Citation: *Canada Employment Insurance Commission v YG*, 2024 SST 45

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	Canada Employment Insurance Commission
Representative:	Angèle Fricker
Respondent:	Y. G.

Decision under appeal:	General Division decision dated June 7, 2023 (GE-23-1046)

Tribunal member:	Glenn Betteridge
Type of hearing:	Videoconference
Hearing date:	December 14, 2023
Hearing participants:	Appellant's representative Respondent
Decision date:	January 12, 2024
File number:	AD-23-663

Decision

[1] I am allowing the Canada Employment Insurance Commission's (Commission) appeal.

[2] The General Division used an unfair process when it decided the Commission should not have reconsidered Y. G.'s claim for Employment Insurance (EI) benefits.

[3] To fix the error I am sending his case back to the General Division to reconsider.

Overview

[4] Y. G. is the Claimant in this appeal. I am calling him the Claimant because he made a claim for EI regular benefits when his contract as a research scientist ended in early 2022.

[5] The Commission approved his claim for benefits. While he was looking for his next research job, he took a restaurant job. He reported his restaurant job and earnings to EI on his biweekly reports.

[6] In late May 2022, he got a new research job, starting in September 2022. When that job didn't work out, he renewed his claim for EI benefits in November 2022.

[7] During the renewal process, the Commission learned the Claimant stopped working at the restaurant job months before he started the new research job. it went back and reconsidered his original claim using its power under section 52 of the *Employment Insurance Act* (EI Act).[1] It decided he voluntarily left his restaurant job

[1] Section 52 of the *Employment Insurance Act* (EI Act) gives the Commission power to reconsider a claim for benefits within 36 months after the benefits were paid or payable. (This time limit is increased to 72 months where a claimant made a false or misleading statement to the Commission.) If the Commission decides the claimant received benefits that they didn't qualify for or weren't entitled to, that amount is an overpayment the claimant has to repay to the Commission under section 43 of the EI Act.

without just cause. It disqualified him from benefits starting when he left the restaurant job.[2] And it created an overpayment.

[8] After the Commission denied the Claimant's request to reconsider its decision, the Claimant appealed to this Tribunal's General Division. The General Division allowed his appeal. It decided the Commission didn't use its section 52 reconsideration power judicially. This opened the door for the General Division to decide the Commission should not have gone back and reconsidered his original EI claim.

[9] The Appeal Division then gave the Commission permission to appeal the General Division's decision. The Commission argues the General Division followed an unfair process. The Claimant disagrees.

Issues

[10] There are two issues in this appeal:

- Did the General Division use an unfair process when it failed to give the Commission an opportunity to file evidence and make arguments about how it used its EI Act section 52 reconsideration power?

- If the General Division used an unfair process, how should I fix that error?

[11] The General Division raised the Commission's use of its section 52 reconsideration power—and whether it used that power judicially—in its decision. I will call this the "reconsideration issue" or "section 52 reconsideration issue." The EI Act gives the Commission to go back and reconsider a claim after benefits have been paid. This is different from the Commission's duty to reconsider its decision in a claim when a claimant files a reconsideration request under section 112 of the EI Act.

[2] Section 30(1) of the EI Act says a claimant is disqualified from receiving benefits if they voluntarily left a job without just cause.

Analysis

[12] The Tribunal's General Division and Appeal Division have different roles. If the Commission shows the General Division made an error, then I have the power to step in and fix the error.[3]

[13] In this appeal I have to decide whether the Commission has shown the General Division used an unfair process.[4]

[14] If the Commission doesn't show the General Division used an unfair process (or otherwise made an error), I have to dismiss its appeal. If the Commission shows the General Division made an error, then I should fix the error as simply and quickly as fairness allows.

The General Division denied the Commission the right to be heard

[15] If the General Division was going to raise the section 52 reconsideration issue, it should have given the Commission and the Claimant notice and an opportunity to file evidence and make arguments about that issue.

– The parties didn't raise the Commission's use of its reconsideration power

[16] The General Division says the Claimant "disputes the reconsideration of his claim," but provides no reference for this finding.[5]

[17] The Commission says its written arguments at the General Division were not aimed at proving it had used its reconsideration power judicially.[6] Its arguments were about the main issue under appeal—whether the Claimant voluntarily left his restaurant job. The Commission also says the Claimant didn't argue the Commission should not

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[3] I get this power from sections 58 and 59 of the *Department of Employment and Social Development Act* (DESD Act). This Act created the Social Security Tribunal.
[4] Section 58(1) says it's a ground of appeal where the General Division failed to observe a principle of natural justice. As part of the principles of natural justice, administrative decision-makers owe people a duty of fairness in the procedures they use to make decisions. So this duty is sometimes called procedural fairness.
[5] See paragraph 11 of the General Division decision.
[6] See page AD5-5 of the Commission's submissions to the Appeal Division.

have reconsidered his claim, or it was unfair for the Commission to do that.[7] He argued he didn't voluntarily leave his job or had just cause for doing that.

