Citation: *RN v Canada Employment Insurance Commission*, 2024 SST 40

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	R. N.
Respondent:	Canada Employment Insurance Commission
Representative:	Julie Villeneuve

Decision under appeal:	General Division decision dated May 25, 2023 (GE-22-3860)

Tribunal member:	Pierre Lafontaine
Type of hearing:	Teleconference
Hearing date:	November 16, 2023
Hearing participants:	Appellant Respondent's representative
Decision date:	**January 11, 2024**
File number:	AD-23-603

Decision

[1] The appeal is allowed. The file returns to the General Division for reconsideration only on the issue of availability.

Overview

[2] The Respondent (Commission) decided that the Applicant (Claimant) was disentitled from receiving Employment Insurance (EI) regular benefits as of October 5, 2020, because she was taking a training course on her own initiative and had not proven that she was available for work. Upon reconsideration, the Commission maintained its initial decision. The Claimant appealed the reconsideration decision to the General Division.

[3] The General Division found that the Commission exercised its discretionary authority in a judicial manner when it reviewed its prior decision to pay benefits to the Claimant. It found that the Claimant wanted to go back to work but that she was not actively looking for employment. The General Division found that the Claimant's choice of only looking for work around her school schedule limited her chances of finding work.

[4] The Appeal Division granted the Claimant leave to appeal of the General Division's decision to the Appeal Division. The Claimant submits that the General Division made an error in assessing her employment status, as she has been wrongfully accused of not actively seeking work. She submits that she was totally transparent with the agents she spoke too and was consistently assured that she was entitled to the benefits she applied for. The Claimant submits she has complied with all requirements.

[5] I must decide whether the General Division made an error when it concluded that the Commission acted judicially in reviewing the Claimant's claim. I must also decide whether the General Division made an error when it concluded that the Claimant was not available to work.

[6] I am allowing the Claimant's appeal on the issue of availability.

Issues

[7] Issue no 1: Did the General Division make an error when it concluded that the Commission acted judicially in reviewing the claim?

[8] Issue no 2: Did the General Division make an error when it concluded that the Claimant was not available to work?

Preliminary Matters

[9] To decide the present appeal, I listened to the recording of the General Division hearing held on May 23, 2023.

Analysis

Appeal Division's mandate

[10] 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.[1]

[11] 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.[2]

[12] 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 perverse or capricious manner or without regard for the material before it, I must dismiss the appeal.

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[1] *Canada (Attorney general) v Jean*, 2015 FCA 242; *Maunder v Canada (Attorney general)*, 2015 FCA 274.
[2] *Idem*.

Issue no 1: Did the General Division make an error when it concluded that the Commission acted judicially in reviewing the claim?

[13] Throughout the proceedings, and before the General Division, the Claimant raised the issue whether the Commission could review her claim considering that she had truthfully declared in good faith her school situation from the start of her claim.

[14] The General Division found that the Commission exercised its power in a judicial manner when it reassessed the Claimant's eligibility for EI benefits.

[15] To decide whether the General Division made any errors, it is important to first look at the Commission's reconsideration powers before considering the impact of the *Temporary Measures to Facilitate Access to Benefits* that came into force during the pandemic.

[16] The Commission's reconsideration powers are set out in section 52 of the *Employment Insurance (EI) Act*. This section provides that the Commission may reconsider a claim for benefits within 36 months of the benefits having been paid or payable.[3]

[17] Case law has established that the only restriction on the Commission's reconsideration power under section 52 of the EI Act is the time limit. Therefore, the Commission can reconsider a claim under section 52 even if there are no new facts. In other words, it can withdraw its earlier approval and require claimants to repay the benefits that were paid pursuant to such approval.[4]

[18] During the pandemic, the government made various Interim Orders amending the EI Act. Section 153.161 was added to the EI Act and came into effect on September 27, 2020.

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[3] In situations where the Commission is of the opinion that a false or misleading statement has been made, then the Commission has 72 months to reconsider a claim.

[4] *Brisebois v Canada (Employment and Immigration Commission)*, A-582-79, *Brière v Commission, (Attorney General)*, A-637-86.

