Social Security Tribunal of Canada | Tribunal de la sécurité sociale du Canada

[TRANSLATION]

Citation: *JP v Canada Employment Insurance Commission*, 2021 SST 109

Tribunal File Number: GE-20-2367

BETWEEN:

J. P.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Employment Insurance Section

DECISION BY: Charline Bourque

HEARD ON: February 23, 2021

DATE OF DECISION: March 3, 2021

DECISION

[1] The appeal is allowed. I am of the view that the Commission did not exercise its discretion judicially and that it should not have reconsidered the Appellant's claims for benefits. As a result, the associated overpayments are written off.

OVERVIEW

[2] The Appellant is a teaching assistant. He corrects mid-term and end-of-term university exams. He explains that his work is usually performed over a period of up to three weeks for each of those periods. He says he therefore reported the earnings from his employer when he was performing his correction work.

[3] Nevertheless, the Commission determined that the Appellant had made false and misleading statements and that the earnings from his employer had not been correctly allocated to the right periods. Therefore, the Commission reconsidered the claims for benefits and corrected the allocation of earnings for the claims for benefits effective April 19, 2015, and November 5, 2019, that is, within 72 and 36 months respectively, which created an overpayment.

[4] The Appellant disagrees with the reconsideration of his claims for benefits and the allocation of earnings. On this point, the representative says he agrees with the method of allocation the Commission said it applied—that is, an allocation to the weeks when the Appellant performed his work—but that it did not actually apply it.[1]

[5] Therefore, I must turn my analysis to the Commission's authority to reconsider, namely whether the Commission exercised its discretion judicially when it reconsidered each of the Appellant's claims for benefits. Furthermore, the Appellant says he made his reports the way the Commission told him to and that, as a result, his earnings were reported and allocated to the time when he performed his correction work.

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[1] See the representative's arguments at footnote no 12 (GE-20-2368/GD7-212).

PRELIMINARY MATTERS

[6] I joined the appeals (files GE-20-2367 and GE-20-2368) in accordance with section 13 of the *Social Security Tribunal Regulations* (Regulations) because the appeals raise common questions of law or fact and because joining the appeals will not cause any injustice to the parties. Furthermore, I find that joining the appeals will speed up and simplify the Appellant's appeal process.

ISSUES

[7] Did the Commission have the authority to retroactively review the Appellant's files, in accordance with section 52 of the *Employment Insurance Act* (Act)?

[8] If so, from what date and until when can it act retroactively?

[9] Were the earnings allocated correctly under the Regulations?

ANALYSIS

Issue 1: Did the Commission have the authority to retroactively review the Appellant's files, in accordance with section 52 of the Act?

[10] The Appellant is a teaching assistant. More specifically, he says that his work consists of correcting mid-term (intra) and end-of-term (final) exams. Therefore, his work is concentrated over approximately one- to three-week periods at mid-term and end of term.

[11] Therefore, the Appellant says he reported his hours of work and associated earnings at the time when he performed his correction work—that is, at mid-term and end of term, as the Commission told him to.

Decision on April 19, 2015, Claim for Benefits

[12] Nevertheless, on January 30, 2020, the Commission found that the Appellant had made false or misleading statements, which meant that it had 72 months to reconsider the Appellant's claim for benefits effective April 19, 2015. Therefore, the Commission made a decision indicating that the Appellant had not reported a portion of his earnings from his employer for the

period from April 19, 2015, to May 4, 2015; from October 18, 2015, to December 5, 2015; and from April 3, 2016, to May 14, 2016.[2]

[13] In its arguments, the Commission says that [translation] "[t]his allocation created an overpayment of $433 (GD3-58). A table explaining the overpayment is attached to the reconsideration file (GD3-59)."[3] This table indicates an overpayment of $232.[4] In addition, a table sent by the Commission to the representative shows an overpayment of $235.[5]

Decision on November 5, 2017, Claim for Benefits

[14] On January 30, 2020, the Commission also reconsidered the Appellant's claim for benefits effective November 5, 2017, that is, within 36 months. It made a decision indicating that the Appellant had reported only a portion of his earnings from his employer for the period from November 5, 2017, to March 23, 2018.[6]

[15] In its arguments, the Commission says that [translation] "[t]his allocation created an overpayment of $6,344 (GD3-43 to GD3-44). A table explaining the overpayment is attached to the reconsideration file (GD3-45).[7] This table shows an overpayment of $3,829.[8] In addition, a table sent by the Commission to the representative confirms an overpayment of $3,829.[9]

Commission's Discretion to Reconsider

[16] The representative submits that the decision-making process of section 52 of the Act was not followed in these files. He submits that the facts in the files could not allow the Commission to make decisions retroactively, let alone to act retroactively beyond 36 months. The Appellant says he reported his earnings as the Commission had told him to—that is, to the weeks when he performed his work and when it was payable under the Act.

