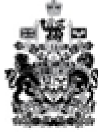

Citation: *AD v Canada Employment Insurance Commission*, 2023 SST 267

Social Security Tribunal of Canada
Appeal Division

Decision

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

Decision under appeal:	General Division decision dated October 12, 2022 (GE-22-1975)

Tribunal member:	Neil Nawaz
Type of hearing:	Teleconference
Hearing date:	February 9, 2023
Hearing participants:	Appellant's representative Respondent
Decision date:	March 10, 2023
File number:	AD-22-802

Decision

[1] I am allowing this appeal. The General Division made an error of law when it decided that the Respondent was entitled to Employment Insurance (EI) benefits. To fix that error, I am giving the decision that the General Division should have given. I find that the Respondent disqualified himself from receiving benefits because he refused an offer to resume his employment.

Overview

[2] The Respondent is a school bus driver. In September 2021, he went to a meeting organized by X, the company for which he had worked in previous school years. The company offered him a route for the coming term, but he refused it because it didn't give him enough hours.

[3] At the time, the Respondent was receiving Employment Insurance (EI) regular benefits. Two months later, the Canada Employment Insurance Commission (Commission) found out about the offer and decided that the Respondent had voluntarily left his job without just cause. The Commission disqualified him and asked him to pay back some of the benefits that he had received.

[4] The Respondent appealed the Commission's decision to the Social Security Tribunal's General Division. He said that he never voluntarily left the job because he never accepted the job in the first place.

[5] The General Division held a hearing by teleconference and agreed with the Respondent. It accepted the Respondent's testimony that he couldn't have quit his job because there was no job to quit. It also noted that the Respondent never actually drove the route.

[6] The Commission sought permission to appeal the General Division's decision. It alleged that General Division made the following errors:

- It based its decision on an erroneous finding that the Respondent did not voluntarily leave his employment; and
- It erred in law by misapplying section 29(b.1) of the *Employment Insurance Act* (EIA), which says that voluntarily leaving employment includes a refusing an employment offer.

[7] In November, I gave the Commission permission to appeal because I thought it had raised an arguable case. Last month, I held a hearing by teleconference to discuss its allegations in full.

[8] Now that I have heard submissions from both parties, I have concluded that the General Division's decision cannot stand.

Issue

[9] There are four grounds of appeal to the Appeal Division. An appellant must show that the General Division

- proceeded in a way that was unfair;
- acted beyond its powers or refused to use them;
- interpreted the law incorrectly; or
- based its decision on an important error of fact.[1]

[10] In this appeal, I had to decide whether either of the Commission's allegations fell under one or more of the above grounds of appeal and, if so, whether they had merit.

Analysis

[11] I have reviewed the General Division's decision, as well as the law and the evidence it used to reach that decision. I agree with the Commission that the General Division made both factual and legal errors.

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[1] See *Department of Employment and Social Development Act* (DESDA), section 58(1).

The General Division made a factual error by finding that the Respondent didn’t voluntarily leave his job

[12] The available evidence established the following facts:

- The Respondent was employed by X from September 4 until December 18, 2020, when he was laid off because of a shortage of work;
- In January 2021, he went back to his job and continued to work until June 2021, when the school year ended;
- In September 2021, at the beginning of the school year, the Respondent attended a so-called “start-up” meeting, where he was offered a route;
- However, he turned the route down because it didn’t have enough hours and he couldn’t make enough money to live on;
- There was another, longer, route available, but he didn’t feel comfortable taking it because it had more stops, and his English wasn’t up to it;[2]
- Although he was paid for the four hours in which he attended the start-up meeting, he never drove a route for X during that term.

[13] Based on this evidence, the General Division found that the Respondent didn’t voluntarily leave his job. Indeed, the General Division found that the Respondent could not have quit his job because he never accepted it in the first place.[3]

[14] However, the General Division never contemplated the possibility that the Respondent continued to be X’s seasonal employee until the moment he refused his employer’s offer in September 2021. At that point, the Respondent had a choice to stay or to leave. He decided to leave, as indicated by a record of employment that X issued indicating he had “quit.”[4]

[2] Refer to recording of General Division hearing, 1:10 to 1:20.
[3] See General Division decision, paragraph 24.
[4] See record of employment dated November 3, 2021, GD3-18.

