Citation: *BU v Canada Employment Insurance Commission*, 2024 SST 828

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	B. U.
Representative:	
Respondent:	Canada Employment Insurance Commission
Representative:	Lora MacKay

Decision under appeal:	General Division decision dated April 22, 2024 (GE-24-980)

Tribunal member:	Stephen Bergen
Type of hearing:	In Writing
Decision date:	July 16, 2024
File number:	AD-24-355

Decision

[1] I am allowing the appeal. The General Division made an error of law and an important error of fact. I am returning the matter to the General Division for reconsideration.

Overview

[2] B. U. is the Appellant. I will call him the Claimant because he made a claim for Employment Insurance (EI) benefits. The Respondent, the Canada Employment Insurance Commission (Commission), found that the Claimant did not have sufficient hours of insurable employment to qualify for benefits.

[3] This is because it found that the Claimant voluntarily left an employment without just cause, which meant that it could not count the hours that he had accumulated prior to leaving that employment. The Commission decided that he did not have enough hours once it had excluded the hours from before he left his job.

[4] The question of whether the Claimant had just cause for voluntarily leaving his employment is not the issue in this appeal. The only issue is whether he had sufficient hours of insurable employment to qualify for benefits. The Claimant appealed this to the General Division of the Social Security Tribunal (Tribunal).

[5] The General Division held an “in-writing” hearing process and decided that it did not have jurisdiction to consider the appeal because the Claimant had never asked the Commission to reconsider its decision. The Claimant is now appealing to the Appeal Division.

[6] I am allowing the appeal and returning the matter to the General Division for reconsideration. The General Division made an error of law by not offering the Claimant the method of hearing he requested. It also made an important error of fact when it found that he had not asked the Commission to reconsider.

Issues

[7] Did the General Division make an error of law by not giving the Claimant his preferred method of hearing?

[8] Did the General Division make an important error of fact by finding that the Claimant had not requested a reconsideration of the issue in this appeal.

Analysis

General Appeal principles

[9] The Appeal Division may only consider errors that fall within one of the following grounds of appeal:

a) The General Division hearing process was not fair in some way.
b) The General Division did not decide an issue that it should have decided. Or, it decided something it did not have the power to decide (error of jurisdiction).
c) The General Division made an error of law when making its decision.
d) The General Division based its decision on an important error of fact.[1]

Error of law

[10] The General Division made an error of law.

[11] The Claimant asked for a General Division hearing by teleconference or videoconference. Before the hearing, the General Division scheduled a case conference by teleconference. The Claimant responded to the Notice of Case Conference by asking to participate in writing.

[12] When the Claimant did not provide a written response to the case conference summary, the General Division changed the method of hearing to "in writing," and proceeded with the appeal.

[1] This is a plain-language version of the three grounds. The full text is in section 58(1) of the *Department of Employment and Social Development Act* (DESDA).

[13] Section 2(1) of the *Social Security Tribunal Regulations (2022)* states that the Tribunal must hold an appeal hearing in the format requested by the appellant. The only exceptions to this requirement are where the Tribunal determines that the appellant's choice of hearing method

- would not allow for a full and fair hearing;
- would raise security or health concerns that cannot be mitigated to the Tribunal's satisfaction; or
- would be impractical in extraordinary circumstances such as fire, flood, epidemic, natural disaster, political turmoil, act of terrorism or major accident.[2]

[14] There is no indication that the General Division made such a determination. It appears to have presumed that the Claimant's choice to participate in the case conference in-writing was also a choice to have his hearing in-writing.

[15] The Commission concedes that the General Division should have given the Claimant the method of hearing he requested.

[16] I find that the General Division made an error of law by proceeding without justification to hold the hearing in a format that was different from the format that the Claimant had requested. At a minimum, the General Division should have confirmed that the Claimant intended to change his choice of hearing to in-writing before proceeding.

Error of fact

[17] The Commission also acknowledged that the General Division made an error of fact. It conceded that the General Division had not considered all the evidence.

[2] See section 2(3) of the *Social Security Tribunal Regulations (2022).*

[18] The General Division found that the appeal was premature because it had not yet reconsidered its decision that the Claimant did not qualify. It said that there was no evidence that the Claimant had requested a reconsideration of whether he had sufficient hours to qualify.

