



Citation: *Canada Employment Insurance Commission v JN*, 2023 SST 212

## Social Security Tribunal of Canada Appeal Division

# Decision

**Appellant:** Canada Employment Insurance Commission  
**Representative:** Isabelle Thiffault

**Respondent:** J. N.  
**Representative:** P. N.

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**Decision under appeal:** General Division decision dated October 10, 2022  
(GE-22-2680)

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**Tribunal member:** Melanie Petrunia

**Type of hearing:** Teleconference

**Hearing date:** January 25, 2023

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

**Decision date:** February 27, 2023

**File number:** AD-22-817

## Decision

[1] The appeal is allowed in part. The General Division erred in law and based its decision on an important error of fact. The matter is returned to the General Division for reconsideration of the Claimant's availability for the period beginning January 6, 2022.

## Overview

[2] The Respondent, J. N. (Claimant), applied for regular employment insurance (EI) benefits on August 15, 2021. She stated on her application form that she would be enrolled in a full-time university program from September 8, 2021, to April 20, 2022.

[3] On May 6, 2022, the Claimant completed a training questionnaire. She indicated that she was enrolled in a full-time course from January 6 to May 5, 2022, and her attendance was not approved by a designated authority. She said that she was available for work and had tried to find a job. If she had found a full-time job, the Claimant said that she would have accepted it if she could delay starting until she had completed her course.

[4] The Claimant contacted the Appellant, the Canada Employment Insurance Commission (Commission), and said that she was also enrolled in course from May 9 to August 13, 2022. This course was 15 hours per week and the Claimant stated that she would leave the program if it conflicted with a full-time job.

[5] The Commission decided that the Claimant could not be paid benefits starting January 6, 2022, because she was taking a course of her own initiative and had not proven her availability for work. On reconsideration, the Commission confirmed that the Claimant was disentitled to benefits but changed the start date to August 9, 2021.

[6] The Claimant appealed the Commission's decision to the Tribunal's General Division. The General Division allowed the Claimant's appeal. It found that the Claimant believed that her training had been approved by the Commission when it paid her benefits. It found that the Claimant had rebutted the presumption that she was not available for work from August 9, 2021.

[7] The Commission is now appealing the General Division decision to the Tribunal's Appeal Division. It argues that the General Division made errors of law and based its decision on an important error of fact.

[8] The General Division erred in law when it found that the Claimant had rebutted the presumption that she was not available for work and by failing to assess the Claimant's availability. The General Division also based its decision on an important error of fact when it found that the Claimant believed her training was approved by the Commission.

[9] I find that the record is not complete, and I am returning the matter to the General Division to reconsider the Claimant's availability while attending full-time training for the period starting January 6, 2022.

## **Preliminary matters**

[10] The Commission initially imposed a disentitlement for the period starting January 6, 2022. On reconsideration it changed the period of disentitlement to begin on August 9, 2021.

[11] The Commission says that it did not have the authority to complete a reconsideration of the Claimant's availability for the period from August 9, 2021, to January 5, 2022, because there was no original decision to disentitle the Claimant for this period.

[12] In its submissions, the Commission conceded its appeal for the period from August 9, 2021, to January 5, 2022. I accept the Commission's submissions. I find that the period of disentitlement at issue begins on January 6, 2022.

## **Issues**

[13] The issues in this appeal are:

- a) Did the General Division err in law by failing to assess the Claimant's availability?
- b) Did the General Division err in law when it found that the Claimant had shown exceptional circumstances to rebut the presumption of non-availability?
- c) Did the General Division base its decision on an important error of fact when it found that the Claimant believed that she was in a referred and approved training course?
- d) If so, how should the error be fixed?

## Analysis

[14] I can intervene in this case only if the General Division made a relevant error. So, I have to consider whether the General Division:<sup>1</sup>

- failed to provide a fair process;
- failed to decide an issue that it should have decided, or decided an issue that it should not have decided;
- misinterpreted or misapplied the law; or
- based its decision on an important mistake about the facts of the case.

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<sup>1</sup> The relevant errors, formally known as "grounds of appeal," are listed under section 58(1) of the *Department of Employment and Social Development Act* (DESD Act).

