Citation: *JL v Canada Employment Insurance Commission*, 2023 SST 318

# Social Security Tribunal of Canada
## Appeal Division

# Decision

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| **Appellant:** | J. L. |
| **Respondent:** | Canada Employment Insurance Commission |
| **Representative:** | Rachel Paquette |
| **Added Party:** | |

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| **Decision under appeal:** | General Division decision dated September 27, 2022 (GE-22-1673) |

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| **Tribunal member:** | Janet Lew |
| **Type of hearing:** | Videoconference |
| **Hearing date:** | March 9, 2023 |
| **Hearing participants:** | Appellant<br>Respondent's representative |
| **Decision date:** | March 21, 2023 |
| **File number:** | AD-22-727 |

## Decision

[1] The appeal is allowed. The matter will go back to a different member of the General Division for redetermination.

## Overview

[2] The Appellant, J. L. (Claimant), is appealing the General Division decision. The General Division agreed with the Added Party, X (the Employer), that the Claimant quit his job and that he did not have just cause for having left his job when he did. The General Division determined that the Claimant had reasonable alternatives to leaving his employment. The Claimant was disqualified from receiving Employment Insurance benefits.

[3] The Claimant argues that the General Division made an important factual error. He denies that he quit his employment. He maintains that his Employer laid him off.

[4] The Respondent, the Canada Employment Insurance Commission (Commission), initially argued that the General Division did not make any errors and that there are no grounds of appeal.

[5] During the course of the hearing at the Appeal Division, the Commission acknowledged that the General Division based its decision on incomplete information. The Commission does not oppose returning the matter to the General Division for a redetermination. The Claimant is willing to accept having the matter returned. The Commission also states that the evidence that the General Division had was equally balanced and that the benefit of the doubt should have been given to the Claimant.

[6] The Employer did not provide any written submissions or attend the Appeal Division hearing.

## Preliminary matters

[7] The Commission does not oppose sending the matter to the General Division for a redetermination, on the ground that the General Division made its decision without

complete information. However, the General Division did not create this vacuum of information.

[8] The fact that there was incomplete information alone does not merit returning the matter to the General Division for a redetermination when the parties were responsible for the limited information. The General Division was in no way responsible for the limited information. The General Division did not deprive the parties of the chance to present their case.

[9] It should not lie at the feet of the General Division that the parties get a second chance to make their case, when the parties had notice and every opportunity to present their case at the General Division and they simply chose not to attend the hearing.

[10] The General Division was entitled to make a decision in the absence of the parties, even with the limited evidence it had before it. But, having determined that it would proceed in the absence of the parties, it needed to subject the parties' evidence and arguments to greater scrutiny, and it needed to ensure that it accurately interpreted that evidence. It is from this perspective that I will examine whether the General Division made any errors. If so, then intervention by the Appeal Division is warranted.

## Issues

[11] The issues in this appeal are:

a) Did the General Division make a mistake about any of the evidence?

b) Did the General Division fail to consider whether the Claimant had just cause under subsection 29(c)(ix) of the *Employment Insurance Act*?

c) If the answer is "yes" to either a) or b) above, how should the error be fixed?

# Analysis

[12] The Appeal Division may intervene in General Division decisions if there are jurisdictional, procedural, legal, or certain types of factual errors.[1]

[13] For factual errors, the General Division had to have based its decision on an erroneous finding of the fact that it made in a perverse or capricious manner or without regard for the material before it.

## Did the General Division make a mistake about any of the evidence?

[14] The General Division made a mistake about some of the evidence about the circumstances surrounding his departure from his employment.

### – The Claimant's text message

[15] The General Division wrote the following:

> The Employer says that the Claimant suddenly quit via text message after only three days of working there. It says the Commission made a mistake in deciding the Claimant had just cause.[2]

[16] The only reference in the hearing file to any text message from the Claimant is in the Employer's Notice of Appeal to the General Division. The Employer filed the Notice of Appeal in May 2022, about 14 months after the Claimant's employment ended. The Notice of Appeal reads:

> [The Claimant] worked for [the Employer] from MARCH 8, 2022 to MARCH 11, 2021.
>
> [The Claimant] worked a total of 30.5 hours while at [the Employer].
>
> **[The Claimant] sent communication to [the Employer] via text message with regards to no longer working […].**

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[1] See section 58(1) of the *Department of Employment and Social Development Act*.
[2] See General Division decision, at para 28. The General Division cited the Notice of Appeal, filed on May 6, 2022, at GD 2-5.

