



Citation: *KH v Canada Employment Insurance Commission*, 2023 SST 48

Social Security Tribunal of Canada Appeal Division

Decision

Appellant: K. H.

Respondent: Canada Employment Insurance Commission
Representative: Isabelle Thiffault

Decision under appeal: General Division decision dated March 2, 2023
(GE-22-3410)

Tribunal member: Pierre Lafontaine

Type of hearing: Teleconference

Hearing date: September 7, 2023

Hearing participants: Appellant
Respondent's representative

Decision date: September 21, 2023

File number: AD-23-330

Decision

[1] The appeal is allowed. The file returns to the General Division for reconsideration by a different member.

Overview

[2] The Appellant (Claimant) applied for Employment Insurance (EI) benefits. On May 17, 2021, the Claimant completed a report for the two-week period commencing May 2, 2021.

[3] On September 29, 2021, the Claimant submitted a request to renew her claim for regular. Her claim was re-activated effective September 19, 2021. On October 6, 2021, she submitted a request to antedate her claim to May 16, 2021, explaining she did not have access to the internet and couldn't apply to renew her claim.

[4] The Respondent (Commission) concluded that the Claimant's reasons for returning her report late did not constitute good cause under the law. It therefore denied EI benefits for the period May 16, 2021, to September 18, 2021. The Claimant appealed the reconsideration decision to the General Division.

[5] The General Division found that the Claimant had failed to show good cause throughout the entire period of delay. It concluded that the Claimant did not prove she had good cause for the delay throughout the entire period of the delay and that the claim could not be antedated.

[6] The Appeal Division granted the Claimant leave to appeal. The Claimant submits that the General Division based 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.

[7] I must decide whether the General Division based 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.

[8] I am allowing the Claimant's appeal. The file returns to the General Division for reconsideration by a different member.

Issue

[9] Is the General Division decision based on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it?

Preliminary matters

[10] It is well-established that I must decide the present appeal based on the evidence presented to the General Division. The powers of the Appeal Division are limited.¹

Analysis

Appeal Division's mandate

[11] The Federal Court of Appeal has determined that when the Appeal Division hears appeals pursuant to section 58(1) of the *Department of Employment and Social Development Act*, the mandate of the Appeal Division is conferred to it by sections 55 to 69 of that Act.²

[12] The Appeal Division acts as an administrative appeal tribunal for decisions rendered by the General Division and does not exercise a superintending power similar to that exercised by a higher court.³

[13] Therefore, unless the General Division failed to observe a principle of natural justice, erred in law, based its decision on an erroneous finding of fact that it made in a

¹ See section 58(1) of the *Department of Employment and Social Development Act*.

² *Canada (Attorney General) v Jean*, 2015 FCA 242; *Maunder v Canada (Attorney General)*, 2015 FCA 274.

³ *Idem*.

perverse or capricious manner or without regard for the material before it, the Tribunal must dismiss the appeal.

Is the General Division decision based on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it?

[14] The General Division had to decide whether the Claimant had proven good cause for the delay in completing her bi-weekly reports to allow an antedate for the period of May 16, 2021, to September 18, 2021.⁴

[15] The General Division determined that, contrary to the Claimant's representations, she did have access to either telephone or internet service during the period in question. The General Division based its finding on the fact that the Claimant regularly ordered in Chinese food during the relevant period. It considered that such ordering had to be done either on-line or by phone.

[16] The General Division brought into question the Claimant's credibility and found that there was nothing hindering her from calling the Commission for assistance during the delay to clarify her circumstance and submitting her bi-weekly reports.

[17] The General Division concluded that the Claimant had failed to show good cause throughout the entire period of delay. It dismissed her appeal.

[18] The Claimant submits that the General Division based 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 when it found that she did have access to internet and her phone because she was regularly ordering in Chinese food. The Claimant submits that she never said that. Her representations before the General Division were that she ordered beforehand a large quantity of Chinese food which she placed in her freezer.

⁴ Pursuant to section 10(5) of the *Employment Insurance Act*.

[19] The Commission submits that while the Claimant did say she ordered in Chinese food, she never mentioned it was regularly. She rather stated that she ordered in a lot of Chinese food as an explanation that those supplies, along with her landlords' assistance in buying her groceries equipped her with sufficient food provision. The Commission submits that it is supported by the Claimant's statement in a conversation held with the Commission that she ordered Chinese food that she put in her freezer.⁵

[20] The Commission agrees with the Claimant that the General Division misinterpreted the evidence before it and rendered a decision that may be qualified as perverse and capricious.

[21] I agree with the position of the parties.

[22] I find that the General Division based its credibility finding and decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it. There is no evidence to support a finding that the Claimant was regularly ordering in Chinese food during the relevant period. Furthermore, the General Division ignored the Claimant's evidence to the effect that she ordered a lot of Chinese food and put it in a freezer.

[23] Given these errors, I am justified in intervening in this case.

There are two ways to fix the General Division's errors

[24] When the General Division makes an error, the Appeal Division can fix it in one of two ways:

- It can send the matter back to the General Division for a new hearing; or
- It can give the decision that the General Division should have given.

⁵ See GD3-47.

The record is incomplete, and I cannot decide this case on its merits

[25] During the Appeal Division hearing, the Claimant vigorously insisted that I render the decision that the General Division should have given. She does not want to go back and forth from the General Division to the Appeal Division. The Claimant considers the record is complete and that I can decide the case on its merits.

[26] The Commission agrees with the Claimant and considers the evidence on file to be complete.

[27] Unfortunately, I disagree with the parties. The record is not complete.

[28] Before the General Division, the Commission argued that the Claimant had failed to show that she did what a reasonable and prudent person would have done to satisfy herself as to her rights and obligations when failing to complete her reports.

[29] The Commission put forward that the Claimant went out by taxi once, to the bank and to the dentist and at that time, she herself could have gotten a phone card, or could have visited Service Canada for assistance. Having been on claim for six months, she was aware of the requirements to complete the bi-weekly reports.

[30] In her application for leave to appeal to the Appeal Division, the Claimant herself raised the issue that she was denied by the General Division the opportunity to address these specific arguments in any capacity.⁶ A review of the Claimant's personal hearing transcripts confirms that she was not given an opportunity by the General Division to address these arguments.⁷

[31] These facts need to be specifically addressed by the General Division and are crucial to determine whether the Claimant acted like a reasonable person during the relevant period.

⁶ See ADN1-9.

⁷ See ADN20-1 to ADN20-13.

[32] The record is therefore not complete, and I cannot render the decision that the General Division should have given.

[33] I have no other choice but to return this matter to the General Division for reconsideration by a different member.

Conclusion

[34] The appeal is allowed. The file returns to the General Division for reconsideration by a different member.

Pierre Lafontaine
Member, Appeal Division