Citation: *JF v Canada Employment Insurance Commission*, 2024 SST 70

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	J. F.
Representative:	K. M.
Respondent:	Canada Employment Insurance Commission
Representative:	Gilles-Luc Bélanger

Decision under appeal:	General Division decision dated January 6, 2023 (GE-22-3015)

Tribunal member:	Elizabeth Usprich
Type of hearing:	Videoconference
Hearing date:	December 6, 2023
Hearing participants:	Appellant Appellant's representative Respondent's representative
Decision date:	January 24, 2024
File number:	AD-23-150

Decision

[1] The appeal is allowed.

[2] The case must go back to the General Division for reconsideration with directions.

Overview

[3] The Claimant, J. F., works part-time as a school bus driver. He applied for Employment Insurance (EI) benefits during a school break.

[4] The Canada Employment Insurance Commission (Commission) refused to pay the Claimant benefits. The Commission said the Claimant had to show he was available and actively searching for work without restrictions.[1]

[5] The Claimant appealed to the Social Security Tribunal (Tribunal). The General Division decided the Claimant wasn't looking for work and was just waiting for his employer to call him back to work.

[6] I have decided the General Division made an error of law by failing to explain how it applied the facts to the law in this case.[2]

[7] I have also decided the Claimant didn't receive a fair hearing. The General Division failed to make sure he was aware of the legal test and what was at issue. The General Division didn't consider that the Commission's disentitlement decision covered three separate school breaks.[3]

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[1] See the Commission's reconsideration decision dated April 4, 2022, at GD3-27.
[2] The legal test for availability is from *Faucher v Canada (Employment and Immigration Commission)*, A-56-96 and A-57-96. The General Division correctly identified this test but didn't apply it correctly.
[3] The school breaks in question are the original December 2021 winter break, March break 2022, and the summer break 2022.

[8] I have decided this case must be returned to the General Division for a new hearing. I am also adding some directions to make sure the process is fair for the parties.

Issues

[9] The issues in this appeal are as follows:

a) Did the General Division provide an unfair process by failing to explain all of the issues?

b) Did the General Division make an error of law by failing to provide adequate reasons?

c) If the General Division made an error, how should I fix the error?

Analysis

[10] I can intervene (step in) only if the General Division made an error. I can only consider certain errors. In this case, the errors are about whether the General Division:

- acted unfairly in some way
- didn't follow or misinterpreted the law

The General Division provided an unfair hearing because it failed to explain all of the issues

[11] The Claimant, a part-time school bus driver, originally applied for EI benefits for the December 2021 school winter break.[4]

[12] The Commission denied the Claimant EI benefits, and the Claimant appealed to the Tribunal.

[4] See the Claimant's application for benefits at GD3-6, where his last day worked is listed as December 17, 2021, and his expected date of return is January 3, 2022.

[13] There are many different requirements to get EI benefits. Here, the Claimant was denied benefits because the Commission decided he didn't meet the "availability" requirements.

[14] It isn't disputed that case law gives three things you have to show to prove you are "available" for work.[5] This includes showing you are capable of and actively looking for work. You must also show that you are available for every working day during the EI benefit period.[6]

[15] At the hearing, the General Division didn't explain the legal test. It didn't give the Claimant any information about what to include when he was giving his testimony. The Claimant wasn't told about the requirement to show availability for every working day. The Claimant wasn't told that the December 2021 disentitlement also prevented his receiving benefits from later breaks.[7]

[16] The General Division also didn't tell the Claimant that the disentitlement he had received in December had continued into the following March break and summer break. The Claimant didn't know all the issues/periods under consideration, so he could not provide evidence about them. Some breaks were shorter (for example, one week) and others longer (for example, 9 to 10 weeks), and the evidence relating to each was different. But neither the General Division nor the Claimant seemed to understand the issues/periods under consideration.

