Citation: *AP v Canada Employment Insurance Commission*, 2023 SST 309

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	A. P.
Respondent:	Canada Employment Insurance Commission
Representative:	Gilles-Luc Bélanger

Decision under appeal:	General Division decision dated June 15, 2022 (GE-22-751)

Tribunal member:	Janet Lew
Type of hearing:	Videoconference
Hearing date:	March 6, 2023
Hearing participants:	Appellant Respondent's representative
Decision date:	March 17, 2023
File number:	AD-22-411

Decision

[1] The appeal is dismissed. The Claimant is disentitled from receiving Employment Insurance benefits from October 5, 2020 to January 10, 2021 and from August 15, 2021 to September 11, 2021. However, he may have options regarding write-off of the overpayment, or for arranging a repayment schedule.

Overview

[2] The Appellant, A. P. (Claimant), is appealing the General Division decision. The General Division found that the Claimant did not prove that he was available for work while he was in school. The General Division concluded that he was therefore disentitled from receiving the Employment Insurance benefits that he had already received. This created an overpayment of benefits.

[3] The Claimant argues that the General Division made factual errors about whether he was available for work. The Claimant says that he was available for work. He says that he had an extensive search for suitable work, and did not limit his job search in any way.

[4] The Respondent, the Canada Employment Insurance Commission (Commission), argues that the General Division did not make any reviewable errors. The Commission asks the Appeal Division to dismiss the appeal.

Preliminary matters

[5] The Claimant brought a witness (S. A.) with him to the hearing. The Claimant also filed additional information that the General Division did not have. He intended to elicit evidence to show that his job search efforts were much broader than the evidence at the General Division indicated.

[6] The Commission objected to the admissibility of any evidence from the witness.

[7] The Appeal Division (Employment Insurance section) generally does not receive new evidence or hear from witnesses. The Appeal Division may accept new evidence if

that evidence provides general background information or if it brings procedural defects to light.[1] That is not the case here.

[8] As the Federal Court has held, "hearings before the Appeal Division are not redos based on updated evidence of the hearings before the General Division. They are instead reviews of General Division decisions based on the same evidence".[2]

[9] I am not admitting this new evidence. It does not fall within the exception to the general rule against admitting new documents at the Appeal Division.

Issue

[10] The issue in this appeal is:

a) Did the General Division make any factual errors about the Claimant's availability?

Analysis

[11] The Appeal Division may intervene in General Division decisions if there are jurisdictional, procedural, legal, or certain types of factual errors.[3]

[12] 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.

Background facts

[13] The Claimant attended university. He applied for Employment Insurance benefits in April 2020, after his part-time job at a restaurant ended because of the pandemic. He received the Canada Emergency Response benefit. When that benefit came to an end on October 4, 2020, the Commission began paying him Employment Insurance benefits.

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[1] See *Sibbald v Canada (Attorney General)*, 2022 FCA 157.
[2] See *Gittens v Canada (Attorney General)*, 2019 FCA 256.
[3] See section 58(1) of the *Department of Employment and Social Development Act*.

[14] About a year later, the Commission asked the Claimant about his schooling. Based on the information that he gave, the Commission determined that the Claimant was not entitled to receive Employment Insurance benefits.

[15] The Commission found that the Claimant had not proven that he was available for work after October 5, 2020. The Commission determined that the Claimant was a full-time student and that he had limited himself to part-time work from October 5, 2020 to early January 2021 and from August 2021 to about mid-September 2021.[4] This resulted in an overpayment of benefits for these timeframes. The Commission issued a Notice of Debt to the Claimant.

– **The General Division's findings about the Claimant's availability**

[16] The Claimant appealed the Commission's decision to the General Division. The General Division examined whether the Claimant showed that:

a) He wanted to return to work as soon as a suitable job was available

b) He made enough efforts to find a suitable job and

c) He did not set personal conditions that might have unduly or overly limited his chances of returning to work.

[17] The General Division accepted that the Claimant wanted to go back to school as soon as a suitable job became available. However, it found that the Claimant had not made enough efforts to find a suitable job and that he had set personal conditions that limited his chances of going back to work. This meant that the Claimant was disentitled from receiving benefits for the two timeframes described above.[5]

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[4] Between January 2021 and August 2021, the Claimant was doing two internships. The Commission did not and does not require the Claimant to have been available for work when he did his internships. The Claimant did not receive any benefits while he did his internships. See also Overpayment Breakdown, as it shows the weeks when the Commission paid the Claimant any benefits.
[5] The General Division did not break down the periods of disentitlement, but the periods in question are from October 5, 2020 to January 10, 2021, and from August 15, 2021 to September 11, 2021.