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[2] See the Commission's decision for this period (GE-20-2367/GD3-56/57).
[3] See the Commission arguments (GE-2367/GD4-4).
[4] See the Commission's explanation of the overpayment (GE-20-2367/GD3-59).
[5] Commission's table emailed to the representative (GE-20-2367/GD3-79).
[6] See the Commission's decision for this period (GE-20-2368/GD3-41/42).
[7] See the Commission's arguments (GE-20-2368/GD4-3).
[8] See the Commission's explanation of the overpayment (GE-20-2368/GD3-45).
[9] Commission's table emailed to the representative (GE-20-2368/GD3-67).

[17] Generally speaking, section 52 of the Act gives the Commission the authority to reconsider any claim for benefits within 36 months after the benefits have been paid or would have been payable. Furthermore, if the Commission finds that a false or misleading statement or representation has been made in connection with a claim, it has 72 months within which to reconsider the claim.[10]

[18] Case law says that, to reconsider a claim within 72 months, the Commission does not have the burden of proving "that the claimant knowingly made false statements." The legislation requires only that "in the opinion of the Commission, a false or misleading statement … has been made." To reach this conclusion, the Commission must be satisfied that an appellant has made a false or misleading statement or representation in connection with a claim. Therefore, the mere existence of a false or misleading statement is enough to trigger the application of this section without the need to find intention in the person making the statement.[11]

[19] In short, the Commission can reconsider a claim for benefits within 36 months, but it must find that a false or misleading statement has been made to be able to extend the reconsideration period to 72 months.

[20] I note that there is case law on reconsideration for a period up to 72 months. However, there is limited case law on reconsideration within the 36-month period. As a result, I completed a more detailed analysis of the application of section 52 of the Act.

[21] I am of the view that the Commission's authority to reconsider, based on section 52 of the Act, is discretionary, regardless of whether it is used within the 36- or 72-month period.

[22] In reaching this conclusion, I rely on the fact that Parliament chose to use the term "may" when drafting the Act: "[...] the Commission may reconsider a claim for benefits within 36 months after the benefits have been paid or would have been payable."

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[10] See section 52 of the Act.
[11] See *Canada (Attorney General) v Dussault*, 2003 FCA 372.

[23] I take the Federal Court of Appeal's reasoning in *Gill* into account. Even though that decision dealt with a completely different subject,[12] I am of the view that the reasoning on the question of the Commission's discretion is relevant, particularly when the term "may" is used by Parliament.[13] Unlike the term "must," "may" indicates that reconsidering a claim for benefits is at the Commission's discretion. More specifically, since the reconsideration is not mandatory or automatic based on the wording of the provision, it is up to the Commission to decide whether to apply it. Therefore, the authority to retroactively reconsider a claim has all the characteristics of discretion. If Parliament had intended otherwise, it would have made the language of its statute more explicit in this regard.

[24] Furthermore, as noted by the representative, the Commission's authority to reconsider does not impose a duty on the Commission to carry out the reconsideration retroactively. The reconsideration process must be done in four operations, within the established timeframes. The representative referenced the Digest of Benefit Entitlement Principles.

[25] In this guide, the Commission indicates in Chapter 17 that it can act retroactively under section 52 of the Act. It adds that it has sole authority, but no obligation, to reconsider a claim retroactively.[14] It explicitly adds that this is a discretionary authority that involves four distinct operations that must be completed within the 36 or 72 months.

