Citation: *ML v Canada Employment Insurance Commission*, 2023 SST 251

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	M. L.
Representative:	N. O.
Respondent:	Canada Employment Insurance Commission
Representative:	Gilles-Luc Belanger

Decision under appeal:	General Division decision dated April 7, 2022 (GE-22-537)

Tribunal member:	Stephen Bergen
Type of hearing:	Teleconference
Hearing date:	August 14, 2023
Hearing participants:	Respondent's representative
Decision date:	September 20, 2023
File number:	AD-22-301

Decision

[1] I am allowing the appeal in part.

[2] I am returning the appeal to the General Division for reconsideration of the Claimant's availability for work, whether he knowingly made a false statement, and how the Commission decided on the appropriate penalty.

[3] I am dismissing the Claimant's appeal of his disentitlement for being outside of Canada.

Overview

[4] M. L. is the Appellant. He applied for Employment Insurance (EI) benefits, so I will call him the Claimant. Back in 2018, the Claimant left Canada to attend a volleyball tournament while he was collecting benefits. The Respondent, the Canada Employment Insurance Commission (Commission) learned later that he had been outside of Canada. It disentitled him to the benefits he received from March 30 to April 2, 2018, because he was outside Canada. At the same time, it disentitled him from March 29 to April 3, 2018, because he could not prove he was available for work on those days. The disentitlements resulted in an overpayment. The Commission also found that the Claimant had knowingly made a false statement, so it imposed a warning.

[5] The Claimant asked for a reconsideration, but the Commission would not change its decision. He appealed to the General Division of the Social Security Tribunal (Tribunal). The General Division dismissed his appeal on all issues.

[6] The Claimant applied to the Appeal Division and was granted leave to appeal. His hearing proceeded at the Appeal Division on August 14, 2023.

[7] I am allowing the appeal in part. The General Division decision made a number of errors.

[8] It made an error of law by failing to give adequate reasons, and it acted unfairly by not making or preserving an audio recording of the hearing. Both affected the Claimant's ability to challenge the General Division's decision. The General Division made an important error of fact when it found that he had knowingly made a false statement, and an error of law by failing to apply the legal test for the exercise of discretion when it considered the penalty issue.

[9] I am referring all of the above matters to the General Division for reconsideration.

[10] The General Division made no error when it decided that the Claimant was disentitled to benefits while outside of Canada. I am dismissing this part of the appeal.

Preliminary matters

[11] The Claimant requested an adjournment because he was ill, but he did not provide any information on when he might be ready to proceed. I denied his request.

[12] His appeal file had been adjourned or held in abeyance since it was first set for hearing on September 9, 2022. Over a period of about 11 months, the Tribunal made repeated efforts to schedule the hearing, settlement conferences, and a case conference to discuss the management and scheduling of his appeal. Although the Claimant has had several telephone discussions with the Tribunal staff over the months, he has responded to every notice, update, or inquiry, by saying that he could not participate because he was too ill.

[13] On August 14, 2023, the Appeal Division hearing proceeded in the Claimant's absence. The Claimant was aware of the hearing date and time, and that the Tribunal expected that he or his representative would be present. He acknowledged receipt of the Notice of Hearing by seeking an adjournment of the hearing. He discussed my denial of his most recent adjournment request with the Tribunal staff.

[14] The Commission relied on its written submissions and did not appear at the hearing to make additional representations.

[15] Following the August 14, 2023, hearing, I wrote the Claimant to tell him that the Commission had not attended the hearing and that it was relying only on its written submission. I offered the Claimant until August 31, 2023, to provide written submissions of his own.

[16] The Claimant did not provide written submissions or ask for additional time to respond.