> The letter received states that there was a request for reconsideration against an employment insurance decision dated MARCH 11, 2022. We believe that there was mis-information given and/or the letter and dispute ARE NOT VALID.
>
> We have attached a copy of our accounting system paystub and a copy of the original record of employment from 2021.
>
> (My emphasis)

[17] The General Division misapprehended the evidence. Contrary to the General Division's findings, the Employer did not actually say that the "Claimant suddenly quit via text message after only three days of working there." At most, the Employer wrote that the Claimant sent a text message "with regards to no longer working."

[18] As the General Division noted, the Employer did not produce a copy of the text message to verify whether the Claimant quit.

[19] The fact that the Claimant might have sent a text message to his Employer "with regards to no longer working" does not necessarily show that he quit his employment. Indeed, the Claimant could have given other reasons to explain why he was no longer working. Or the Claimant may not have cited any reason at all for his departure.

[20] If the General Division was going to base its decision, in part, on the Employer's reference to the Claimant's text message, it had to ensure that its analysis accurately reflected what that evidence said.

[21] The General Division made a mistake about this evidence. And, misapprehending this piece of evidence about what the Claimant's text message said could have coloured the General Division's understanding and interpretation of the rest of the evidence.

## Did the General Division fail to consider whether the Claimant had just cause under subsection 29(c)(ix) of the *Employment Insurance Act*?

[22] If I were to examine whether the General Division failed to consider whether the Claimant had just cause for leaving, that would effectively be saying that the Claimant

voluntarily left his employment. But, given the nature of the error that I identified above, whether the Claimant left or was laid off from his employment still remains in dispute. So, it would be appropriate to firstly decide whether it can be determined that the Claimant quit or whether his Employer laid him off from his job.

## Remedy

[23] Under section 59(1) of the *Department of Employment and Social Development Act,* the Appeal Division can give the decision that the General Division should have given, or it can send the matter back to the Employment Insurance Section for reconsideration.

[24] If all the evidence is present for me to make my own decision, and there were no issues about procedural fairness at the General Division, then generally I should not return the matter.

[25] But, as the Commission notes, there are gaps in the evidence. I can now consider this fact when considering the appropriate remedy, as it is a different matter from whether the General Division made a mistake.

[26] I will review the evidence to see if it is sufficient to let me decide whether the Claimant quit or was laid off.

### – The Claimant says he was laid off from his job

[27] The Claimant explained that, because he did not have the correct training or skill set, his Employer laid him off. The notes of the conversation between the Commission and the Claimant reads as follows:

> [Claimant] stated that they originally took the job because they are training to become a welder and wanted to get more hours under their belt.
>
> [Claimant] stated that there was a miscommunication and that their boss was actually looking for fabricators, not welders.
>
> Because the [Claimant] not have the correct training to work as a fabricator, the [Claimant's] boss called them into the office after three days and laid them off because they didn't have the correct training.

> [Claimant] maintains that they were laid off because they did not have the correct skill set. They did not quit.[3]

[28] Notes of another conversation between the Commission and the Claimant reads as follows:

> Claimant states that the company would not sign his apprenticeship hours welding. Claimant states that he did not quit the employment and was let go after 3 days.[4]

[29] The Claimant has been consistent throughout that his Employer released him from his employment by structuring it as a layoff, as the Claimant did not offer the right skill set for his Employer.

– **The Claimant also states that his Employer "offered him an out" and that he took it**

[30] The Claimant wrote that his Employer "offered [him] an out and [he] took it."[5] Otherwise, staying would have jeopardized his two years of welding school.

[31] The Claimant's statement suggests that he had an option to stay and that he could continue to work for the Employer.[6] Staying would impact his apprenticeship because he would not get signed papers. The potential loss of his apprenticeship if he stayed suggests that the Claimant willingly left or quit his employment.

