



Citation: *CL v Canada Employment Insurance Commission*, 2023 SST 922

Social Security Tribunal of Canada Appeal Division

Decision

Appellant:	C. L.
Respondent:	Canada Employment Insurance Commission
Representative:	Christine Chabot
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Decision under appeal:	General Division decision dated November 14, 2022 (GE-22-1941)
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Tribunal member:	Melanie Petrunia
Type of hearing:	In person
Hearing date:	June 5, 2023
Hearing participants:	Appellant Respondent's representative
Decision date:	July 17, 2023
File number:	AD-22-916

Decision

[1] The appeal is allowed. The General Division made an error of law in its decision and failed to provide a fair process. The matter is returned to the General Division for a new hearing before a different member.

Overview

[2] The Appellant, C. L. (Claimant), stopped working on June 9, 2021, and took a medical leave. She applied for employment insurance (EI) sickness benefits. On her application, the Claimant reported that she was attending a full-time training program of her own initiative from September 1, 2021, to June 11, 2022.

[3] The Claimant was paid sickness benefits. Later, the Respondent, the Canada Employment Insurance Commission (Commission), decided that the Claimant was disentitled to sickness benefits because she was not able to establish that she would have been available for work, were it not for her illness.

[4] The Claimant appealed this decision to the Tribunal's General Division and her appeal was dismissed. The General Division found that the Claimant did not show that, but for her illness, she would have been available for work. It also found that it did not have the jurisdiction to write off an overpayment.

[5] The Claimant is now appealing the General Division decision to the Appeal Division. I find that the General Division made an error of law in its decision and failed to provide a fair process. I am returning the matter to the General Division for a new hearing.

Issues

[6] The issues in this appeal are:

- a) Did the General Division make an error of law by misapplying the legal test for availability?

- b) Did the General Division fail to provide a fair process?
- c) How should the error be fixed?

Analysis

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

- 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.

Background

[8] The Claimant established a claim for benefits effective June 13, 2021.² The Claimant said in her application for benefits that she would be taking a full-time training course starting September 1, 2021.³ She also stated that, were it not for her illness, she would be available for and capable of working and that her intention was to complete her course once she recovered, before returning to work.⁴

[9] The Claimant's training was automatically approved due to transitional provisions in place during the COVID-19 pandemic. Her claim for benefits was reactivated as of August 21, 2021.⁵ The Claimant was paid benefits until September 25, 2021 when the Commission stopped payments while it reviewed her file.⁶

¹ 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).

² GD3-3 to GD3-22

³ GD3-11 to GD3-14

⁴ GD3-14

⁵ GD3-27

⁶ GD4-4

[10] The Commission determined that the Claimant was not available for work, but for her illness, and imposed a disentitlement. It informed the Claimant that she could not be paid benefits starting September 27, 2021.⁷

– **The General Division decision**

[11] In its decision, the General Division found that the Claimant was not available for work, were it not for her illness. The General Division found that there was no evidence that the Appellant was carrying out a comprehensive job search in an attempt to obtain full-time employment.⁸

[12] The General Division stated that the Claimant was required to carry out a reasonable job search in order to be eligible for benefits.⁹ It considered the factors set out in section 9.001 of the EI Regulations and determined that her job search activities could not be considered reasonable and customary.¹⁰

[13] In its decision, the General Division also discussed at length an overpayment of benefits. It reviewed and commented on circumstances that it says were relevant to the overpayment of benefits.¹¹ The General Division stated that the Claimant requests that the overpayment be written off and found that it does not have the jurisdiction to do so.¹²

The General Division made an error of law

[14] To be considered available for work, a claimant must show that she is capable of, and available for work and unable to obtain suitable employment.¹³

[15] Availability must be determined by analyzing three factors:

(1) the desire to return to the labour market as soon as a suitable job is offered,

⁷ GD3-31

⁸ General Division decision at para 20.

⁹ General Division decision at para 25.

¹⁰ General Division decision at para 26.

¹¹ See General Division decision at paras 42 to 56.

¹² General Division decision at para 54.

¹³ See section 18(1)(a) of the *Employment Insurance Act*.

(2) the expression of that desire through efforts to find a suitable job, and

(3) not setting personal conditions that might unduly limit the chances of returning to the labour market.¹⁴

[16] In addition, availability is determined for each working day in a benefit period for which the claimant can prove that, on that day, they were capable of and available for work and unable to find a suitable job.¹⁵

[17] However, claimants who apply for sickness benefits are not entitled to benefits for any period in which they would not otherwise be available for work, were it not for their illness. These claimants are not expected to show that they are actually available, but rather that the illness is the only reason they are not available.

[18] The General Division erred in law by expecting the Claimant to prove a desire to return to work by carrying out a comprehensive job search during a period when she was not physically capable of suitable work. The General Division applied the *Faucher* factors as though the Claimant was seeking regular benefits.