[19] However, that is not correct. There was evidence that the Claimant requested a reconsideration of the Commission's decision on this issue. The Claimant provided the General Division with a copy of his request for reconsideration of the December 4, 2023, decision. The Commission acknowledged receipt of the same reconsideration request. The December 4, 2023, decision letter that the Claimant asked the Commission to reconsider actually included two decisions. It included the decision that the Claimant voluntarily left his employment without just cause, but it also included a decision that he did not qualify because he had insufficient hours of insurable employment.

[20] As the Appeal Division has previously noted:

> The Tribunal takes a broad approach to its jurisdiction, within the limits of the law, to manage appeals fairly and efficiently. Reconsideration decisions are not always detailed, and it is sometimes necessary to look at the underlying requests and decisions to determine the scope of the reconsideration decision.[3]

[21] The General Division made an error of fact because it did not consider the evidence that the Claimant did request a reconsideration of the decision **which included the issue of whether he had sufficient hours to qualify**. It should have considered that the Commission's denial of a reconsideration was a response to this request.

[22] This evidence would have helped the General Division interpret the scope of the Commission's reconsideration decision, and decide whether the Commission's reconsideration decision should be understood to be a reconsideration of both issues. It

[3] MS v Canada Employment Insurance Commission, 2022 SST 933; followed in LS v Canada Employment Insurance Commission - 2023 SST 1776.

was relevant to whether the General Division had jurisdiction under section 112 of the *Employment Insurance Act.*

Other possible errors

– **Jurisdiction: Voluntary leaving without just cause**

[23] The Claimant has made arguments based on his disagreement with the Commission's decision that he voluntarily left his employment without just cause.

[24] That issue was not before the General Division and is not before me. The Appeal Division refused the Claimant leave to appeal on that issue, in a different decision from a separate application. I have no authority to consider whether the Appeal Division was correct to refuse leave.

[25] The Claimant's only legal recourse was to seek judicial review to the Federal Court, which he has done. I understand that he has discontinued that application.

– **Procedural fairness: Allegations of bias**

[26] The Claimant's allegations of bias appear to relate to the General Division member that heard the Claimant's appeal of his voluntary leaving decision. He also disagrees with how the Appeal Division member conducted its review of the General Division decision.[4]

[27] Again, none of these issues were before the General Division in the decision from which the Claimant has brought this application. These issues are not before me either.

[28] I have no authority to consider whether a different member in a different appeal was biased towards the Claimant. I can only review the conduct of the member in GE-24-980.

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[4] See AD3(A.

Remedy

[29] I must decide what I will do to correct the General Division's error. I can make the decision that the General Division should have made, or I can send the matter back to the General Division for reconsideration.[5]

[30] The Commission's position is that I should return the matter to the General Division to have it reconsider the decision, with a direction that it ask the Commission to complete the reconsideration.

[31] I agree with the Commission that I should return this to the General Division to reconsider.

[32] Since I have found an error which concerns the Claimant's preferred method of hearing, I cannot remedy the error by making the decision the General Division should have made. I cannot presume the result of such a hearing if it were to be held according to the Claimant's preference. It is at least possible that the Claimant is better able to explain what happened with his reconsideration request when he can mount the appeal in his preferred format. Having heard his arguments in person, the General Division may have taken jurisdiction, better understood his evidence and arguments, and reached a decision on the merits of the appeal.

[33] I am returning the matter to the General Division for reconsideration. If the General Division determines that the Commission has not yet reconsidered its decision on whether the Claimant had sufficient hours to qualify, it may request the Commission to complete the reconsideration before it decides the matter.

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[5] See section 59(1) of the *Department of Employment and Social Development Act*.

Conclusion

[34] I am allowing the appeal.

[35] The General Division made an error of law by not giving the Claimant the method of hearing he selected. It made an error of fact by not considering that the Claimant asked the Commission to reconsider its decision that he did not qualify based on his accumulated insurable hours.

[36] I am returning the matter to the General Division for reconsideration.

Stephen Bergen
Member, Appeal Division