– The Claimant's arguments against the General Division decision

[18] The Claimant is appealing the General Division decision. He maintains that he conducted an extensive job search, outside internships or the restaurant sector. He also denies that he set any personal conditions that limited his chances of returning to the workforce.

[19] In his Application to the Appeal Division, the Claimant also argued that the General Division was wrong to assume that looking for work in the restaurant sector necessarily limited his chances of finding work.[6]

[20] But, in the hearing at the Appeal Division, the Claimant conceded that the pandemic limited opportunities in the restaurant sector. He noted that restaurants shut down or laid staff off because business had slowed. He applied for work in other sectors he says, because they were less impacted than the restaurant sector.

[21] I granted leave to appeal (permission for the Claimant to move to the hearing of the appeal) on this point. But, given the Claimant's acknowledgment that the pandemic limited opportunities in the restaurant sector, I no longer need to consider this issue. Instead, I will focus on the Claimant's two other points.

Did the General Division make factual errors about the Claimant's availability?

[22] The Claimant says the General Division made two factual errors: (1) that his efforts to find a suitable job were inadequate and (2) that he set personal conditions that limited his chances of finding work.

– The Claimant's efforts to find a suitable job were inadequate based on the evidence at the General Division

[23] The Claimant says that he did not limit his job search to internships or the restaurant sector. He says that he also looked for work in other sectors, including in

[6] At paragraph 41, the General Division found, "… with pandemic restrictions in place during that time, the Claimant looking to work in those areas did limit his chances of finding a job with enough hours."

retail and in the fast-food industry. He says, for instance, that he applied for work at Costco, Home Depot, and Canadian Tire, as well as at various fast-food chains.[7]

[24] The Claimant explains that he did not know that he should have presented all of this evidence at the General Division hearing. He says he thought he had already shown that his job search was extensive. So, he thought that was enough.

[25] In his Notice of Appeal, he said that he applied for 113 positions through the university portal.[8] He did not say then what types of jobs these were. He also stated that when he learned that the restaurant where he worked part-time was about to shut down, he "conducted numerous job searches on a routine and daily basis."[9] These included applying for work at several restaurants.

[26] Following the General Division hearing, the Claimant filed what he described as his "complete job search list from May 2019 through April 2021."[10] The list shows that the Claimant submitted applications from May 12, 2019 to April 19, 2021, many of them from October 18, 2020 to January 18, 2021.

[27] The Commission says that the Claimant had the chance to submit evidence about his job search efforts after the General Division hearing. So, it says that he could have included any job searches he made in the retail or fast-food sectors.

[28] None of the evidence at the General Division showed that the Claimant extended his job search beyond internships or the restaurant sector. So, the General Division did not make a factual mistake when it found that the Claimant limited his job search to internships or to the restaurant sector. The General Division had to make findings based on the evidence before it. And, based on the evidence before it, it could only conclude

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[7] See Claimant's arguments filed on January 9, 2023, at AD 3-2.
[8] See Claimant's Notice of Appeal to the General Division, at GD 2-6. At approx. 49:50 of the audio of the General Division hearing, the Claimant's witness testified that he applied to 115 positions.
[9] See Claimant's Notice of Appeal to the General Division, at GD 2-6.
[10] See Claimant's job search list, at GD 6-2 to GD 6-37. During the General Division hearing, the member noted that the job search list was missing from the file materials. The member asked the Claimant to send the spreadsheet. From approx..49:50 to 1:04:20 of the audio recording of the General Division hearing, esp. at 1:02:20.

that the Claimant's search was for internships or for work in the restaurant sector. From this, the General Division found that the Claimant should have expanded his job search.

[29] As I indicated previously, I cannot consider the Claimant's new information and come to my own assessment as to whether the Claimant's efforts to find a suitable job were adequate. The Appeal Division does not accept new evidence of this nature.

[30] The Claimant's list also does not seem to cover his job search from August 2021 to about mid-September 2021. So, the job search list does not help him establish that his job search efforts in August and September 2021 were adequate.

– **The Claimant set personal conditions that limited his chances of finding work**

[31] The Claimant denies that he set any personal conditions that limited his chances of finding work. When his internships ended in August 2021, he initially looked for work around his school schedule. But he says that he was always prepared to reschedule his classes for work.

[32] At the beginning of the school semester, he could reschedule his classes around his work. If he rescheduled his classes well into the school semester, this would have meant prolonging his schooling. He would have had to take an extra school semester to finish. But he says he was still prepared to do this if it meant getting work.[11]

[33] The General Division acknowledged the Claimant's assertions that he would move his course schedule, if possible, so that he would become available for work. But the General Division also found that the Claimant prioritized his schooling. The evidence supported such a finding.