Issues

[17] The issues in this appeal are:

a) Did the General Division make an important error of fact by finding that the Claimant was not available for work while outside Canada without regard to the evidence,

   i. that he was willing to return to Canada if a job was available?
   ii. that he was already working at a part-time job?

b) Did the General Division make an error of law by failing to provide adequate reasons for finding that the Claimant was not available?

c) Was the General Division hearing process unfair because it did not maintain a record of the Claimant's oral testimony?

d) Did the General Division make an important error of fact or an error of law when it disentitled the Claimant to benefits on statutory holidays?

e) Did the General Division make an important error of fact or an error of law when it found that the Claimant knowingly made a false statement?

f) Did the General Division make an error of law in how it found that the Commission exercised its discretion judicially when it decided to give the Claimant a warning?

General Principles

[18] The Appeal Division may only consider errors that fall within one of the following grounds of appeal:

a) The General Division hearing process was not fair in some way.
b) The General Division did not decide an issue that it should have decided. Or, it decided something it did not have the power to decide (error of jurisdiction).
c) The General Division made an error of law when making its decision.
d) The General Division based its decision on an important error of fact.[1]

Analysis

[19] The General Division made a decision on four issues:

a) It decided that the Claimant was disentitled because he was not available for work between March 29 to April 3, 2018.
b) It decided that the Claimant was disentitled from March 30 to April 2, 2018, because he was outside of Canada.
c) It decided that the Claimant knowingly made a false representation.
d) It decided that the Commission acted judicially in imposing a warning.

Availability for work

[20] The General Division found that the Claimant was not available for work from March 29 to April 3, 2018. It found that he did not have a desire to return to the labour market as soon as a suitable job was offered, that he had not made reasonable and customary efforts to obtain suitable employment, and that he had set personal conditions that unduly limited his chances of returning to the labour market.

[1] This is a plain language version of the three grounds. The full text is in section 58(1) of the *Department of Employment and Social Development Act* (DESDA).

[21] The Claimant argues that the General Division made an important error of fact when it found that he was not available for work. He says that it ignored evidence that he would have returned to Canada to take a job and that he already had a part-time job in Canada.

[22] The General Division did not ignore or misunderstand the Claimant's evidence that he had a part time job in Canada. It referred to the Claimant's testimony that he had part-time work, and I presume that it understood the evidence. The Claimant has not argued that there was more to that evidence or that it had a special meaning that the General Division mistook.

[23] However, I cannot say whether the General Division made an important error of fact by ignoring the Claimant's evidence that he was ready and willing to work and would have returned to take a job.

[24] There are two reasons for this. First, the General Division reasons do not identify what evidence it relied on to make its findings of fact, or adequately explain how it reached its decision. Second, the General Division did not maintain an audio record of the oral hearing.

[25] So, while I cannot find an important error of fact, I do find that it was an error of law to provide inadequate reasons. I also find that the General Division breached the Claimant's right to procedural fairness by not maintaining the audio record of the hearing.

– **Inadequate reasons**

[26] To decide if a claimant is available, the General Division must apply a legal test which I will call the *Faucher* test.[2] The *Faucher* test sets out three factors, and states that all of them must be considered. The first factor is the Claimant's "desire to return to the labour market as soon as a suitable job was offered."

[2] The test is described in the Federal Court decision in *Faucher v. Canada Employment And Immigration Commission*; A-56-96, A-57-96.

[27] The General Division made an error of law because its reasons are inadequate. The Supreme Court of Canada has said that one of the purposes of written reasons is to explain to parties why the decision was made.[3] The General Division did not explain how it found that the Claimant did not have a desire to return to work.

[28] The General Division relied on the Claimant's "statements and submission" that he was not seeking full-time work because he was outside of Canada.[4] However, the General Division did not identify the "statements or submission" to which it was referring.

[29] Furthermore, it is not obvious that there was any statement or submission from which it might have found that the Claimant had no desire to return to work. The Claimant told the Commission that he did not know he was required to be willing and ready to work on March 30, 2018 (Good Friday), and April 2, 2018 (the Monday after Easter).[5] He mentioned this again in his Notice of Appeal to the General Division. However, he did not tell the Commission that he was not seeking work at the time.

[30] Evidence that the Claimant was not aware of the Commission's requirements is not evidence that he was not seeking work. In addition, the file evidence that the Claimant did not know the Commission still required him to be available relates only to Good Friday and the following Monday. This cannot be evidence that he was not seeking work on all of the days of his disentitlement, and it does not establish that he had no desire to return to work as soon as possible.

