Citation: *Canada Employment Insurance Commission v CB*, 2024 SST 681

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	Canada Employment Insurance Commission
Representative:	Nikkia Janssen
Respondent:	C. B.

Decision under appeal:	General Division decision dated March 20, 2024 (GE-23-1399)

Tribunal member:	Elizabeth Usprich
Type of hearing:	Videoconference
Hearing date:	June 5, 2024
Hearing participants:	Appellant's representative Respondent
Decision date:	June 19, 2024
File number:	AD-24-244

Decision

[1] The appeal is allowed. The General Division didn't do an analysis about whether the Claimant was capable for work and what a suitable job may have been.

[2] This means there was an error of law. The General Division failed to apply binding case law and consider all aspects of availability including capability and what a suitable job was.

[3] The matter will go back to the General Division for reconsideration.

Overview

[4] The Claimant, C. B., applied for Employment Insurance (EI) benefits in July 2019. She established a benefit period effective July 28, 2019.

[5] The Claimant had a few periods of unemployment during the benefit period. This means she had some work, and earnings, after the benefit period was established. The Claimant hadn't properly reported this to the Canada Employment Insurance Commission (Commission).

[6] Additionally, the Commission accepted the Claimant wasn't able to work for some of the time due to sickness. So, the Commission converted some of the Claimant's regular benefits into sickness benefits for the maximum time.[1]

[7] After the Claimant's sickness benefits were exhausted, the Commission decided the Claimant wasn't available for work because she wasn't capable.[2] The Claimant had already received EI benefit payments for the period the Commission said she wasn't

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[1] See GD4-6 where the Commission summarized the Claimant's sickness benefits period between February 2, 2020 and May 10, 2020.
[2] See GD3-144 where the Commission decided the Claimant wasn't available from May 17, 2021, because she wasn't capable. It is assumed this is a typographical error as most of the Commission's other documents refer to May 17, 2020. See, for example, GD3-157. Additionally, 2021 is outside of the benefit period.

available. This meant there was a benefit overpayment. These decisions were unchanged in the Commission's reconsideration.[3]

[8] The Claimant appealed to the Social Security Tribunal (Tribunal) General Division. The Claimant said that the overpayment wasn't properly calculated.[4] The Claimant said despite her doctor's note saying she was unable to work, she still looked for work anyway.[5]

[9] The General Division agreed with the Claimant on the issue of availability. It decided the Claimant was available for work. The Commission appealed this decision to the Appeal Division.

[10] Between May 17, 2020 and July 14, 2020, it was an issue whether the Claimant was capable and available for work. The Claimant's doctor said the Claimant was unable to work. Yet, the General Division found she was able. But it didn't explain why.

[11] The General Division made an error of law. It didn't do an analysis of whether the Claimant was capable, and therefore available, as required by law.[6] The General Division didn't ask probing questions about this issue.

[12] The Claimant also didn't receive a fair process. This means I must send the case back to the General Division for a new hearing.

Issues

[13] The issues in this appeal are:

a) Did the General Division make an error of law when it didn't do an analysis about whether the Claimant was capable of suitable employment from May 17, 2020 to July 14, 2020?

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[3] See GD3-158.
[4] See GD2-9.
[5] See GD2-11.
[6] See section 18(1)(a) of the *Employment Insurance Act* (EI Act) and section 9.002(1)(a) of the *Employment Insurance Regulations* (Regulations).

b) Did the General Division provide the Claimant with a fair process?

c) If so, how should the error be fixed?

Analysis

[14] I can intervene (step in) only if the General Division made a relevant error. There are only certain errors I can consider.[7] Briefly, I can intervene if the General Division made at least one of the following errors:

- It acted unfairly in some way.
- It decided an issue it should not have, or didn't decide an issue it should have.
- It didn't follow established case law.
- It based its decision on an important error about the facts of the case.

[15] In this case, the Commission argues the General Division made an error of law because it didn't make findings about if the Claimant was capable of, and what was, suitable employment.

The General Division made an error of law when it didn't do an analysis about whether the Claimant was capable of suitable employment from May 17, 2020 to July 14, 2020

[16] The General Division correctly identified the legal test for availability in its decision.[8] But it didn't do an analysis about whether the Claimant was capable for suitable employment.

[7] Section 58(1) of the *Department of Employment and Social Development Act* (DESD Act) sets out the grounds of appeal.
[8] See the General Division decision at paragraphs 17 to 19.

[17] The law says, in order to be paid benefits, a claimant must be "capable and available for work and unable to obtain suitable employment".[9] So, this means a claimant must be available, but also capable of working.

[18] At issue in this case is whether the Claimant was capable of working during the period of May 17, 2020 to July 14, 2020. The Claimant's doctor said the Claimant was unable to work between February 1, 2020 and July 14, 2020.[10]

[19] The Commission decided the Claimant wasn't capable of work during this time. So, it meant she was not available and therefore not entitled to EI benefits.

[20] The General Division analyzed whether the Claimant was available based on the legal test in *Faucher*.[11] The legal test for availability has three factors that must be considered. 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

[21] The General Division didn't make any findings about what a suitable job for the Claimant would be. Nor did it make any findings about what type of work, if any, the Claimant would have been capable of given her doctor's note stating she was unable to work.

[22] The General Division should have analyzed what a suitable job was because the Claimant's capability was in question.[12] The General Division didn't alert the Claimant to

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[9] See section 18(1)(a) of the *Employment Insurance Act*.
[10] See GD3-139.
[11] See *Faucher v Canada (Employment and Immigration Commission)*, A-56-96 and A-57-96.
[12] See section 9.002 of the *Employment Insurance Regulations*.

this issue during the hearing. It didn't ask probing questions about her doctor's note and her statement that she was still looking for work.

[23] Because the General Division didn't analyze this there is an error of law. The General Division failed to apply binding case law and consider all aspects of availability including capability and what a suitable job was.

The General Division didn't provide the Claimant with a fair process

[24] The Claimant told the General Division that she hadn't looked at all of the documents sent to her.[13] The General Division didn't offer to stand the matter down, didn't explain the Commission's arguments to the Claimant or inquire about whether the Claimant needed some time to prepare. I find this means the Claimant may not have fully understood all of the issues that were before the General Division.

[25] For this reason, I find that the Claimant wasn't provided with a fair process.

Remedy

[26] I have found errors. So, there are two main ways I can remedy (fix) it. I can make the decision the General Division should have made. I can also send the case back to the General Division if I don't feel the hearing was fair, or if the hearing record wasn't complete.[14]

[27] I have found the hearing record may not be complete. I have also found the General Division didn't provide the Claimant with a fair process.

[28] As I noted above, the General Division didn't ask probing questions about the Claimant's position that she was capable of working despite a medical note saying she was unable. This means the Claimant may not have had a full opportunity to present her case.

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[13] Listen to the General Division hearing recording at 00:07:44.
[14] Section 59(1) of the DESD Act allows me to fix the General Division's errors in this way.

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

Conclusion

[30] The appeal is allowed. The General Division made an error of law and failed to provide a fair process.

[31] This means the case must go back to the General Division for a new hearing.

Elizabeth Usprich
Member, Appeal Division