[26] I am therefore of the view that, since the Commission's authority to reconsider is discretionary, I cannot interfere with the Commission's decision unless I find that it did not exercise its discretion judicially, meaning in good faith, having regard to all the relevant factors, and ignoring any irrelevant factors.[15]

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[12] *Gill* deals with the provisions surrounding the imposition of a notice of violation following the imposition of a penalty.
[13] See *Gill v Canada (Attorney General)*, 2010 FCA 182.
[14] See Introduction to Chapter 17 of the Digest of Benefit Entitlement Principles (GE-2367/GD7-94 to GD7-102).
[15] See *Chartier v Canada (Employment and Immigration Commission)*, 1990 FCA A-42-90; *Canada (Attorney General) v Uppal*, 2008 FCA 388.

The Use of Guidelines

[27] The Federal Court of Appeal has recognized that it is helpful for the Commission to have guidelines governing the exercise of its discretion. Although the Court ruled on the issue of penalties, I am of the view that the reasoning can be helpful for issues related to the Commission's discretion. The Federal Court of Appeal has reiterated many times that the Commission was justified in having its own guidelines to guarantee some consistency nationally and avoid arbitrary decisions.[16] These guidelines are found in the Digest of Benefit Entitlement Principles. I note that I am not bound by this document that does not carry the force of law. Nevertheless, I am of the view that this is an important tool that the Commission can use in making Employment Insurance decisions. Therefore, I find that these guidelines reduce the risk of an arbitrary decision and that the Commission should explain its decision if it chooses not to follow its own guidelines.

[28] The Commission submits that it can reconsider any claim within 72 months if it finds that a false or misleading statement has been made in connection with a claim for benefits under section 52(1) of the Act. The Commission is of the view that the Claimant made false statements by failing to report a portion of his earnings from his employer for the period in question.

[29] The Commission also submits that it can reconsider any claim within 36 months after the benefits have been paid or would have been payable under section 52(1) of the Act. The Commission made a decision on January 30, 2020, after reconsidering the weeks included in the period from April 19, 2015, to May 8, 2016; and from November 5, 2017, to June 24, 2018.[17]

[30] The Appellant disagrees with that position. He submits that he reported his earnings based on when the Commission told him to—that is, in the weeks when he performed his work and when it was payable under the Act. The representative submits that the Commission cannot make a retroactive decision in accordance with its own reconsideration policy. He adds that the Commission alleges that the Appellant failed to properly report his earnings, arguing that the information provided by the employer corresponds to earnings allocated to the weeks when he

[16] See *Canada (Attorney General) v Hudon*, 2004 FCA 22; *Canada (Attorney General) v Gagnon*, 2004 FCA 351.
[17] See the Commission arguments (GE-20-2367/GD4-6 and GE-20-2368/GD4-5).

performed his work and not based on contract allocation. The representative submits that the Commission did not exercise its discretion with regard to the decision to reconsider the file given that the Appellant's statements are consistent with the Commission's position on the allocation of his earnings. Furthermore, he adds that the Commission did not properly complete the third operation—that is, the calculation of the overpayment.

I note that the Commission provided little information about why it reconsidered the Appellant's claims for benefits. The Commission indicated only that the Appellant had failed to report a portion of his earnings from his employer. The Commission also did not indicate whether it considered extenuating circumstances in making its decision.

Incomplete Reconsideration Process

[31] Generally speaking, section 52 of the Act gives the Commission the authority to reconsider any claim for benefits within 36 months after the benefits have been paid or would have been payable. In addition, if the Commission finds that a false or misleading statement or representation has been made in connection with a claim, it has 72 months within which to reconsider the claim.[18]

[32] In the Digest of Benefit Entitlement Principles, the Commission indicates that the reconsideration process consists of four operations that must be completed within the 36- or 72-month timeframes set out in the Act. These four operations are:

- decide whether or not to exercise its discretion to reconsider (i.e. the information presented warrants reconsideration; reconsideration will result in an overpayment or underpayment; there is enough time to complete the work)
- make the new decision
- calculate the amount to be recovered or to be paid, and
- notify the claimant of the decision[19]

[18] See section 52 of the Act.
[19] See section 17.3.0 of the Digest of Benefit Entitlement Principles.

[33] I find that discretion was applied arbitrarily because the Commission's reconsideration process was not followed. As a result, I have the power to intervene. I am of the view that the Commission not only has to calculate an overpayment, but it must also inform claimants of it. However, in this case, I am of the view that the Commission did not properly inform the Appellant of his overpayment and, as a result, it did not carry out the third operation of its reconsideration process.

