Citation: *CA v Canada Employment Insurance Commission*, 2023 SST 87

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	C. A.
Respondent:	Canada Employment Insurance Commission
Representative:	Josée Lachance

Decision under appeal:	General Division decision dated September 19, 2022 (GE-22-2015)

Tribunal member:	Charlotte McQuade
Type of hearing:	Teleconference
Hearing date:	January 26, 2023
Hearing participants:	Appellant Respondent's representative
Decision date:	January 27, 2023
File number:	AD-22-752

Decision

[1] The appeal is allowed.

[2] The General Division based its decision on erroneous findings of fact that it made without regard for the material before it.

[3] The General Division decision is rescinded and I am sending the appeal back to the General Division for reconsideration.

Overview

[4] C. A. is the Claimant. He collected Employment Insurance (EI) regular benefits while attending school full-time. After the Claimant had received benefits, the Canada Employment Insurance Commission (Commission) decided the Claimant was not entitled to benefits from January 12, 2021, to December 10, 2021, because he hadn't proven his availability for work. This decision resulted in an overpayment. The Claimant appealed the Commission's decision to the Tribunal's General Division.

[5] The General Division decided the Claimant was a full-time student and he had not rebutted the presumption of non-availability in the law that applied to full-time students. The General Division also decided that the Claimant had not proven his availability for work and that the Commission had the authority to verify the Claimant's entitlement to benefits, even after benefits had been paid.

[6] The Claimant appealed the General Division's decision, arguing the General Division decided he wasn't available for work based on erroneous findings of fact made without regard to the evidence before it. The Commission agrees.

[7] I am allowing the appeal. I agree with the parties that the General Division based its decision about the Claimant's availability for work on erroneous findings of fact that it made without regard for the material before it. I am sending this matter back to the General Division for reconsideration.

I won't consider the Claimant's new evidence

[8] As part of his submissions to the Appeal Division, the Claimant provided some new information about the efforts he had made to find work.[1] He also provided a letter from his current employer that was not before the General Division.[2] The Claimant says this is not new evidence, but background information only.

[9] The Appeal Division generally does not consider new evidence because the Appeal Division isn't rehearing the case. Instead, the Appeal Division is deciding whether the General Division made certain errors, and if so, how to fix those errors. In doing so, the Appeal Division looks at the evidence that the General Division had when it made its decision.

[10] There are a few limited exceptions to this rule.[3] One of those exceptions is where the information is background information only. I don't agree the new information is background information only. The Claimant has provided it to help prove he was available for work. So, it is new evidence.

[11] Since the Claimant's new evidence doesn't meet any of the allowed exceptions, I decided at the hearing I would not accept it.

The parties agree on the outcome of the appeal

[12] At the hearing the parties agreed on the outcome of the appeal. They agreed that the General Division based its decision that the Claimant wasn't available for work from January 12, 2021, to December 10, 2021, on errors of fact that the General Division made without regard to the evidence before it.[4]

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[1] AD2-1
[2] AD2-3.
[3] Generally, new evidence will only be accepted if it provides general background information, highlights findings that the Tribunal made without supporting evidence, or reveals ways in which the Tribunal acted unfairly. See *Sharma v Canada (Attorney General)*, 2018 FCA 48; See also *Sibbald v Canada (Attorney General)*, 2022 FCA 157.
[4] See AD3. The Commission also noted in its submissions its agreement that the General Division had overlooked important evidence and the matter should be returned to the General Division.

[13] The parties also agreed that I should allow the appeal, rescind the General Division decision, and send the matter back to the General Division for reconsideration.

I accept the proposed outcome

[14] I accept that the General Division based its decision that the Claimant had not proven his availability for work on erroneous findings of fact that it made without regard to the material before it.[5]

[15] The Commission disentitled the Claimant from benefits from January 12, 2021, to December 10, 2021, for reason he had not proven his availability for work while attending school full-time.

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

[17] There was no dispute that the Claimant was a full-time student. The law says that full-time students are presumed to be unavailable for work.[6]

[18] However, they can rebut the presumption if they can show they have a history of combining full-time work with full-time school.[7] They can also rebut the presumption by showing exceptional circumstances.[8]

[19] If the presumption is rebutted, the student still has to prove that they are capable of and available for work and unable to obtain suitable employment.[9]

[20] To prove availability, three factors must be considered.[10] These are:

- Whether the claimant wants to go back to work as soon as a suitable job is available.

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[5] See section 58(1)(c) of the *Department of Employment and Social Development Act* (DESD Act).
[6] See *Canada (Attorney General) v Cyrenne*, 2010 FCA 349.
[7] See *Canada (Attorney General) v Rideout*, 2004 FCA 304.
[8] See *Canada (Attorney General) v Cyrenne*, 2010 FCA 349.
[9] See sections 18(1)(a) and 153.161(1) of the *Employment Insurance Act* (EI Act).
[10] See *Faucher v Canada Employment and Immigration Commission*, A-56-96, and A-57-96, which describes these three factors.

- Whether the claimant has made efforts to find a suitable job.
- Whether the claimant has set personal conditions that might unduly (in other words, overly) limit their chances of going back to work.

[21] The General Division decided the Claimant had not rebutted the presumption of non-availability.

[22] In reaching that decision, the General Division noted that the Claimant testified that he made no attempts to find work while in training nor had any intention to do so. The General Division also noted that the Claimant confirmed that the requirements of his program were such that he could not both work and remain in school.[11]

[23] Even though the General Division found the Claimant had not rebutted the presumption of non-availability, it went on to consider whether the Claimant had proven his availability, having regard to the three factors noted above.