[19] Section 153.161 of the EI Act mentions the following:

> «Availability
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> **Course, program of instruction or non-referred training**
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> 153.161 (1) For the purposes of applying paragraph 18(1)(a), a claimant who attends a course, program of instruction or training to which the claimant is not referred under paragraphs 25(1)(a) or (b) is not entitled to be paid benefits for any working day in a benefit period for which the claimant is unable to prove that on that day they were capable of and available for work.
>
> **Verification**
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> (2) The Commission may, at any point after benefits are paid to a claimant, verify that the claimant referred to in subsection (1) is entitled to those benefits by requiring proof that they were capable of and available for work on any working day of their benefit period.

[20] This temporary provision provides that in applying section 18(1) (a) of the EI Act, the Commission may **verify** whether a claimant is entitled to benefits by requiring proof of their availability to work at any point after benefits are paid. Section 52 of the EI Act is worded differently. It provides that the Commission may **reconsider a claim** for benefits within 36 months after the benefits have been paid.

[21] The Claimant was paid benefits after she spoke to agents and was reassured that she was entitled to EI benefits even though she made it clear from the beginning of her claim that she was going to school full-time.

[22] The evidence shows that the Commission had already verified the Claimant's entitlement after speaking with the Claimant following the completion of her training questionnaire and by permitting the payment of benefits.

[23] That being said, I am of the opinion that section 153.161 must be read together with section 52 of the EI Act. Both sections aim to reclaim amounts improperly received by a claimant. Furthermore, the decision to seek verification under section 153.161, and to reconsider a claim under section 52, are discretionary decisions.

[24] This mean that although the Commission has the power to seek verification of entitlement and to reconsider a claim, it does not have to do so.

[25] The law says that discretionary powers must be exercised in a judicial manner. This means that when the Commission decides to reconsider a claim, it cannot act in bad faith or for an improper purpose or motive, consider an irrelevant factor or ignore a relevant factor or act in a discriminatory manner.[5]

[26] The Commission has developed a policy to help guide how it exercises its discretion to reconsider decisions under the EI Act. The Commission says the reason for the policy is "to ensure a consistent and fair application of section 52 of the EI Act and to prevent creating debt when the claimant was overpaid through no fault of their own." The policy provides that a claim will only be reconsidered when:

- benefits have been underpaid;
- benefits were paid contrary to the structure of the EI Act;
- benefits were paid as a result of a false or misleading statement;
- the claimant ought to have known there was no entitlement to the benefits received.[6]

[27] The policy says that a period of non-availability is not a situation where benefits were paid contrary to the structure of the EI Act.[7] The Claimant did not make a false or misleading statement and could not have known there was no entitlement to the benefits received. None of the factors mentioned in the Commission's policy justifies a reconsideration of the Claimant's claim.

[28] I have no doubt that the Claimant acted in good faith and declared her schooling repeatedly to the Commission. The Commission reviewed the claim on facts that were available to it when the initial entitlement decision was made, and benefits were paid.

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[5] See *(Attorney General) v Purcell*, 1995 CanLII 3558 (FCA).
[6] See *Digest of Benefit Entitlement Principles* Chapter 17 - Section 17.3.3.
[7] See Digest of Benefit Entitlement Principles Chapter 17 – Section 17.3.3.2.

[29] Absent section 153.161 of the EI Act, I would agree that the Commission should have considered the factors noted above, and its own policy, when exercising its discretion to decide whether to reconsider the Claimant's claim.

[30] However, I am of the view that during the temporary measures put in place during the pandemic, the Commission's discretion in deciding whether to reconsider a claim had to be exercised by keeping in mind the legislative intent of section 153.161 of the EI Act. By implementing this temporary section during the pandemic, Parliament clearly wanted to emphasize that the Commission had the power to review availability and reconsider whether a claimant attending a course, program of instruction or training, was entitled to EI benefits, even after benefits were paid.

[31] In these circumstances, I agree with the General Division that the Commission exercised its discretion properly. The Commission considered all the relevant information in deciding to reconsider the claim. There were no new relevant facts provided at the General Division hearing that the Claimant had not already provided to the Commission. There is no indication that the Commission considered irrelevant information or acted in bad faith or in a discriminatory manner. The Commission also acted for a proper purpose in reconsidering the claim, that being, verification of entitlement to benefits.