[31] If the General Division had evidence that the Claimant did not desire to return to work, it could only have come from his testimony at the oral hearing. However, the General Division decision does not describe his testimony - and it did not maintain an audio record of the hearing.

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[3] *R. v. Sheppard*, 2002 SCC 26, [2002] SCR 869
[4] See General Division decision at para 9.
[5] See GD3-54.

[32] Even if the Claimant had testified that he was not seeking work during the time he was outside of Canada, and even if the General Division had referred to that specific testimony, the reasons would still be inadequate. They do not explain how “not seeking work” means that the Claimant had no “desire to return to work.”

[33] The General Division’s reasons are equally obscure where it considers the other two *Faucher* factors. The other factors are as follows:

a) the expression of the desire to find work through efforts to find a suitable job,
b) not setting personal conditions that might unduly limit the chances of returning to the labour market.

[34] When the General Division considered whether the Claimant met the second Faucher factor, it said that “per the [the Claimant’s] “submissions and testimony,” he had not been conducting a ”comprehensive job search” [between March 29 and April 3]. It said that his “submissions and testimony” indicate “no ongoing effort” to obtain employment.

[35] The General Division’s statement that the Claimant made no ongoing effort to obtain employment is a statement of conclusion. It suggests that it considered or weighed evidence, but the General Division did not specify what submissions and testimony it relied on, or how it weighed that evidence to reach its conclusion. Its conclusion would perhaps be sufficient if it had found that there was “**no evidence**” of on-going efforts (assuming there was no evidence). However, there is a distinction between this and saying, as the General Division did, that “**the evidence indicates** no on-going effort.”

[36] To support its conclusion that the Claimant “set conditions that unduly limited his chances of returning to the labour market,” the General Division relied again on its conclusion that he had made no efforts to find work. However, there is no necessary relationship between the two factors. Claimants may not be looking for work at some particular time without unduly limiting the kind of work they would accept. The General

Division should have explained why not looking for work during a holiday weekend absence from Canada unduly limited his chances" of finding a job.

[37] The Supreme Court of Canada has said that inadequate reasons will justify intervention (by a reviewing court) where they, "fail to disclose an intelligible basis for the decision, capable of permitting meaningful appellate review."[6]

[38] It is impossible to know how the General Division evaluated the evidence and whether it ignored or misunderstood any evidence related to his availability. This prejudices the Claimant's ability to challenge the General Division decision.

[39] I find that the General Division made an error of law by giving inadequate reasons.

– **Lack of audio record of hearing**

[40] I also find that the General Division breached the Claimant's right to procedural fairness by not maintaining the record of the hearing.

[41] The General Division's failure to maintain an audio record compounded the problem of inadequate reasons. The Claimant insists that he testified about his willingness to return to Canada if a job was available. The General Division does not refer to that evidence. However, if the Claimant is correct, this evidence is potentially relevant to all three *Faucher* factors.

[42] The absence of an audio record prejudices the Claimant's ability to show that the General Division ignored relevant evidence from the hearing.

Outside of Canada

[43] The General Division found that the Claimant was outside of Canada from March 29, 2018, to April 3, 2018. It said that this was, "by the [Claimant's] admission." The Claimant has not argued that the General division made an error in this finding.

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[6] *R. v. R.E.M.*, 2008 SCC 51.

[44] The *Employment Insurance Act* (EI Act) says that a claimant is not entitled to receive benefits for any time that they are outside of Canada.[7] It allows for certain exceptions, but none of those exceptions apply to the Claimant. The Claimant was outside Canada to attend a volleyball tournament. There is no exception for that kind of activity.[8]

[45] Since no exceptions apply, the Commission must disentitle him from benefits for the entire time that he was outside of Canada. The General Division rightly excluded the days of March 29 and April 3, 2018, because claimants are not considered "outside of Canada" on days that they are only outside for part of the day. March 29 and April 3 were the Claimant's travel days, and he was outside of Canada for only a part of each day.

