively verify the Claimant's entitlement and reconsider her claim. Since this wasn't explained, the Claimant did not have a chance to properly respond to the Commission's position on that issue.

[49] Further, there is important evidence in the record that requires clarification.

[50] The overpayment under appeal was retroactive to October 4, 2020.

[51] The Commission's file contains notes of a telephone conversation between the Claimant and the Commission, which suggest the Claimant's availability was reviewed and an initial decision was made on October 20, 2020, about the Claimant's availability from September 8, 2020, to December 18, 2020.

[52] The notes provide as follows: "Main Issue Availability. Training from 2020-09-08 to 2020-12-18. 14 hour(s) of training attended per week. The claimant was advised of the decision, of its impact on the claim, of his or her right to file a formal request for reconsideration of the decision and of the applicable time frame."<sup>11</sup>

[53] This decision appears to be approving the Claimant's availability for the period from September 8, 2020, to December 18, 2020, but since the notes don't actually say what the decision is that the Commission made, that is not entirely clear.

[54] I have listened to the recording of the General Division hearing. I didn't hear the Claimant say anything about this decision.

[55] The Commission has not provided any information about this decision other than to say that the Claimant was advised of a decision on her training between September 8, 2020, to December 18, 2020.<sup>12</sup>

[56] An initial entitlement decision can be reconsidered. However, if the Commission already verified the Claimant's entitlement before approving the Claimant's availability for the period from September 8, 2020, to December 18, 2020, that is a relevant factor to whether the Commission exercised its discretion judicially when it decided to reconsider the Claimant's entitlement from October 4, 2020, to December 18, 2020.

[57] Generally, the Appeal Division can't accept new evidence.<sup>13</sup> Since the record is not complete, and I can't take new evidence, I can't substitute my decision for that of the

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<sup>11</sup> GD3-17.

<sup>12</sup> GD4-1 and AD2-1.

<sup>13</sup> See *Sibbald v Canada (Attorney General)*, 2022 FCA 157.

General Division on this issue. So, I agree with the parties that this issue must be returned to the General Division for reconsideration.

**I will not decide the availability issue**

[58] I am not going to make a decision about whether the General Division made any reviewable errors when it decided the Claimant wasn't available for work.

[59] I could decide this. However, I am concerned about splitting up the decision-making on two closely related issues. I think these issues need to be considered together.

[60] If, for example, the General Division decided the Commission had not exercised its discretion judicially in reconsidering the Claimant's entitlement and assessing an overpayment, then it might not be necessary to decide the availability issue.

[61] Further, by splitting the decision making, there is the risk of inconsistent decisions at the Appeal Division and the General Division. For example, that could happen if I were to find that the availability decision made by the General Division was to be maintained but the General Division were to decide the Commission hadn't exercised its discretion properly to reconsider the Claimant's entitlement for any or all of her claim period.

[62] I understand that the Claimant wants finality in this matter. However, there is no necessary time savings, as the appeal could possibly end up having to be returned to the General Division anyway on the issue of the Commission's exercise of discretion.

[63] So, I am rescinding the General Division decision and return the matter to the General Division for reconsideration on all issues.

## **Conclusion**

[64] The appeal is allowed. The General Division made an error of jurisdiction.

[65] The General Division decision is rescinded. The matter is returned to the General Division to for reconsideration on all relevant issues.

Charlotte McQuade  
Member, Appeal Division