[19] The General Division also made an error of law by requiring that the Claimant show that her job search efforts were “reasonable and customary”. The Commission did not require that the Claimant prove that she made reasonable and customary efforts, pursuant to section 50(8) of the EI Act. The General Division referred to the criteria in section 9.001 of the EI Regulations, which apply to section 50(8). The Claimant was disentitled under section 18(1)(b) of the EI Act, not section 50(1).

The General Division did not provide a fair process

[20] As discussed above, the General Division devoted a significant portion of its decision to a discussion of an overpayment of benefits.¹⁶ As indicated by the

¹⁴ *Faucher v Canada Employment and Immigration Commission*, A-56-96

¹⁵ *Canada (Attorney General) v Cloutier*, 2005 FCA 73

¹⁶ See General Division decision at paras 42 to 56.

Commission in its written submissions, the General Division erred in considering this issue, as there was no overpayment of benefits to the Claimant.¹⁷

[21] I have listened to the recording of the hearing before the General Division. The hearing lasted 19:00 minutes and the General Division member spent the majority of the hearing discussing the overpayment of benefits and his limited jurisdiction with respect to this issue.

[22] The General Division member discussed at the hearing that it is only the Commission that has the authority to cancel an overpayment of benefits. The member stated that he is unable to help the Claimant with this issue but, if she appeals to the Appeal Division, a Commission representative will be in attendance at the hearing and will have the authority to address the overpayment.¹⁸

[23] The General Division member stated to the Claimant at the hearing:

I hate to say it but at this point there is nothing in the law that will allow me to be of any help to you. Which is not what you wanted to hear today. But, I'd rather be honest with you up front.¹⁹

[24] The General Division member then states that he and the Claimant have "agreed that the main goal is to have the debt written off" and that nothing can happen until the appeal procedure is over with."²⁰

[25] The Claimant advised the General Division member that she was told she would not be paying anything back.²¹ The member indicates to the Claimant that it's good that she was told that she would not have to repay benefits and looked through the file for the name of the Service Canada agent who reviewed the Claimant's reconsideration request.²² The member then ended the hearing.²³

¹⁷ AD6-4

¹⁸ Recording of the hearing before the General Division at 14:30.

¹⁹ Recording of the hearing before the General Division at 15:50.

²⁰ Recording of the hearing before the General Division at 16:30.

²¹ Recording of the hearing before the General Division at 17:10.

²² Recording of the hearing before the General Division at 17:20 to 18:45.

²³ The recording ends at 19:10.

[26] The Claimant provided very little testimony during the hearing and was asked no questions by the member relevant to the issue of her availability. There were no questions asked by the General Division about the Claimant's course of study or her hypothetical availability were it not for her illness. It appears that the General Division's analysis of this issue in its decision is based entirely on the evidence in the Commission's reconsideration file.

[27] The General Division spent the hearing discussing the overpayment of benefits and its inability to address this issue. It advised the Claimant that a Commission representative at the Appeal Division might be able to assist her but that it was not able to help her.

[28] There was no overpayment of benefits in this matter. The Claimant even advised the General Division member of this during the hearing. Despite this, the General Division focused the hearing on that issue.

[29] I find that the General Division failed to provide a fair process. It misstated the issue at the hearing and did not provide the Claimant with an opportunity to provide any evidence on the issue of her availability, were it not for her illness.

[30] The Commission agrees that the General Division erred in its application of the test for availability by reviewing the Claimant's job search efforts. It also says that the General Division erred by referring to an overpayment and the possibility of a write-off.²⁴

Fixing the error

[31] 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.²⁵

²⁴ AD6-4

²⁵ Section 59(1) of the DESD Act explains the remedies available to the Appeal Division.

[32] The Commission says that, while the General Division made errors in its decision, these errors do not affect the outcome. It argues that I should make the decision that the General Division should have made and dismiss the appeal.²⁶

[33] The General Division mischaracterized the issue to the Claimant at her hearing. It did not ask the Claimant any questions regarding her availability were it not for her illness and did not give the Claimant an opportunity to speak to this issue.

[34] I have found that the General Division made errors of law and failed to provide a fair process. The Claimant did not know the case that it had to meet or what evidence she should have provided that would be relevant to the actual issue that the General Division had to decide. Because of this, I find that the record is not complete.

[35] This is not an appropriate case for me to provide the decision that the General Division should have given. The Claimant has not had an opportunity to present her evidence concerning her availability, but for her illness. I am sending the matter back to the General Division for a new hearing before a different member.

Conclusion

[36] The appeal is allowed. The General Division erred in law and failed to provide a fair process. The matter is returned to the General Division for a new hearing before a different member.

Melanie Petrunia
Member, Appeal Division

²⁶ AD6-5