[32] The Claimant asserted at the Appeal Division that he understood being "offered an out" meant that, as he did not have the right skills for the position, his Employer would dismiss him if he chose to stay.[7] The General Division did not have this evidence from the Claimant. The Appeal Division generally does not accept new evidence. So, I

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[3] See Supplementary Record of Claim dated August 30, 2021, at GD 3-23.
[4] See Supplementary Record of claim dated November 16, 2021, at GD 3-42.
[5] See Claimant's email dated May 26, 2022, at GD 6-1.
[6] See General Division decision, at paras 18 to 20, citing the Claimant's email dated May 26, 2022, at GD 6-1.
[7] See Application to the Appeal Division, filed October 5, 2022, at AD 1-5, and Claimant's email of January 11, 2023, at AD 2-1.

cannot consider the Claimant's assertions that he understood his employer would eventually dismiss him if he stayed.

### – The Employer says the Claimant quit

[33] The Employer says the Claimant quit. The Employer noted this on the Record of Employment which it prepared shortly after the Claimant's departure.[8] The Employer also spoke with the Commission in March 2022. The Employer stated that the Claimant did not give any reason for leaving.[9]

[34] The Employer filed a Notice of Appeal at the General Division.[10] The Employer disputed whatever the Claimant might have said.

### – There are gaps in the evidence

[35] There are critical gaps in the evidence. For instance, there are questions about what being "offered an out and taking it" means.

[36] Also, there are questions about what role, if any, the Claimant's concerns about losing his apprenticeship played. If, as the Claimant says, his Employer told him it would not sign his apprenticeship forms, this does tend to suggest that it prompted the Claimant to leave his employment. So, the Claimant should be given the chance to explain this.

[37] The Claimant says that he can produce witnesses. He expects them to say that the Employer signed their welding apprenticeship forms, even if they worked as fabricators. So, he expected the same treatment. This does not seem particularly relevant to the Claimant's assertions that he was laid off. (If anything, it could even show that the Claimant had every motivation to want to leave his employment.)

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[8] See Record of Employment, dated March 31, 2021, at GD 3-21.
[9] See Supplementary Record of Claim, dated March 10, 2022, at GD 3-19.
[10] See Notice of Appeal filed May 6, 2022, at GD 2-5.

[38] The Claimant's evidence could be bolstered. He can explain why he thought his employer laid him off. This would involve giving more details about what he and the employer discussed during their meeting.

[39] The Claimant says that he can produce witnesses, or at the very least, produce witness statements, to verify that he had told these witnesses that he had been laid off. (This would not prove that he had in fact been laid off, but it could have established that he had told others what had happened.)

[40] Similarly, the Employer's evidence could be bolstered if it produces a copy of the Claimant's text message that purportedly says he quit. The Employer could also respond to the Claimant's allegations. The Claimant said that his Employer called for a meeting and that they discussed his suitability for the position. They reportedly also discussed the Claimant's desire that the Employer would sign his apprenticeship forms. The Employer never responded to these claims.

[41] Given the gaps in the evidence, it is appropriate to return the matter to a different member of the General Division. The Claimant indicates that he will attend any hearing that the Social Security Tribunal might schedule. If the parties fail to attend any new hearing at the General Division, the member could draw an adverse inference against that party(ies).

[42] I am mindful of the passage of time. Two years has now passed since the Claimant left this employment. Witnesses' memories will have dimmed. Those may be factors for the General Division to consider when assessing and weighing any new evidence that might arise.

[43] Finally, the Employer filed the initial appeal at the General Division. The burden remains on the Commission and Employer to prove that the Claimant voluntarily left his job. If this is established, then the burden of proof shifts to the Claimant to prove that he had just cause for leaving. This would involve showing that he did not have any reasonable alternatives to leaving.

## Conclusion

[44] The appeal is allowed. The General Division misapprehended the evidence about the circumstances leading to the Claimant's departure from his employment. This matter will go back to a different member of the General Division for a redetermination.

Janet Lew
Member, Appeal Division