[18] The Commission says if the General Division wanted to consider whether the Commission had used its section 52 reconsideration power in a judicial manner, it should have given the Commission a chance to file evidence and make arguments about that issue.[8]

[19] At the Appeal Division hearing, the Claimant argued—in general terms—the General Division's file disclosure and hearing process was fair to both sides. He said the General Division had the power to choose its process and the law it applied, based on information from him and the Commission. He also said the General Division had the power to decide whether the Commission should have reconsidered his claim. He didn't take a position on whether he raised the reconsideration issue at the General Division hearing.

[20] I have reviewed the documents in the General Division file, read its decision, and listened to the hearing recording.[9] I agree with the Commission that the Claimant didn't raise the reconsideration issue (and whether the Commission used its power judicially). He didn't include it anywhere in his documents. And neither he nor the General Division didn't raise it at the hearing. The section 52 reconsideration issue appears for the first time in the General Division decision.

– The legal test for a decision-maker to raise a new issue in an appeal

[21] The section 52 reconsideration issue raised by the General Division was a new issue. This means the General Division had to follow the proper procedure for raising it.

[22] In the *Mian* case, the Supreme Court of Canada said a new issue is one that is legally and factually distinct from the grounds of appeal advanced by the parties and

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[7] See page AD5-6.
[8] See page AD5-6.
[9] The Claimant does not raise the section 52 reconsideration issue in his reconsideration request (see pages GD3-25 to GD3-30), his notice of appeal (see GD2), or the other documents he sent to the General Division before the hearing (see GD6 and GD7) and after the hearing (see GD8).

cannot reasonably be said to stem from those grounds.[10] The Court said decision-makers can raise new issues on an appeal where several conditions are met.[11] Where a decision-maker raises a new issue, it has to notify the parties as soon as possible, and give them an opportunity to respond.[12] This ensures the decision-maker treats the parties fairly and has full submissions to decide the issue.

[23] The Claimant and the Commission argued the appeal based on the voluntary leaving issue alone.[13] In a voluntary leaving case under sections 29 and 30 of the EI Act there are two issues. First, whether the Commission can prove a person chose to leave their job. Second, if the person did, its up to them to prove they had just cause for leaving in all the circumstances that existed when they left. The analysis focus is on what the person and their employer did or didn't do.

[24] To decide whether the Commission exercised its section 52 power judicially, the General Division had to apply the test set out by the courts.[14] To act judicially, a decision-maker must not: (a) act in bad faith; (b) act for an improper purpose or motive; (c) take into account an irrelevant factor; (d) ignore a relevant factor; or (e) act in a discriminatory way. This issue focuses on what the Commission did or didn't do.

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[10] See *R v Mian*, 2014 SCC 54 at paragraphs 30 to 35. The Social Security Tribunal has applied the *Mian* decision in several cases, including *Minister of Employment and Social Development v JE*, 2022 SST 1565 at paragraphs 31 to 37; *RC v Minister of Employment and Social Development*, 2021 SST 539 at paragraphs 31 to 35; and *RP v Minister of Employment and Social Development*, 2022 SST 1443 at paragraphs 59 to 63.

[11] See *R v Mian*, 2014 SCC 54 at paragraphs 41 to 52. A decision-maker can raise a new issue in an appeal where: failing to raise the new issue would risk a significant injustice; the decision-maker has jurisdiction to consider the new issue; there is enough information on the record to raise and consider the issue; **and** raising the issue wouldn't result in procedural prejudice to any party.

[12] See *R v Mian*, 2014 SCC 54 at paragraphs 35, 52, and 57.

[13] See note 9. The Claimant's evidence and arguments focus on justifying his decision not to return to the restaurant job, and why he should be entitled to EI benefits despite the fact he left that job. In its representations (at page GD4-1), the Commission says the issue under appeal is "an indefinite disqualification imposed pursuant to sections 29 and 30 of the Act because he voluntarily left his employment without just cause." The Commission's position is based on sections 29 and 30 of the EI Act. The Commission does not include section 52.

[14] See, for example, *Canada (Attorney General)* v *Purcell*, 1995 CanLII 3558 (FCA).

[25] The section 52 reconsideration issue is legally distinct and based on different facts than the voluntary leaving issue. And it doesn't stem from the voluntary leaving issue.

[26] So the section 52 issue the General Division raised was a new issue.