[46] The Claimant also argued that the General Division made an error by finding that he was disentitled on statutory holidays. He says that Good Friday and Easter Sunday (taken as a holiday on Monday) were statutory holidays. However, a claimant who is outside of Canada is disentitled for each day that they are outside of Canada. The law does not suspend the disentitlement for statutory holidays.

[47] The General Division did not make an error of fact or law by failing to consider the effect of statutory holidays.

False statements

[48] The Claimant completed claim reports to the Commission for the weeks of March 18 to March 31, 2018, and April 1 to April 7, 2018. For both weeks, he reported that he was not outside of Canada during the period of the report.[9]

[49] The Claimant disagrees that he knowingly made a false statement. He says that his statements that he was not outside of Canada were made innocently. His assertion is supported by his response to the Commission's investigation where he said that he

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[7] See section 37(b) of the EI Act.
[8] See section 55 of the EI Regulations.
[9] See GD3-19 and GD3-27.

completed the report before he was asked to participate in a volleyball tournament (outside of Canada).[10]

[50] It is not clear if he means to argue that the General Division made an important error of fact or an error of law. I will look at it both ways.

– **Error of fact**

[51] The General Division made an important error of fact.

[52] It noted that the Claimant was outside of Canada from March 30 to April 2, 2018,[11] and that he failed to report this "upon his return to Canada." The Claimant did not dispute this. Obviously, the Claimant would have known that he would be outside of Canada **by the day** he left, and that he was outside of Canada **on the day** he left. If he had had already completed his reports on or after the day he left, he would have known that they were incorrect.

[53] The General Division did not ignore or misunderstand the Claimant's protestation that he did not know how to change his reports. It noted that the Claimant said that he was unaware of how to amend his response but made no effort to contact Service Canada to inquire if he could change his report.

[54] In deciding that the Claimant knowingly made a false statement, the General Division relied on three facts:

1. The Claimant had attested to knowing his rights and responsibilities when he applied for benefits, which included his obligation to report any absence from Canada, but he failed to do so.
2. The Claimant stated that he did not know how to change his claim reports, which the General Division accepted as evidence that he was aware that he had given the Commission incorrect information.

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[10] See GD3-38.
[11] See para 31 of the General Division decision.

3. The Claimant made no effort to bring his mistake to the attention of the Commission.[12]

[55] None of these facts support the General Division's finding that the Claimant knowingly made a false statement, at the time that he made the statement. The General Division did not acknowledge that the Claimant said he made the false statement innocently, not knowing that it was false at the time. Instead, it focused on the evidence of the Claimant's failure to correct his statement at some point after he returned to Canada. This does not mean that his statement was false in the first place.

[56] I find that the General Division made an important error of fact because its conclusion does not follow rationally from the evidence.[13]

– **Possible Error of law**

[57] The General Division said that the "Appellant has failed to show that there could be an innocent interpretation of his actions when he failed to disclose the correct information relating to his being outside Canada while in receipt of benefits …." From this statement, and the evidence considered by the General Division, I gather that the General Division based its conclusion that the Claimant knowingly made a false statement on what the Claimant did afterwards. It appears that the General Division's premise is that a claimant's false statement, even if innocent, can become a "knowingly" false statement if the claimant later learns that it is false but makes no effort to correct the record.

[58] However, I am not going to consider whether a claimant's later actions can retroactively transform an innocently false statement into a knowingly false statement.

[59] I cannot be certain how the General Division analyzed the evidence. It did not explain how the law supported its decision. From its reasons, I cannot know how it

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[12] See paras 36-37 of the General Division decision.

[13] Under section 58(1)(c), and error of law is where the General Division, "bases its decision on an erroneous finding of fact that it made in a perverse or capricious manner, or without regard for the material before it."

interpreted “knowingly,” so I cannot evaluate whether it made an error of law in its interpretation.

[60] I am not going to discuss how the law should be interpreted as a hypothetical.

