



Citation: *MM v Canada Employment Insurance Commission*, 2024 SST 153

## Social Security Tribunal of Canada Appeal Division

# Decision

<b>Appellant:</b>	M. M.
<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 August 22, 2023 (GE-23-850)
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<b>Tribunal member:</b>	Glenn Betteridge
<b>Type of hearing:</b>	Teleconference
<b>Hearing date:</b>	February 7, 2024
<b>Hearing participants:</b>	Appellant Appellant's support person Respondent's representative
<b>Decision date:</b>	February 19, 2024
<b>File number:</b>	AD-23-875

## Decision

[1] I am allowing M. M.'s appeal.

[2] She and the Canada Employment Insurance Commission (Commission) agree the General Division made two errors. I accept the parties' agreement about the errors.

[3] The parties don't agree on how I should fix those errors. I am sending her case back to the General Division to reconsider.

## Overview

[4] M. M. is the Claimant in this appeal. I am calling her the Claimant because she made a claim for EI benefits when she was a full-time student.

[5] The Commission denied her claim because she hadn't shown she was **available for work**. When the Claimant requested a reconsideration the Commission upheld its decision.

[6] The Claimant appealed to the General Division of the Social Security Tribunal (Tribunal). She didn't attend the hearing. Her mother attended as her representative. The General Division gave the Claimant the opportunity to send in documents about her job search efforts, after the hearing. So she did.

[7] The General Division dismissed her appeal. It decided she didn't show she wanted to go back to work as soon as a full-time job was available. Her job search evidence was vague, and it wasn't credible that she applied for over 40 jobs. So, she didn't prove she was doing enough to find work. And she unduly limited her chances of going back to work because of her full-time school.

[8] The Claimant and the Commission (parties) now agree the General Division made two errors. The Claimant says I should fix the errors by giving the decision the General Division should have given. The Commission says I should send the case back to the General Division to reconsider.

## I accept the parties' agreement about the General Division's errors

[9] The Tribunal's General Division and Appeal Division have different roles. If the Claimant shows the General Division made an error, then I have the power to step in and fix the error.<sup>1</sup>

[10] The law sets out the types of errors I can consider. At the hearing, the parties agreed the General Division

- used an **unfair process** when it didn't give the Claimant enough information about the type of job search evidence she could send in after the hearing
- made a **legal error** when it didn't follow (or at least consider) a new Federal Court of Appeal decision about the availability of full-time students

[11] I accept the parties' agreement about these errors for the following reasons.

### The General Division used an unfair process

[12] The General Division makes an error when it uses an unfair process. The law calls this a failure of natural justice or a breach of the duty of procedural fairness.<sup>2</sup>

[13] The duty of procedural fairness ensures that an administrative decision-maker uses a fair and open procedure to make its decision.<sup>3</sup> This includes giving each party an opportunity to put forward their **evidence and arguments fully**. The procedure a decision-maker has to use to ensure fairness depends on the legal context and circumstances of the case.<sup>4</sup>

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<sup>1</sup> I get this power from sections 58 and 59 of the *Department of Employment and Social Development Act* (DESD Act). The DESD Act created the Social Security Tribunal.

<sup>2</sup> Section 58(1)(a) of the DESD Act says it's a ground of appeal (in other words, an error) where the General Division failed to observe a principle of natural justice.

<sup>3</sup> See the Supreme Court of Canada's decision in *Baker v Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC).

<sup>4</sup> In *Baker v Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC) at paragraphs 21 to 28, the court decided the duty of procedural fairness a decision-maker owes to a person is flexible and variable and depends on the circumstances in the case. These circumstances include: (1) nature of the

[14] The *Social Security Tribunal Rules of Procedure* (Rules) promote fairness and the parties' participation in the appeal process, considering the parties' particular circumstances.<sup>5</sup> The Rules say the Tribunal should actively adjudicate appeals, which includes going beyond the processes a court would use.<sup>6</sup> This means, for example, the Tribunal should

- help parties and representatives understand the appeal process
- decide what procedures are appropriate in an appeal
- give information about the laws that apply
- give information about the evidence the parties can present<sup>7</sup>

[15] The Commission argued the General Division failed to follow natural justice.<sup>8</sup> The General Division allowed the Claimant to send in job search documents after the hearing. But it didn't give her representative clear instructions of what it expected or required. Then it found that evidence wasn't credible or sufficient without first giving the Claimant a chance to clarify or respond.

[16] The Claimant agreed with the Commission about these errors.

[17] The Claimant wasn't at the hearing. She was represented by a family member. There was no evidence her family member had any legal training or experience representing people at hearings. The Claimant's job search efforts was a key legal issue in her appeal. And her entitlement to EI benefits—while away from home and in her final year of university—was at stake in the appeal.

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decision and the process, (2) decision-making scheme the law set up, (3) impact of the decision on people affected by it, (4) a person's legitimate expectations about the procedure the decision-maker will follow, and (5) choice of procedures made by the Tribunal.

<sup>5</sup> See Rules 1, 6, and 17(1).

<sup>6</sup> See Rule 8(2).

