



Citation: *TB v Canada Employment Insurance Commission*, 2023 SST 1736

## **Social Security Tribunal of Canada**

### **Appeal Division**

# **Decision**

<b>Appellant:</b>	T. B.
<b>Representative:</b>	S. D.
<b>Respondent:</b>	Canada Employment Insurance Commission
<b>Representative:</b>	Daniel McRoberts

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<b>Decision under appeal:</b>	General Division decision dated March 29, 2023 (GE-22-3372)
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<b>Tribunal member:</b>	Melanie Petrunia
<b>Type of hearing:</b>	Teleconference
<b>Hearing date:</b>	November 20, 2023
<b>Hearing participants:</b>	Appellant's representative Respondent's representative
<b>Decision date:</b>	November 30, 2023
<b>File number:</b>	AD-23-396

## Decision

[1] The appeal is allowed. The matter will go back to the General Division for reconsideration.

## Overview

[2] The Appellant, T. B. (Claimant), left his job in August 2021 to focus on his renovation and home repair business. He applied for employment insurance (EI) parental benefits on March 4, 2022.

[3] The Respondent, the Canada Employment Insurance Commission (Commission) decided that the Claimant could not be paid benefits because he was working full work weeks in self-employment and was not considered unemployed.

[4] The Claimant appealed the Commission's decision to the Tribunal's General Division. The General Division dismissed the appeal. It found that the Claimant is presumed to be working full work weeks and he didn't show that his involvement in his self-employment was limited. This means that he was not unemployed.

[5] The Claimant is now appealing the General Division decision. He argues that The General Division based its decision on important factual errors and made errors of law by focusing on his efforts to find a job. The Commission also says that the General Division made an error of law by looking at the Claimant's self-employment during the wrong period of time.

[6] I am allowing the appeal. The General Division made errors of law in its decision. I am returning the matter to the General Division for a new hearing.

## Issues

[7] The issues in this appeal are:

- a) Did the General Division make errors of law in its analysis of the Claimant's involvement in his business?

b) If so, how should the error be fixed?

## Analysis

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

- 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

[9] The Claimant left his job in August 2021 to focus on his renovation and home repair business. His child was born prematurely on January 10, 2022.<sup>2</sup> The Claimant took time away from his business to care for the baby and his older child while his wife recovered.<sup>3</sup>

[10] The Claimant applied for parental benefits on the understanding that he qualified based on the insurable hours he accumulated at his previous job. His application was submitted on March 4, 2022, and a benefit period was established effective February 27, 2022.<sup>4</sup>

[11] Based on the information about his self-employment that the Claimant provided on the application form, the Commission decided that he was not unemployed. The Commission said that the Claimant was involved in the operation of a business and his

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<sup>1</sup> 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).

<sup>2</sup> General Division decision at para 3.

<sup>3</sup> General Division decision at para 5.

<sup>4</sup> GD3-24

involvement was not minor in extent. An indefinite disentitlement was imposed effective February 28, 2022.<sup>5</sup>

[12] The Claimant had requested that his claim start on August 21, 2021. The Commission decided that the Claimant did not have good cause for the delay in applying for benefits and denied his request to antedate.<sup>6</sup>

[13] In his Notice of Appeal to the General Division, the Claimant explained that he did not intend to ask for the claim to start on August 21, 2021. He said that he wanted it to start on January 10, 2022, when his child was born.<sup>7</sup>

### **The General Division made an error of law**

[14] The General Division noted in its decision that there was no reconsideration decision on the issue of antedating the claim. It found that it could not consider this issue, and whether the claim should start on January 10, 2022, as requested by the Claimant. The General Division said that it would only look at the Claimant's self-employment.<sup>8</sup>

[15] Despite there being no reconsideration decision on the issue of antedating the claim, the General Division analyzed the Claimant's involvement in his self-employment for the period from January 10 to March 5, 2022.<sup>9</sup>

[16] The General Division found that the Claimant was presumed to be working full work weeks because he was self-employed.<sup>10</sup> It looked at six factors set out in case law for determining whether an exception applied because the Claimant's involvement in his business was limited.<sup>11</sup>

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<sup>5</sup> GD3-29

<sup>6</sup> GD3-35

<sup>7</sup> GD2

<sup>8</sup> General Division decision at para 7.