[24] The General Division found as a fact that the Claimant did not show that he wanted to go back to work as soon as a suitable job was available. The General Division said the Claimant testified that he did not seek employment because his program was exceedingly demanding and he did not have enough time to complete his program requirements, work, and respond to his other family obligations.[12]

[25] The General Division also found as a fact that the Claimant did not make any efforts to find work. The General Division relied on the Claimant's testimony that he did not make any attempts to find work and he did not believe he was required to do so while he was on training.[13]

[26] The General Division also found the significant demands of the Claimant's program precluded him for both working and attending school. The General Division concluded, therefore, that the Claimant's unwillingness to quit school, coupled with the

[11] See paragraph 18 of the General Division decision.
[12] See paragraph 48 of the General Division decision.
[13] See paragraph 52 of the General Division decision.

significant study demands of his program, unduly limited his chances of finding suitable employment.[14]

[27] The Appeal Division cannot reconsider or re-weigh the evidence. There are only specific kinds of factual errors that allow the Appeal Division to intervene.

[28] For the Appeal Division to intervene on an error of fact, the General Division must have based its decision on the error of fact. So, it must be a material fact.

[29] As well, the erroneous finding of fact must have been made in a perverse or capricious manner or without regard to the material before it.[15]

[30] A perverse or capricious finding of fact is one where the finding squarely contradicts or is unsupported by the evidence.[16]

[31] Factual findings 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.[17]

[32] The General Division made findings of fact that the Claimant did not have any intention to find work and was not making efforts to find work. In making this finding, the General Division relied on the Claimant's testimony.

[33] However, I have listened to the audio recording from the General Division hearing. I did not hear the Claimant say he had no intention to find work or that he did not seek employment because his program was exceedingly demanding. I also did not hear him say that he believed he was not required to seek work while he was on training.

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[14] See section 57 of the General Division decision.
[15] See paragraph 57 of the General Division decision.
[16] See *Garvey v Canada (Attorney General),* 2018 FCA 118; See also Walls v Canada (Attorney General), 2022 FCA 47 (CanLII).
[17] See *Walls v Canada (Attorney General),* 2022 FCA 47 (CanLII) at paragraph 41.

[34] Respectfully, the General Division member appears to have either overlooked or misunderstood what the Claimant actually said.

[35] I heard the Claimant say multiple times that he was looking for work with an employer who would give him a flexibility with his schedule when he had assignments to submit. He testified that he found an employer in November 2021 who offered him that flexibility.[18]

[36] Indeed, there was a Record of Employment (ROE) on file which shows the Claimant was successful in obtaining employment from November 2, 2021, to January 12, 2022.[19]

[37] The General Division's finding of fact that the Claimant did not intend to find work and was not seeking work was in direct contrast to the Claimant's testimony. So, the General Division made this finding of fact without regard to the evidence before it.

[38] The General Division also made a finding of fact that the significant demands of the Claimant's program precluded him for both working and attending school. However, there was evidence on file which directly contradicted this finding of fact.

[39] The evidence was that the Claimant had been able to combine full-time school with significant hours of work. In that regard, there were pay stubs showing the Claimant worked 61 hours from November 1, 2021, to November 15, 2021, 75.33 hours from November 16, 2021, to November 30, 2021, and 79.43 hours from December 1, 2021, to December 15, 2021. [20]The Claimant's schooling was ongoing during this period.[21]

[40] However, the General Division did not address this contradictory evidence. So, the General Division's finding of fact on this point was made without regard to the material before it.

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[18] I heard this from the audio recording of the General Division hearing at approximately 0:06:11 to 0:08:00 and also again at approximately 0:12:00. I also heard this at approximately 0:14:30 to 0:15:10 and again at approximately 0:22:00.
[19] GD5-3
[20] GD3-53, GD3-53, and GD3-52.
[21] GD3-28.

[41] Since the General Division based its decision about the Claimant's availability for work on erroneous findings of fact that it made without regard to the evidence before it, I can intervene in the case.[22]

Remedy

[42] To remedy the errors, I can either substitute my decision for that of the General Division or return the matter to the General Division for reconsideration.[23]

[43] Generally, if the parties had a full and fair opportunity to present their case before the General Division, I would substitute my decision for that of the General Division.

[44] The parties both ask that I allow the appeal and return the matter to the General Division for reconsideration as the record is not complete.

[45] I agree that returning the matter to the General Division for reconsideration is the appropriate remedy.

[46] I have listened to the audio recording from the General Division hearing. I note that there were no questions asked at the hearing and no evidence provided about the specific efforts the Claimant was making to find a job. This may be because the General Division member appears to have misunderstood the Claimant's testimony to be that he wasn't looking for work at all.

[47] As such, I am not satisfied the Claimant had a full and fair opportunity to present his case. So, I cannot substitute my decision for that of the General Division.

[48] I am sending this matter back to the General Division so it can reconsider the matter.

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[22] Section 58(1)(c) of the DESD Act explains this is a reason the Appeal Division can intervene in a decision of the General Division.
[23] See section 59(1) of the DESD Act.

Conclusion

[49] The appeal is allowed.

[50] The General Division based its decision on erroneous findings of fact that it made without regard to the material before it.

[51] The General Division decision is rescinded (cancelled) and the matter is returned to the General Division for reconsideration.

Charlotte McQuade
Member, Appeal Division