<sup>7</sup> See Rule 17(2). And see for example, *Kainz v Potter*, 2006 CanLII 20532 (ON SC).

<sup>8</sup> See the Commission's written argument at page AD03-5.

[18] I agree with the Commission. The General Division process was unfair to the Claimant because it didn't give her information about the evidence she could send in to show her job search. I don't need to deal with the Commission's argument about the other fairness error (credibility finding) to decide this appeal.

### **The General Division made a legal error when it didn't consider *Page***

[19] The General Division makes a **legal error** when it doesn't consider a court decision it has to consider. A Federal Courts' decision about a legal issue is binding on the Tribunal when it decides an appeal about the same legal issue. So the Tribunal has to follow a binding court decision or justify why it isn't going to follow it.

#### **– The law about availability for work**

[20] A person who wants to get EI **regular benefits** has to show they are capable and **available for work**, and unable to find a suitable job.<sup>9</sup> In other words, they have to prove they are looking for work on an ongoing basis but can't find a suitable job.

[21] **Full-time students**, like the Claimant, are **presumed to be unavailable** for work and not entitled to benefits.<sup>10</sup> It's up to a full-time student to prove this presumption doesn't apply to them.

#### **– The *Page* decision clarifies the approach for deciding whether full-time students are available for work**

[22] The Federal Court of Appeal decided the ***Page case*** after the General Division heard the Claimant's appeal **but before it decided the appeal**.<sup>11</sup>

[23] In *Page*, the Court

- recognized there were conflicting Tribunal decisions about whether full-time students were available for work and could get EI benefits

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<sup>9</sup> See section 18(1)(a) of the EI Act.

<sup>10</sup> The Federal Court of Appeal recently confirmed this in *Page v Canada (Attorney General)*, 2023 FCA 169.

<sup>11</sup> See *Page v Canada (Attorney General)*, 2023 FCA 169.

- reviewed, interpreted, and summarized the principles from the most important court cases about full-time student availability (see the summary at paragraphs 66 to 69)
- identified and approved a **contextual approach** for deciding whether a full-time student has **rebutted the presumption** they aren't available for work (paragraph 69)
- indicated that this contextual analysis should take place under the third *Faucher* factor (at paragraph 70)<sup>12</sup>

[24] The General Division states that the Federal Court of Appeal hasn't yet told us how the presumption that full-time students aren't available relates to the law about availability.<sup>13</sup> But in *Page* the Federal Court of Appeal did tell us—before the General Division decided the Claimant's case.

[25] *Page* is the leading decision of the Federal Courts on full-time student availability. It clarified the proper interpretation of the law. This means the General Division had to consider the *Page* decision and apply it (or explain why it wasn't going to apply it).<sup>14</sup> It did neither.

[26] So I accept the parties' agreement that the General Division made a legal error when it didn't consider the *Page* decision.

## **The remedy: sending the case back to the General Division to reconsider**

[27] The law gives me the power to fix (remedy) the General Division's errors. In appeals like this one, I would usually fix the errors by: (1) sending the case back to the

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<sup>12</sup> In *Faucher v Canada Employment Insurance Commission*, A-56-96, the Federal Court of Appeal identified three factors a tribunal should look at when deciding whether someone was available for work. The third factor is whether the person has set personal conditions that might unduly limit their chances of returning to the labour market.

<sup>13</sup> See the General Division's decision at paragraph 26.

<sup>14</sup> The General Division could have written to the parties and given them the opportunity to make legal arguments based on the contextual approach set out in the *Page* decision.

General Division to reconsider, **or** (2) making the decision the General Division should have made based on the evidence at the General Division, without considering any new evidence.

[28] The parties don't agree on how I should fix the errors.

[29] The Claimant argued I should make the decision the General Division should have made. She said her case has been going on long enough. And she gave the General Division everything it asked her to give.

[30] The Commission argued the evidence at the General Division wasn't complete. Important evidence about the Claimant's job search was missing because the General Division process wasn't fair. So it said it's in the interests of natural justice to allow her to give that evidence, the Tribunal to ask questions, and the parties to make submissions about her job search.

[31] The Commission also argued that full-time student availability is a question of fact. And the *Page* decision says the General Division should carry out a contextual analysis to decide full-time student availability. The Commission said that analysis in the Claimant's case needs to consider facts that weren't part of the evidence at the General Division.

[32] I agree with the Commission. There are gaps in the evidence because of the unfair process the General Division used. And it didn't give the parties the chance to fully present evidence and make arguments based on the *Page* decision. This means I can't make an **informed decision** about the Claimant's availability, and her entitlement to EI benefits.

[33] Because I can't make an informed decision based on the General Division record, I am sending the case back to the General Division to reconsider.

## **Conclusion**

[34] I am allowing the Claimant's appeal.

[35] I agree with the parties that the General Division's process was unfair to the Claimant, and it made an error of law by not considering the *Page* decision.

[36] Out of fairness to the parties, I am sending the case back to the General Division to reconsider.

Glenn Betteridge  
Member, Appeal Division