Citation: *SC v Canada Employment Insurance Commission*, 2024 SST 677

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	S. C.
Representative:	S. S.
Respondent:	Canada Employment Insurance Commission
Representative:	J. Duggan

Decision under appeal:	General Division decision dated December 6, 2023 (GE-23-2245)

Tribunal member:	Melanie Petrunia
Type of hearing:	Teleconference
Hearing date:	May 22, 2024
Hearing participants:	Appellant Appellant's representative Respondent's representative
Decision date:	June 18, 2024
File number:	AD-24-33

Decision

[1] The appeal is allowed. I am sending the matter back to the General Division for reconsideration.

Overview

[2] The Appellant, S. C. (Claimant) applied for and received regular employment insurance (EI) benefits while attending school. The Respondent, the Canada Employment Insurance Commission (Commission), decided that the Claimant was not entitled to benefits from March 8, 2021, to June 24, 2021, and from September 8, 2021, onward because he had not proven his availability for work.

[3] The Claimant appealed the Commission's decision to the Tribunal's General Division. The General Division dismissed the appeal. It found that the Claimant did not rebut the presumption that he was not available while attending a course of his own initiative. The Claimant is now appealing the General Division decision to the Appeal Division.

[4] 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

[5] The issues in this appeal are:

a) Did the General Division make an error of law by misapplying the legal test for availability?

b) How should the error be fixed?

Analysis

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

- 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

[7] The Claimant was laid off from his job at a restaurant in March 2021. He established a claim for EI benefits effective March 7, 2021.[2] From March 8, 2021, to June 24, 2021 and from September 8, 2021, the Claimant was attending high school. In May 2021, the Claimant returned to work at the restaurant where he was previously employed, and he reported these hours on his claim reports.[3]

[8] The Claimant completed online questionnaires on May 23 and September 13, 2021, answering questions about his studies and availability for work.[4] In October 2022, the Commission contacted the Claimant for more information about his studies.[5]

[9] On February 9, 2023, the Commission told the Claimant that it was not able to pay him EI benefits from March 8, 2021, to June 24, 2021, and from September 8, 2021, to the end of his claim because he had not proven his availability.[6] This created

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[1] 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).
[2] GD3-3 to GD3-14
[3] GD3-23 and GD3-24
[4] GD3-16 to GD3-21
[5] GD3-22
[6] GD3-39 to GD3-41

an overpayment for the Claimant. He appealed the Commission's decision to the General Division.

– The General Division decision

[10] In its decision, the General Division noted that there is a presumption in law that full-time students are not available for work within the meaning in the *Employment Insurance Act*. It correctly noted that this presumption can be rebutted if a claimant can show a history of working while attending school or demonstrate exceptional circumstances.[7] The General Division then set out the factors to be considered when determining whether a claimant has rebutted the presumption of unavailability.[8]

[11] The General Division also set out the three factors applicable to the test for availability.[9] Availability must be determined by analyzing the following:

> (1) the desire to return to the labour market as soon as a suitable job is offered,
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> (2) the expression of that desire through efforts to find a suitable job, and
>
> (3) not setting personal conditions that might unduly limit the chances of returning to the labour market.[10]

[12] In addition, availability is determined for each working day in a benefit period for which the claimant can prove that, on that day, they were capable of and available for work and unable to find a suitable job.[11]

[13] The General Division found that the Claimant was not available for work and that he did not make reasonable and customary efforts to obtain work. It also found that the Claimant set personal conditions that unduly limited his chances of returning to the labour market.

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[7] General Division decision at para 5.
[8] General Division decision at para 8.
[9] General Division decision at para 9.
[10] *Faucher v Canada Employment and Immigration Commission*, A-56-96
[11] *Canada (Attorney General) v Cloutier*, 2005 FCA 73

The General Division made errors of law

[14] In its decision, the General Division noted that the Claimant was disentitled under two different sections of the Act.[12] However, the decision does not include any analysis of the factors under sections 9.001 of the Regulations when deciding whether the Claimant's efforts to find suitable employment were reasonable and customary.

[15] The General Division also cited case law from the Federal Court of Appeal and stated that a claimant who restricts his availability to hours outside of his course schedule is not available for work.[13]

[16] A recent decision from the Federal Court Appeal calls into question the General Division's statement. In *Page v. Canada (Attorney General)*, the Court found that there was no such bright line rule.[14] It stated that a contextual analysis is required to determine whether the presumption of unavailability has been rebutted.[15] The General Division did not reference this decision.

[17] The General Division set out the factors to consider when determining whether an individual has rebutted the presumption of unavailability, but it did not include any analysis of these factors in its decision. The General Division found that the Claimant did not show a desire to return to the labour market as soon as a suitable job was available and that his focus was on completing his studies.[16] It does not refer to the fact that the Claimant did return to work for his previous employer during this time.

[18] I note that the General Division also did not consider whether the Commission exercised its discretion judicially when it decided to reconsider the Claimant's benefits. The Commission had referred to its legislative power to reconsider benefits in its submissions before the General Division, however the General Division did not address this issue in its decision.[17]

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[12] General Division decision at para 2.
[13] General Division decision at para 32.
[14] See *Page v. Canada (Attorney General),* 2023 FC 169 at para 55.
[15] See *Page* at para 69.
[16] General Division decision at paras 17, 25 and 26.
[17] GD4-5

[19] The General Division erred in law in its decision by misapplying the test for availability, and by not following binding case law from the Federal Court of Appeal concerning the presumption of unavailability for students.

Fixing the error

[20] 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.[18]

[21] The Commission says that, while the General Division made errors in its decision, these errors do not affect the outcome. It argues that I should make the decision that the General Division should have made and dismiss the appeal.[19]

[22] I have found that the General Division made errors of law. I have also listened to the hearing before the General Division. The Federal Court of Appeal has said that a contextual analysis is required to determine whether a claimant has successfully rebutted the presumption of unavailability. The Claimant was asked very few questions and was not asked about his history of working while attending school or the nature of the work he was searching for.

[23] Additionally, the Claimant was not asked about any efforts he may have made to find suitable employment as set out in section 9.001 of the Regulations. I am not satisfied that the Claimant knew the case that he had to meet or what evidence he should have provided that would be relevant to the issue that the General Division had to decide. Because of this, I find that the record is not complete.

[24] This is not an appropriate case for me to provide the decision that the General Division should have given. The Claimant has not had an opportunity to fully present his evidence concerning his availability. I am sending the matter back to the General Division for a new hearing.

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[18] Section 59(1) of the DESD Act explains the remedies available to the Appeal Division.
[19] AD3-7

Conclusion

[25] The appeal is allowed. The General Division erred in law. The matter is returned to the General Division for a new hearing.

Melanie Petrunia
Member, Appeal Division