[17] So, the Claimant was denied the chance to fully present his case. It is a component of a fair hearing that a party understand what the issues are and have a chance to respond.[8]

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[5] See *Faucher v Canada (Employment and Immigration Commission)*, A-56-96 and A-57-96.

[6] See section 32 of the *Employment Insurance Regulations*, which says: "For the purposes of sections 18 and 152.19 of the Act, a working day is any day of the week except Saturday and Sunday." See also *Canada (Attorney General) v Cloutier*, 2005 FCA 73.

[7] The breaks in question are March break 2022 and the summer break 2022.

[8] See *Sae-Bin Im v BMO Investorline Inc*, 2017 ONSC 95.

[18] The Claimant raised the issue that he had always received EI benefits for all his school break periods.[9] Yet, the General Division didn't consider whether he went back to work after the December 2021 break. It also didn't consider what had happened with later school breaks.[10]

[19] The General Division only spoke about the December 2021 break period. Yet, by the time of the hearing, the Claimant had had three distinct interruptions in his employment.

[20] During the Appeal Division hearing, the Claimant stated he wasn't aware his benefit disentitlement continued for his additional two breaks. The Commission clarified that he continued to be disentitled for the two additional breaks because of the December 2021 break. During the General Division hearing, it was important for the Claimant to understand that all his work interruptions were being considered.

[21] This means the Claimant needed to be aware of the continuing EI disentitlement during the three different periods. That way he could have given evidence about any of his job search efforts during those different times.

[22] I find this means the Claimant didn't have a fair hearing, which is a denial of natural justice. A person should know what case they have to meet so all of their information can be presented.[11]

The General Division made an error of law by failing to provide adequate reasons

[23] The General Division's written decision identified the correct legal test for availability. But the General Division didn't analyze each part of the *Faucher* test and tie it back to the facts of this case. This means there weren't adequate reasons given.

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[9] See the General Division hearing recording at 0:10:48 and GD2-5.
[10] It is common knowledge that elementary and secondary schools typically break in the winter, in March, and for the summer.
[11] See *Sae-Bin Im v BMO Investorline Inc*, 2017 ONSC 95.

[24] The legal test for availability has three factors that must be considered.[12] According to *Faucher*, being available for work means:

- wanting to go back to work as soon as a suitable job is available
- showing that you want to go back to work by making efforts to find a suitable job
- not setting personal conditions that might unduly (overly) limit your chances of going back to work

[25] The General Division didn't analyze these factors.[13] Its decision doesn't make it clear what evidence was relied on and doesn't do a meaningful analysis. The facts of any case must be applied to a legal test. Here, there are only findings without an analysis as to how those findings were reached. This means there is a lack of adequate reasons.

[26] Because the General Division made errors, this means they need to be fixed.

[27] Since there have been two errors identified, I don't need to address other potential errors.

Remedy

[28] The Commission says that I can remedy (fix) the errors by sending the case back to the General Division or giving the decision the General Division should have given.

[29] The Claimant wants me to give the decision that the General Division should have given.

[30] As I noted above, the General Division didn't explain the legal test to the Claimant. The Claimant didn't understand that his disentitlement was ongoing through later breaks. This means he didn't have an opportunity to fully present his case.

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[12] See *Faucher v Canada (Employment and Immigration Commission)*, A-56-96 and A-57-96.
[13] See paragraph 13 of the General Division decision.

[31] It became clear during the Appeal Division hearing that the Claimant wasn't aware the denial of benefits was for all three school breaks. This means he has additional evidence to give about his job search efforts during those different periods. This would be new evidence.

[32] I find the only way to fix the error is to send the case back to the General Division.

[33] So, I am sending the case back to the General Division with some directions. The General Division should give both parties an opportunity to file information about all of the break periods.

Conclusion

[34] The appeal is allowed. The General Division made an error of law and failed to provide a fair process. This means the case needs to go back to the General Division for a new hearing.

[35] Before its hearing, the General Division should give both parties an opportunity to file information about all of the break periods.

Elizabeth Usprich
Member, Appeal Division