[61] However, I find that the General Division made an error of law by providing inadequate reasons. Its reasons should explain how it applied the law to the evidence to reach its decision.

Penalty

– Error of law

[62] The Commission imposed a warning on the Claimant for having knowingly made a false statement.

[63] The General Division had to determine if the Commission had exercised its discretion judicially. It understood that it needed to do this, and it was correct in how it described the test for whether the Commission’s decision was judicial. It said that the Commission had to demonstrate that it acted in good faith, considered all the relevant factors, and ignored irrelevant factors.[14]

[64] The General Division found that the Commission had exercised its discretion judicially. To explain why it did so, the General Division said that the Appellant failed to show there could be an innocent interpretation of his actions.[15]

[65] In all cases where the Commission decides on a penalty for a false statement, it must first find that the claimant made the false statement knowingly. A claimant cannot be penalized for having made a false statement “innocently,” that is, believing it was true. Having an “innocent interpretation” for his actions would not be compatible with knowingly making a misrepresentation.

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[14] See General Division decision at para 39.
[15] See para 40 of the General Division decision.

[66] The General Division made an error of law by failing to apply the legal test. Its decision does not show that it analyzed whether the Commission acted in good faith, and it does not review the factors the Commission considered relevant.

Remedy

[67] I have found errors in how the General Division reached its decision, so I must now decide what I will do about that. I can make the decision that the General Division should have made, or I can send the matter back to the General Division for reconsideration.[16]

[68] The Commission agrees that the General Division breached procedural fairness and asks me to return the appeal to the General Division to decide the issue of availability.

[69] I agree that I cannot decide the issue of availability without the audio record of the General Division hearing, so I am returning this issue to the General Division for reconsideration.

[70] I have found no error with the General Division's decision regarding the question of the Claimant's disentitlement while he was outside of Canada. The Claimant has not suggested any particular error or described any missing testimony that could possibly have affected this finding.

[71] The Commission asked me to uphold the finding that the Claimant knowingly made a false statement, but I have found that the General Division made an error in how it determined that the Claimant knowingly made a false statement.

[72] I am returning this to the General Division for reconsideration as well. The Commission did not say what it would want me to do if I found an error. In my view, the record is not sufficiently complete for me to make this decision.

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[16] See section 59(1) of the DESDA.

[73] The Claimant said that he filled out the reports before he knew he was leaving Canada to attend the tournament. However, it appears that he may have reserved accommodations for the time that he would be outside of Canada well before he completed his claim reports for the two benefit weeks in question.[17] According to the Reconsideration file, it looks like the Claimant filed his online report for the week of March 18 to March 31 on April 6, 2018.[18] His online report for the week of April 1 to April 7 indicates that it was filed on April 11, 2018.[19] The decision reasons are silent about this evidence.

[74] Based on this evidence, the Commission concluded that the Claimant likely returned to Canada before he made the statements that he was not outside of Canada.[20] Without the hearing record, I cannot tell whether the General Division asked the Claimant about any of this evidence or whether he had an explanation.

[75] I am returning the question of whether the Claimant knowingly made false statements to the General Division for reconsideration. The Claimant should be given an opportunity to respond to the evidence I have highlighted and to discuss any other evidence related to what he knew when he filed the claim reports.

[76] Since a decision on the penalty issue first requires a finding that the Claimant knowingly made a false statement, (and since I am already sending this back to the General Division to reconsider the nature of the false statement) I will also ask the General Division to reconsider (if necessary) whether the Commission acted judicially in imposing a warning.

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[17] See GD3-42.
[18] See GD3-45.
[19] See GD3-27.
[20] See GD3-45.

Conclusion

[77] I am allowing the appeal in part. I have confirmed the General Division decision that the Claimant was disentitled to benefits while he was outside of Canada, from March 30 to April 2, 2018.

[78] I am returning the appeal to the General Division for reconsideration of the following:

a) The Claimant's availability for work.
b) Whether the Claimant knowingly made a false statement.
c) Whether the Commission exercised its discretion judicially by imposing a warning.

Stephen Bergen
Member, Appeal Division