[34] At the General Division hearing, the Claimant stated that he would have accepted full-time work if it did not conflict with his studies. He also indicated that attending university was his priority. He would not abandon his schooling for a full-time job. He testified, "it was not about leaving school."[12] He agreed with the General

[11] Oral submissions at the Appeal Division.
[12] At approximately 30:47 to 31:10 of the audio recording of the General Division hearing.

Division member that he was looking for work evenings and weekends. He expected to be able to find 35 to 40 hours of work evenings and weekends.

[35] When he spoke with the Commission in October 2021, he reportedly said that, if he found full-time work but it conflicted with his course or program, he would finish the course.[13] And in December 2021, he reportedly said that he would not abandon his school to accept a full-time job.[14] In January 2022, when reviewing his fall 2020 school schedule, the Claimant reportedly confirmed that he would not drop any courses for full-time work.[15]

[36] On top of that, the Claimant confirmed in his submissions to the Appeal Division that attending university has always been his priority.[16]

[37] There was no indication in any of this evidence that he would in fact have rescheduled his courses.

[38] This situation was similar to the one in a case called *Canada (Attorney General) v Primard*.[17] There, the respondent Ms. Primard told the Board of Referees (the predecessor to the General Division) that she could take her courses part-time in the evenings.

[39] The Federal Court of Appeal found that this was, in fact, an admission from the respondent that she was not available for work, but that she could become available if she found employment. The Court of Appeal found that this in fact showed an absence of availability and, at best, a possible availability, which was also conditional.

[40] In a case called *Canada (Attorney General) v Bertrand,* the claimant Ms. Bertrand was available to work 30 to 40 hours per week during evenings. She could not work during the day because she could not find a reliable babysitter. Although she was available to work upwards of 40 hours a week, the Court of Appeal found that she

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[13] See Supplementary Record of Claim dated October 18, 2021, at GD 3-12.
[14] See Supplementary Record of Claim dated December 13, 2021, at GD 3-17.
[15] See Supplementary Record of Claim dated January 27, 2022, at GD 3-34.
[16] See Claimant's Application to the Appeal Division, at AD 1-2.
[17] See *Canada (Attorney General) v Primard*, 2003 FCA 349.

was not available for work for the purposes of the *Employment Insurance Act*. It is clear form this case that claimants must be available during regular hours for every working day, [18] otherwise they will be seen as setting personal conditions that limit their chances of finding work.

[41] The evidence supported the General Division's findings regarding the Claimant's availability. The fact that the Claimant was only available evenings and weekends meant that he set personal conditions that limited his chances. As the Court of Appeal stated, the fact that the Claimant suggested that he could reschedule his classes only confirmed that he was unavailable at the time.[19]

The Claimant's options regarding the overpayment

[42] The Claimant believed that he was legitimately entitled to receive benefits because he was, in his eyes, available for full-time work. He did not appreciate that being available upwards of 40 hours evenings and weekends did not meet the availability requirements under the *Employment Insurance Act*.

[43] On top of that, he had contacted Service Canada. An agent encouraged him to apply for benefits. He applied for and received benefits. It was only about a year later that the Commission assessed his application and determined that he was not entitled to those benefits, resulting in an overpayment.

[44] The Claimant says the Commission should have assessed his application before paying him any benefits. He says that he is unable to repay the benefits and that it will cause hardship.

[45] As the Commission notes, if the Claimant has trouble repaying the overpayment, he should contact Canada Revenue Agency (CRA). CRA would then assess his

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[18] Under section 32 of the *Employment Insurance Regulations*, a working day is defined as any day of the week except Saturday and Sunday. See also *Canada (Attorney General) v Bertrand*, 1982 CanLII 3003 (FCA). The case does not involve a student. Ms. Bertrand was available to work 30 to 40 hours per week during evenings, but she could not work during the day because she could not find a reliable babysitter. The Court of Appeal found that she was not available for work for the purposes of the *Employment Insurance Act*.
[19] See *Primard*.

financial situation. Following that, it would make recommendations to the Commission. The Commission would then decide whether to write off the overpayment, or any portion of it. The Claimant could also contact CRA about making a repayment arrangement. The contact information is located on the Notice of Debt.[20]

Conclusion

[46] The appeal is dismissed. The Claimant is disentitled from receiving Employment Insurance benefits from October 5, 2020 to January 10, 2021 and from August 15, 2021 to September 11, 2021.

Janet Lew
Member, Appeal Division

[20] See Notice of Debt at GD 3-20.