[32] One of the principles of the interpretation of statutes is that Parliament does not speak needlessly. In implementing section 153.161 of the EI Act, Parliament clearly decided that the re-opening of an initial decision regarding a student's availability made during the pandemic outweighed the importance of the initial decision being final. The Commission exercised its discretion within the pandemic parameters set by Parliament.

[33] Having regard to the factors noted above, I find that the General Division did not make any error in deciding that the Commission exercised its power in a judicial manner and that it could not interfere in the Commission's decision to reconsider the Claimant's entitlement.

[34] There is no reason for me to intervene on the issue of whether the Commission acted judicially in reviewing the Claimant's claim.

Issue no 2: Did the General Division make an error when it concluded that the Claimant was not available to work?

[35] The General Division found that the Claimant did not rebut the presumption that she is unavailable for work, as she did not have a history of working full-time while also in school and exceptional circumstances were not present.

[36] I am of the view that the General Division erred when it did not explain why it concluded that exceptional circumstances were not present. It is not enough to emphasize the position of the parties and simply mention that the Claimant has not met one of the exceptions to the presumption.

[37] It has been held that the nature of a claimant's previous employment and their demonstrated ability to maintain part-time employment over the long term, while simultaneously attending full-time studies, is an exceptional circumstance sufficient to rebut the presumption of non-availability.[8]

[38] In applying the *Faucher* factors, the General Division found that the Claimant wanted to go back to work but that she was not actively looking for employment. The General Division further found that the Claimant's choice of only looking for work around her school schedule limited her chances of finding work. It concluded that the Claimant was not available for work under the law.[9]

[39] The Claimant vigorously disputes that she was not looking for work during her benefit period. She argues that she was actively looking for work. She puts forward that after the pandemic job shortage, she managed to find two part-time job starting September 2022 while attending full-time school.

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[8] See GD3-11; *J. D. v. Canada Employment Insurance Commission*, 2019 SST 438.
[9] *Faucher v Canada Employment and Immigration Commission*, A-56-96, and A-57-96.

[40] The General Division found that the Claimant's efforts were insufficient to meet the requirements of the second *Faucher* factor. It found that she didn't actively look for a job on a daily or even weekly basis.

[41] However, the General Division did not explain why it rejected the Claimant's evidence that she experienced serious difficulties finding a second part-time job while in school because of the unusual circumstances created by the pandemic. The Claimant said that there were limited suitable job offers and a lot of people looking for work in her field of work. She was never asked by the Commission to expand her job search.

[42] The Claimant said that she walked around giving her resume to grocery stores, which were some of the places open at the time because they were considered mandatory. She searched on TikTok.[10] In addition, after the uncertainty created by the pandemic, she said that her efforts landed her two new jobs that allowed her to work over 30 hours per week while in school full-time.

[43] When the General Division decides that evidence should be dismissed or assigned little or no weight at all, it must explain the reasons for the decision. The General Division did not do so. This is an error of law.

[44] Furthermore, considering the recent *Pagé* decision from the Federal Court of Appeal, the General Division erred in the application of the third *Faucher* factor by determining that the Claimant set personal conditions that might have unduly limited her chances of going back to work, as she was only available for work outside her school hours on weekday evenings and weekends.[11]

[45] The Court established that full-time students are not always disentitled to employment insurance benefits if they are unavailable to work on a full-time basis during daytime hours. It is not an error of law to conclude that a claimant is available if they are available for employment in accordance with their previous work schedule.

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[10] See GD2-12.
[11] *Page v Canada (Attorney General)*, 2023 FCA 169.

[46] For all these reasons, I am justified to intervene.

Remedy

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

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

1) It can send the matter back to the General Division for a new hearing;

2) It can give the decision that the General Division should have given.

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

[48] Considering that the recent *Pagé* decision was rendered after the General Division decision hearing, and that it establishes guidelines for the Tribunal regarding availability of students while in full-time school adapted to the new realities of the workforce, I find that the record is incomplete. Among other things, the Claimant's history of combining work and school must be addressed by the General Division.

[49] I therefore have no choice but to return the file to the General Division for reconsideration on the issue of availability.

Conclusion

[50] The appeal is allowed. The file returns to the General Division for reconsideration only on the issue of availability.

Pierre Lafontaine
Member, Appeal Division