– **The General Division didn't notify the Commission of the new issue, which led to an unfair process**

[27] In *Mian* the Supreme Court pointed out that it will often be possible for a decision-maker to adjusting the process to ensure it is fair.[15] Adjusting the process might include granting an adjournment in the hearing or providing an opportunity for parties to file written submissions.

[28] The *Social Security Tribunal Rules of Procedure* (Rules) include these types of process fairness safeguards. The Rules allow Tribunal members to decide what issues need to be addressed, hold conferences with the parties, grant adjournments, and give the parties an opportunity to file evidence and submissions before or after a hearing. The Tribunal has to use the Rules so that the appeal process is as simple and quick **as fairness allows**.[16]

[29] In this case, the General Division didn't do that. It didn't notify the Commission and the Claimant about the section 52 reconsideration issue. So the parties didn't have an opportunity to file evidence and make submissions. This was especially unfair to the Commission. The General Division decided the Commission hadn't used its reconsideration power judicially. Then decided the Commission should never have reconsidered the Claimant's claim and allowed the Claimant's appeal without deciding the voluntary leaving issue.

[30] So the General Division breached the Commission's right to a fair process.

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[15] See *R v Mian*, 2014 SCC 54 at paragraph 52.
[16] See section 6(a) and 8(1) of the *Social Security Tribunal Rules of Procedure* (Rules)..

Fixing the error (the remedy)

[31] Because the General Division didn't follow a fair process, I have the power to fix that error.[17] The Appeal Division usually fixes errors one of two ways: (1) I can send the case back to the General Division for reconsideration; or (2) I can give the decision the General Division should have given.

[32] The Commission says I should make the decision the General Division should have made—on both the section 52 reconsideration issue and the voluntary leaving issue.[18] But it says if I find the record is incomplete, I should send the case back to the General Division to reconsider.

[33] The Claimant said I should send the case back to the General Division to reconsider, although he also said that no information was missing from the record. He says he is more comfortable participating at the General Division because it focuses on evidence and "telling his story," rather than the Appeal Division that focus on errors and legal argument.

[34] The General Division's error meant the parties weren't given the chance to file evidence and make submissions about the section 52 reconsideration issue. This means the record is incomplete and I cannot make the decision that the General Division should have made.

[35] The General Division decision made the Claimant aware of the section 52 reconsideration issue. At the Appeal Division, he tried to file new evidence and make submissions about that issue.[19] But I can't accept new evidence. Appeal Division

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[17] Section 59(1) of the DESD Act gives this power to the Tribunal's Appeal Division.
[18] The Commission made these arguments about the remedy at pages AD5-7 and AD5-8 of its submissions and said the same thing at the hearing.
[19] The Claimant sent three documents to the Appeal Division that contain new evidence and argument on the section 52 reconsideration issue, and whether the Commission should have reconsidered his claim. See AD1B, AD6, and AD7.

hearings are reviews of General Division decisions based on **the same evidence** that was before the General Division, with rare exceptions that don't apply here.[20]

[36] I am also concerned that the Commission's evidence before the General Division doesn't properly support an informed analysis. According to the Commission's policy on reconsideration, "false or misleading statements" is one factor the Commission should consider when it uses its reconsideration power.[21] At the Appeal Division, the Commission says it considered this factor and the Claimant made false or misleading reports. The Claimant strongly disagrees. But his biweekly claim reports covering the period when he worked at the restaurant job, and when he stopped working there, weren't part of the evidence at the General Division. Ideally, they should be.

[37] So because the procedure followed by the General Division didn't allow the parties to file evidence and make submissions about the Section 52 reconsideration issue, I am sending the Claimant's case back to the General Division to reconsider.

[38] The General Division should give the parties an opportunity to file evidence and make submissions on the EI Act section 52 reconsideration issue.

Conclusion

[39] I am allowing the Commission's appeal. The General Division used an unfair process when it decided the Claimant's appeal.

[40] To fix the error I am sending this case back to the General Division to reconsider.

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[20] See *Gittens v Canada (Attorney General)*, 2019 FCA 256; and *Canada (Attorney General) v Sibbald*, 2022 FCA 157.

[21] See section 17.3.3 (Reconsideration Policy) in the *Digest of Benefits Entitlement Principles*. The Appeal Division recently decided that the factors set out in that policy are relevant to the Commission's use of its reconsideration power—in other words, whether the Commission used that power judicially. See the leading case, *MS v Canada Employment Insurance Commission*, 2022 SST 933 at paragraphs 36 to 50.

[41] The General Division should give the parties an opportunity to file evidence and make submissions on the EI Act section 52 reconsideration issue.

Glenn Betteridge
Member, Appeal Division