<sup>9</sup> General Division decision at paras 17, 20 and 26.

<sup>10</sup> General Division decision at para 11.

<sup>11</sup> General Division decision at para 15.

[17] The General Division applied the factors and found that five of the six factors support that the Claimant's involvement in his business was not limited.<sup>12</sup> It noted that the case law says two of the factors are particularly significant: the time spent on self-employment and whether the Claimant intended to find another job quickly.<sup>13</sup>

[18] The General Division acknowledged that the Claimant argued that he should not have to show an intention to find another job because he was applying for parental benefits.<sup>14</sup> He planned to return to his self-employment after his leave.

[19] The Claimant argues that the General Division made an error of law by focusing on his efforts to find another job. He says that this should not be required when he is on parental leave and wouldn't be required of a claimant that was not self-employed. He says that he invested time in his business before his child was born but was devoting all of his time to caring for his children after the birth.<sup>15</sup>

[20] In its written submissions, the Commission says that the General Division made an error of law by looking at the period from January 10 to March 5, 2022.<sup>16</sup> It argues that the General Division was required to consider the extent of the claimant's involvement in self-employment in any given week in a benefit period.<sup>17</sup> If the engagement in self-employment is minor in extent for any given week, then a claimant will not be regarded as working a full work week, for that week.

[21] I agree with the Commission that the General Division erred by not assessing the Claimant's self-employment for the period beginning February 28, 2022.

[22] At the hearing, the Commission's representative argued that the General Division also erred by placing too much weight on whether the claimant was trying to find

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<sup>12</sup> General Division decision at para 36.

<sup>13</sup> General Division decision at para 38.

<sup>14</sup> General Division decision at para 32.

<sup>15</sup> AD6

<sup>16</sup> AD5-3

<sup>17</sup> See *Martens v. Canada (Attorney General)*, 2008 FCA 240.

another job. The Commission says that claimants seeking special benefits should not be expected to be looking for other work.

[23] The Commission says that the General Division erred in its interpretation of this factor when evaluating the extent of the Claimant's involvement in his business and that it should have been addressed more clearly in the written decision. The Commission adds that there was also a lack of clarity about the length of time the Claimant spent on the business and that this factor was not weighed properly or sufficiently.

[24] I agree with the Commission that the General Division analyzed the Claimant's involvement in his business during the wrong period, by focusing on January 10 to March 5, 2022. This was an error of law. I also agree with the parties that the General Division erred in law by not properly weighing the factors and placing undue emphasis on whether the Claimant intended to find another job.

## **Remedy**

[25] 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.

[26] The parties agree that the General Division made errors in its decision, but they do not agree on the appropriate remedy. The Commission says that the matter should go back to the General Division so the Claimant can provide information about the period starting February 28, 2022.

[27] The Claimant argues that the record is complete, and he has had an opportunity to present his case. His position is that I should make the decision that the General Division should have made, that he was entitled to benefits from January 10 to March 5, 2022.

[28] I understand that the Claimant would like me to make the decision, and not have another hearing before the General Division. However, I agree with the Commission

that the Claimant was not asked about his level of involvement in his business during the right period.

[29] I understand that the Claimant believes that he requested that the claim start on January 11, 2022, in his Notice of Appeal. The remedy that he would like is not within my jurisdiction.

[30] Because there was no reconsideration decision on the antedate issue, I cannot make a decision about the Claimant's entitlement to benefits before February 27, 2022. The Claimant's representative was unsure whether a request for reconsideration of the antedate issue was submitted. That step will need to be taken if the Claimant wants his claim to start on an earlier date.

[31] I am returning the matter to the General Division so that that Claimant will have an opportunity to address his involvement with his business for the period starting February 28, 2022.

## **Conclusion**

[32] The appeal is allowed. The matter will return to the General Division for reconsideration.

Melanie Petrunia  
Member, Appeal Division