[15] In my view, the General Division mischaracterized the circumstances under which the Respondent left his job. That was an erroneous finding of fact, one made without regard for the material before it.

The General Division erred in law by disregarding the legal definition of voluntary leaving

– **Voluntarily leaving includes refusing an offer to resume employment**

[16] The Commission submits that the General Division ignored a provision of the *Employment Insurance Act* (EIA) that defines what it means to voluntarily leave your job. It points to section 29(b.1), which says that voluntarily leaving an employment includes:

> (i) the refusal of employment offered as an alternative to an anticipated loss of employment, in which case the voluntary leaving occurs when the loss of employment occurs;
>
> (ii) the refusal to resume an employment, in which case the voluntary leaving occurs when the employment is supposed to be resumed; and
>
> (iii) the refusal to continue in an employment after the work, undertaking or business of the employer is transferred to another employer, in which case the voluntary leaving occurs when the work, undertaking or business is transferred…

– **The General Division's decision did not address the definition for voluntary leaving**

[17] In its decision, the General Division set out its understanding of the law as follows: "The legal test to determine voluntary leaving is whether he [the Respondent] had a choice to stay or leave his job."[5]

[18] However, the General Division did not mention section 29(b.1) of the EIA which, as seen above, refines and expands the meaning of voluntary leaving. The General Division went on to assume that the Respondent was no longer employed by X when he

[5] See General Division decision, paragraph 10, citing *Canada (Attorney General) v Peace*, 2004 FCA 56.

attended the September 2021 start-up meeting. It also found that, since he never accepted X’s reduced hours, there was “no job for him to voluntarily leave.”[6]

[19] The General Division failed to consider the whether the Respondent fit into either of the circumstances described under sections 29(b.1)(i) or (ii) of the EIA. In failing to do so, the General Division made an error of law.

The General Division failed to consider whether the Respondent had just cause to leave his job

[20] As we have seen, the General Division erroneously found that the Respondent did not leave his job. That led it to conclude—again in error—that there was no need to consider whether the Respondent left his job voluntarily.

[21] Those errors led to a potential third error. Once it is established that a claimant left their job voluntarily, the question then becomes whether they had just cause to leave that job accordance with s. 29(c) of the EIA. The General Division saw no need to ask that question. That was an error.

[22] I am not going to decide whether the Respondent had just cause to voluntarily leave his job. I will leave that question to the General Division in a future hearing. For now, though, it does appear that the Respondent had reasonable alternatives to leaving his employment when he did. He could have requested a longer route. He could have taken the route that was offered and driven it until he found another, higher paying, job. The Federal Court of Appeal has said that leaving your job to seek a better job at higher pay does not amount to just cause.[7]

Remedy

[23] When the General Division makes an error, the Appeal Division can fix it by one of two ways: (i) it can send the matter back to the General Division for a new hearing or (ii) it can give the decision that the General Division should have given.[8]

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[6] See General Division decision, paragraph 17.
[7] See *Canada (Attorney General) v Campeau*, 2006 FCA 376.
[8] See DESDA, section 59(1).

[24] The Tribunal is required to proceed as quickly as fairness permits. I would ordinarily be inclined to give the decision that the General Division should have given and decide this matter on its merits, but I do not think that the record is complete enough to allow me to do so.

[25] I have listened to the entire recording of the General Division hearing. I heard the Respondent testify about many relevant topics, including the nature of his job as a bus driver and the reasons he refused the routes X offered him in September 2021. However, I did not hear the presiding General Division member ask the Respondent whether he had considered alternatives to refusing the routes. This is an important topic in any EI disqualification case, and this gap in the record makes me wary about deciding the merits of this matter myself.

[26] Unlike the Appeal Division, the General Division's primary mandate is to weigh evidence and make findings of fact. As such, it is better positioned than I am to hear the Respondent's testimony on this important topic and to explore whatever avenues of inquiry that may arise from it. In this particular instance, I feel the best option is to refer this matter back to the General Division for rehearing.

Conclusion

[27] For the above reasons, I find that the General Division made factual and legal errors in deciding that the Respondent was entitled to EI benefits. Because the record is not sufficiently complete to allow me to decide this matter on its merits, I am referring it back to the General Division for a fresh hearing.

Neil Nawaz
Member, Appeal Division