## **The General Division made errors of law and an important mistake about the facts**

### **– The General Division decision**

[15] In its decision, the General Division set out the legal principles that apply to an assessment of a claimant's availability while enrolled in a course of full-time study.<sup>2</sup> It set out factors to consider that may be relevant to this determination.<sup>3</sup>

[16] The General Division noted that there is a presumption that a person enrolled in a course of full-time study is not available for work.<sup>4</sup> This presumption can be rebutted. The General Division stated that the Claimant must demonstrate that her main intention is to accept suitable employment, evidenced by job search efforts. The General Division stated that the Claimant must show that the course of study is of secondary importance and is not an obstacle to seeking and accepting suitable employment.<sup>5</sup>

[17] The General Division did not apply these factors and consider whether the Claimant had rebutted the presumption of non-availability. It found that the Claimant was not approved by a designated authority to attend her program of studies.<sup>6</sup> However, it found that she had tacit approval from the Commission because her application for benefits was accepted and she received benefits.<sup>7</sup>

[18] Because the Claimant believed she had the approval of the Commission to attend her program, she did not conduct a comprehensive job search. The General Division found that this was a reasonable assumption.<sup>8</sup>

[19] The General Division found that the Claimant believed the Commission approved her program and therefore she did not need to show a sincere desire to return to the labour market.<sup>9</sup> The General Division did not consider the other factors for determining

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<sup>2</sup> General Division decision at paras 5 to 9.

<sup>3</sup> General Division decision at para 8.

<sup>4</sup> General Division decision at para 5.

<sup>5</sup> General Division decision at para 6.

<sup>6</sup> General Division decision at para 11.

<sup>7</sup> General Division decision at para 12.

<sup>8</sup> General Division decision at para 14.

<sup>9</sup> General Division decision at para 14.

availability: whether the Claimant was making reasonable and customary efforts to find work and if she set personal conditions that might unduly limit her chances of returning to the labour market. The General Division identified these factors as issues in its decision but simply stated under each issue “moot given the above.”<sup>10</sup>

[20] The General Division then concluded that it supports the Claimant’s effort to complete her education and find suitable employment. On this basis it found that she presented evidence of “exceptional circumstances” that would rebut the presumption of non-availability while attending a full-time course.<sup>11</sup> The General Division did not explain what these exceptional circumstances are.

– **The Commission’s appeal**

[21] The Commission argues that the General Division’s acceptance of the Claimant’s belief was contrary to the record and this was an error of fact. It argues that the General Division erred in law by failing to refer to or apply section 153.161 of the Employment Insurance Act. In doing so, the Commission says that the General Division ignored that the Claimant is required to show her availability, and that her availability could be verified at any time after benefits were paid.

[22] The Commission also argues that the General Division’s reasons are not functionally adequate. It says that the reasons do not provide a coherent chain of analysis, justifying its findings, as required by jurisprudence.

[23] The Claimant argues that the General Division did not err. Her representative says that she operated under the knowledge that she was being funded to attend university and she believed she was obliged to stay in school rather than look for work.

[24] The Claimant’s representative also argues that her classes from January to May 2022 were offered online and she would have been available and ready for work during this time.

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<sup>10</sup> General Division decision at paras 16 and 17.

<sup>11</sup> General Division decision at para 18.

[25] I find that the General Division based its decision on an important error of fact when it determined that the Claimant believed that her program of study was approved by the Commission. The General Division did not refer to the evidence in the file that the Claimant was aware that she was not approved for the course and had decided on her own to take it.<sup>12</sup> The General Division does not have to refer to all evidence but it must address evidence that contradicts its findings.

[26] I also find that the General Division erred in law by failing to apply the test for availability. It was an error of law to assume that all of the elements of the test are moot based on the Claimant's belief that her training was approved. The General Division found that the Claimant rebutted the presumption of non-availability but failed to provide reasons for this determination. It did not consider and apply the factors that ordinarily apply to a consideration of whether the presumption has been rebutted.

[27] Having found that the General Division erred, I do not need to consider the other arguments raised by the Commission.

### **Fixing the error**

[28] To fix the General Division's error, I can give the decision that the General Division should have given or I can refer this matter back to the General Division for reconsideration.<sup>13</sup> The Commission argues that the matter should go back to the General Division for a new hearing because the General Division did not assess the Claimant's availability.

[29] I agree. I find that the record is not complete because the General Division did not conduct an analysis of the Claimant's availability while attending full-time training. There is evidence in the file that the Claimant's course was available online, and that she had told the Commission she would leave her studies if she found a full-time job. The Claimant also referred to job search activity that was not considered or discussed by the General Division.

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<sup>12</sup> See GD3-9 and GD 3-24.

<sup>13</sup> Section 59(1) of the DESD Act explains the remedies available to the Appeal Division.

[30] I have listened to the hearing before the General Division. The Claimant was asked very few questions relating to whether she could rebut the presumption of non-availability. She also gave very little evidence concerning her efforts to find suitable employment or whether she set personal conditions that unduly limited her chances of returning to the labour market.

[31] The General Division erred in law by failing to assess the Claimant's availability and based its decision on an important error of fact. The record is not complete. The matter is returned to the General Division for a new hearing to determine the Claimant's availability while attending a full-time course of instruction for the period starting January 6, 2022.

## **Conclusion**

[32] The appeal is allowed in part. The matter returns to the General Division for a new hearing to determine the Claimant's availability while attending a full-time course of instruction for the period starting January 6, 2022.

Melanie Petrunia  
Member, Appeal Division