[34] I am of the view that it is not for the Commission to say that the Appellant has an overpayment. It must inform him of the amount of the overpayment. However, after reviewing the file, I cannot find that the Appellant was informed of the amount of the overpayment he is being asked to repay. The Commission gives contradictory information, and I therefore cannot find that the Appellant was informed of the overpayment amount he is being asked to repay. The Commission offers no explanation for the differences, and it is difficult to know which calculations are correct when the Commission should have revised its decision and sent arguments in this regard to the Tribunal.

[35] I note that, for the April 19, 2015, claim, the Commission says that the overpayment is the following:

- $433 according to the attestation certificate – notice of debt notification[20]
- $232 according to the [translation] "explanation of overpayment" table[21]
- $235 according to a table sent by the Commission to the representative[22]
- $433 according to arguments presented to the Tribunal.[23] In the same paragraph, the Commission refers to the table explaining the overpayment, which indicates an overpayment of $232.[24]

[20] See the attestation certificate – notice of debt notification (GE-20-2367/GD3-58).
[21] See Commission's explanation of the overpayment (GE-20-2367/GD3-59).
[22] Commission's table emailed to the representative (GE-20-2367/GD3-79).
[23] See the Commission's arguments (GE-20-2367/GD4-4).
[24] See Commission's explanation of the overpayment (GE-20-2367/GD3-59).

- $433 according to the notice of debt[25]

[36] For the November 5, 2017, claim, the Commission says that the overpayment is the following:

- $6,344 ($3,086+$3,258) according to the attestation certificate – notice of debt notification[26]
- $3,829 according to the [translation] "explanation of overpayment" table[27]
- $3,829 according a table sent by the Commission to the representative[28]
- $6,344 according to the arguments presented to the Tribunal.[29] In the same paragraph, the Commission refers to the table explaining the overpayment, which indicates an overpayment of $3,829.[30]
- $3,258 according to the February 22, 2020, notice of debt[31]
- The account statement indicates a repayment amount of $6,777.[32] I am of the view that this amount corresponds to the amount of $6,334 and $433. The Appellant also says that he never repaid $1,525 as shown in this statement.

[37] I note that I cannot conclude what amount the Appellant is being asked to repay The Commission provided tables to the representative without explaining the different calculations or even what earnings it allocated to what period and why it did it that way.

[38] Furthermore, the overpayment amount shown in these tables differs between the time when the Commission made the initial decision and the time when it made the reconsideration decision. However, no document presents different earnings between these two periods. The only

[25] See notice of debt (GE-20-2367/GD7-6).
[26] See attestation certificate – notice of debt notification (GE-20-2368/GD3-44).
[27] See Commission's explanation of the overpayment (GE-20-2368/GD3-45).
[28] Commission's table emailed to the representative (GE-20-2368/GD3-67).
[29] See the Commission's arguments (GE-20-2368/GD4-3).
[30] See Commission's explanation of the overpayment (GE-20-2368/GD3-45).
[31] See notice of debt (GE-20-2367/GD7-8).
[32] See statement of account (GE-20-2367/GD7-4).

documents submitted for the reconsideration request were the challenge to the decisions and a request from the representative to clarify the overpayment. No explanation of the different calculations was given.

[39] Finally, in its arguments, the Commission uses different amounts than those given to the representative. In the same paragraph, the Commission even makes reference to an overpayment amount owing but refers to its calculation tables, which give a different amount.[33]

[40] I cannot rely on the tables given to the representative based solely on the fact that they correspond to the Commission's latest calculations. Without additional explanations, and considering that the Commission's arguments, written after these same calculations, reach different conclusions, I find it hard to conclude what amount the Appellant is being asked to repay.

[41] It is true that the Commission could redo its calculations and provide explanations for the differences. Nevertheless, I am of the view that it had the opportunity to provide explanations, especially since the differences are not by just a few dollars nor based on obvious calculation errors.

[42] I refer to a similar decision from this Tribunal's Appeal Division, which deals with a situation in which the Commission still had not done its overpayment calculations even though it had the required documents:

> Allowing the Commission to repeatedly redo its overpayment calculations would contravene the requirements of section 52 of the EI Act, which sets out that the operations mentioned in that section must be completed within a strict time frame.
>
> Since the Commission failed to notify the Claimant of the amount erroneously paid within the specified 72-month period—which it easily could have done—the Tribunal finds that the reconsideration the Commission engaged in was completed improperly and illegally.[34]

[33] See the Commission's arguments (GE-20-2367/GD4-4; GE-20-2368/GD4-3).
[34] See *LG v Canada Employment Insurance Commission*, 2019 SST 1283.

[43] I am therefore of the view that the Commission did not exercise its discretion judicially. The Commission did not follow its own policy and failed to inform the Appellant of the overpayment amount he is being asked to repay.

Reconsideration Policy not Followed

[44] I refer again to the Digest of Benefit Entitlement Principles in which the Commission determined, in its reconsideration policy, that a claim will only be reconsidered in the following situations:

- benefits have been underpaid
- benefits were paid contrary to the structure of the EIA
- benefits were paid as a result of a false or misleading statement
- the claimant ought to have known there was no entitlement to the benefits received[35]

[45] Based on the first criterion, the allocation of earnings created an overpayment, even though the amount of it remains unclear. Therefore, the first situation set out in the reconsideration policy does not apply.

[46] Regarding the structure of the Act, section 17.3.3.2 clearly states that the allocation of earnings is not part of the structure of the Act.

[47] The third criterion for which the Commission will reconsider earlier decisions concerns the payment of benefits as a result of a false or misleading statement. In this case, the Commission submits that the Appellant made false statements when he reported his earnings from his employer.

[48] The Appellant disagrees with that position. He submits that he reported his earnings based on when the Commission told him to—that is, in the weeks when he performed his work

[35] See section 17.3.3 of the Digest of Benefit Entitlement Principles.

and when it was payable under the Act. The representative submits that the Commission cannot make a retroactive decision in accordance with its own reconsideration policy. He adds that the Commission alleges that the Appellant failed to properly report his earnings, arguing that the information provided by the employer corresponds to earnings allocated to the weeks when he preformed his work and not based on contract allocation. The representative submits that the Commission did not exercise its discretion with regard to the decision to reconsider the file given that the Appellant's statements are consistent with the Commission's position on the allocation of his earnings.

[49] I recognize that the burden on the Commission is not as strict with regard to the determination that a false or misleading statement has been made compared to the burden it has to impose a penalty. Among other things, the Commission does not have to show that the false statements were made knowingly.[36] I am of the view that this reasoning is valid both for the reconsideration period up to 36 months and for the reconsideration period up to 72 months.

[50] The Appellant referred to the section "Your responsibilities" when he completed his claims for benefits. He said that this section clearly indicates that he must: "accurately report all employment earnings before deductions in the week(s) in which you earn them, as well as any other money you may receive."[37]

[51] Furthermore, I note that the Commission wrote an email to the Appellant informing him of the following:

> [translation]
>
> Regarding Employment Insurance reports, they are done from Sunday to Saturday. That is why we ask you to report the number of hours worked during the period by multiplying this number by your hourly rate.
>
> […] You are not considered a teacher under the Employment Insurance definition. Therefore, you do not have to report your earnings based on the

[36] See *Canada (Attorney General) v Langelier*, FCA A-140-01.
[37] See the Appellant's application (GE-2367/GD3-7).

> length of your work contract because this applies only to primary and secondary school teachers and not to university lecturers.[38]

[52] Furthermore, the employer says [translation] "that the earnings were paid in accordance with J. P.'s contracts for the periods of work and not based on the time when J. P. performed that work or when services were provided for these teaching assistant contracts."[39]

[53] The Appellant explains that he reported his earnings when he performed his correction work—that is, generally over three weeks at mid-term and over three weeks at end of term.

[54] To explain its allocation, the Commission says that [translation] "the Claimant's earnings were allocated based on the information obtained by his employer. The X sent the Commission the earnings paid to the Claimant for each week concerned [...]. The Commission did not consider the Claimant's work contracts when it applied the earnings as the Claimant claims."[40]

[55] Once again, I find that discretion was applied arbitrarily because the Commission did not follow its reconsideration process. As a result, I have the power to intervene.

[56] I am of the view that the Appellant reported his earnings when he performed the work and that the employer paid him based on its own policy, without considering when the Appellant actually performed the work.

[57] To make this finding, I rely on the Appellant's testimony and the different examples of lesson plans that he provided. Furthermore, I am of the view that the Commission's allocation is inconsistent with the advice it itself gave the Appellant.

[58] The Commission told the Appellant to report the number of hours worked during the period when he worked by multiplying that number by his hourly rate and not to report his earnings based on the length of his work contract.[41] However, the notice of initial decision shows that the Commission allocated the earnings to the week of January 14, 2018.[42] Yet, the Appellant

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[38] See Commission email sent to the Appellant (GE-20-2367/GD3-40).
[39] See employer's email (GE-20-2367/GD7-18).
[40] See the Commission's arguments (GD4-7).
[41] See Commission email sent to the Appellant (GE-20-2367/GD3-40).
[42] See notice of decision (GE-20-2368/GD3-40).

has persuaded me, by the very nature of his work, that he could not have been correcting exams on that date because the session had barely begun.

[59] Therefore, I am of the view that, contrary to what it indicated, the Commission allocated the Appellant's earnings based on the length of his contract, according to the amounts that the employer paid him, without considering when the work was performed because the employer itself says that it does not consider when the work is performed.

[60] Furthermore, I find that the total earnings the Commission allocated from the week of December 31, 2017, to the week of June 24, 2018, is $7,507, while the amount the Appellant reported for the same period is $7,509. Therefore, I cannot find that the Appellant reported all the earnings he received from his employer, which is contrary to the Commission's position that the Appellant failed to report a portion of his earnings.

[61] In short, I am of the view that the Commission should have explained the reasons why it did not allocate the earnings based on the advice it gave the Appellant. The Appellant has persuaded me that he reported his earnings based on when he performed his work and based on advice he received from the Commission. I therefore cannot find that the Appellant made false or misleading statements when he reported his earnings based on advice from the Commission.

[62] Finally, the last situation in the Digest of Benefit Entitlement Principles is when a claimant should have known that they were not entitled to the benefits received. Given that the Appellant followed the Commission's advice, I cannot find that he knew or should have known that he was receiving benefits to which he was not entitled.

[63] Therefore, based on what is mentioned above, I find that the Commission did not apply its own guidelines for reconsideration. I find that it exercised its discretion arbitrarily and in a non-judicial manner. I am of the view that the Commission did not act in good faith, considering all relevant factors and ignoring any irrelevant factors.[43]

[64] I am of the view that the Commission did not consider all the relevant circumstances and

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[43] See *Chartier v Canada (Employment and Immigration Commission)*, 1990 FCA A-42-90; *Canada (Attorney General) v Uppal*, 2008 FCA 388.

did not consider important elements. The Commission did not consider its own advice and was unable to clearly provide the amount of overpayment the Appellant had to repay. The Commission cannot simply justify a new calculation or change its allocation contrary to its advice without providing any further explanation.

[65] In addition, I find that the Commission did not consider the Appellant's ability to pay and that the overpayment constitutes a significant and excessive financial burden under the circumstances, especially since it is a system that functions by exception that must be interpreted in a restrictive way.[44]

Issue 2: If so, from what date and until when can the Commission act retroactively?

[66] Since I have found under the previous issue that the Commission exercised its discretion arbitrarily and in a non-judicial manner and that, as a result, the Commission did not have just cause for acting retroactively and reconsidering the Appellant's earlier decisions on the allocation of earnings, I am of the view that I do not need to elaborate further on the issue of the reconsideration periods.

Issue 3: Were the earnings allocated correctly under the Regulations?

[67] In addition, I am of the view that I do not need to analyze the issue of the allocation of earnings for the benefit periods at issue, since there are no grounds to review this issue.

CONCLUSION

[68] The appeal is allowed. Since the Commission's decision should not have been reconsidered, the associated overpayments are written off.

Charline Bourque
Member, General Division – Employment Insurance Section

[44] See *Canada (Attorney General) v Laforest*, A-607-87.

HEARD ON:	February 23, 2021
METHOD OF PROCEEDING:	Videoconference
APPEARANCES:	J. P., Appellant Jean-Guy Ouellet (counsel), Representative for the Appellant