



[TRANSLATION]

Citation: *SL v Canada Employment Insurance Commission*, 2021 SST 889

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant: S. L.
Representative: Richard-Alexandre Laniel
Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission
reconsideration decision (415349) dated March 30,
2021 (issued by Service Canada)

Tribunal member: Josée Langlois
Type of hearing: Videoconference
Hearing date: November 12, 2021
Hearing participants: Appellant
Appellant's representative
Decision date: December 23, 2021
File number: GE-21-1205

Decision

[1] The appeal is allowed.

[2] I find that the Commission didn't exercise its discretion judicially when it reconsidered both of the Appellant's claims for benefits, effective August 27, 2017, and July 22, 2018, respectively.

Overview

[3] The Appellant made two claims for benefits, on September 7, 2017, and on July 24, 2018.

[4] On December 30, 2020, the Canada Employment Insurance Commission (Commission) told the Appellant that it wasn't able to pay him benefits from August 27, 2017, because he was running a business and wasn't unemployed. It also told the Appellant that he could not receive benefits from July 22, 2018, because he wasn't unemployed.

[5] On March 30, 2021, the Commission issued a reconsideration decision indicating that it hadn't changed its initial decision that the Appellant wasn't unemployed (it mentioned self-employment then), and it said that there had been no interruption of earnings that would make it possible to establish a benefit period in each file. For the period starting August 27, 2017, the Commission also indicated that it could reconsider the benefit period because false or misleading statements had been made.

[6] The Appellant doesn't deny that he was using a company-provided cell phone, but he says he made limited use of it when not working. He mainly argues that the slight upside he gets from it is disproportionate compared to the downside of having to pay back the benefits he got. Because of this small upside of using the cell phone, he feels he had an interruption of earnings, and he says he also disputes the issue of the weeks of unemployment. Essentially, he says he was unemployed despite running a business. On this point, the Appellant mentions that he was an employee, that his employment is insurable, and that he didn't receive any profits or dividends aside from his wages.

[7] The Appellant also says that the Commission could not reconsider the benefit period starting August 27, 2017, because he didn't make any false or misleading statements.

[8] I have to decide whether the Appellant is entitled to benefits for both benefit periods. To do so, I should first decide whether the Commission was justified in reconsidering the Appellant's benefit periods. If so, I will decide whether the Appellant had an interruption of earnings for seven consecutive days while using a company-provided cell phone and whether he was unemployed while running a business.

[9] On the issue of discretion to reconsider both benefit periods, it is up to the Commission to consider the relevant factors and the irrelevant ones, and I will be able to intervene only if it didn't exercise its discretion judicially.

Preliminary matter

[10] I joined both of the Appellant's files, numbered GE-21-1205 and GE-21-1557, because the appeals raise common questions of law or fact and because no injustice is likely to be caused to any party. This approach helps cases get processed faster.

Issues

[11] Did the Commission judicially exercise its discretion to reconsider? To answer that question, I have to answer these four questions:

- Were benefits paid contrary to the structure of the *Employment Insurance Act* (Act), as stated in the rules the Commission established for itself?
- Was a false or misleading statement made in connection with the benefit period starting August 27, 2017?
- Was the Commission within the time frame when it reconsidered the Appellant's benefit periods?

- Should the Appellant have known there was no entitlement to the benefits received?

[12] If I find that the Commission was justified in reconsidering the Appellant's benefit periods, I should also answer these two questions:

- Did the Appellant have an interruption of earnings for seven consecutive days for the periods starting August 27, 2017, and July 22, 2018?
- Was the Appellant's level of involvement in his business so limited that he wasn't actually working full work weeks?

Analysis

Did the Commission exercise its discretion judicially when it reconsidered the Appellant's files?

[13] The Court has held that the Commissions' discretionary decisions can't be interfered with unless it can be shown that the Commission "exercised its discretionary power in a non-judicial manner or acted in a perverse or capricious manner without regard to the material before it."¹

[14] It is up to the Commission to show that it exercised its discretion judicially. Acting in a non-judicial manner may mean acting in bad faith [or] for an improper purpose or motive, taking into account irrelevant factors, ignoring a relevant factor, or acting in a discriminatory manner.²

[15] Section 52(1) of the Act says that the Commission "may reconsider a claim for benefits" within 36 months. Section 52(5) of the Act says that the time frame is 72 months when a false or misleading statement has been made. In both cases, the authority to reconsider is discretionary.

¹ As indicated in *Uppal*, 2008 FCA 388 (CanLII).

² This principle is explained in the following decisions: *Dunham*, A-708-95; and *Purcell*, A-694-94.

[16] In the Digest of Benefit Entitlement Principles (Digest), the Commission established rules to make consistent decisions. I am not bound by these rules. However, to decide whether the Commission judicially exercised its discretion to reconsider, I have to decide whether it exercised this discretion properly or whether it acted in a perverse manner.

[17] The Commission also acknowledges its discretion to reconsider in this Digest. On this point, the Court has recognized various times that the fact that the Commission has guidelines or guides dealing with its discretion helps to make that discretion consistent.³ I can interfere with a discretionary decision of the Commission only if it exercised its discretion in a non-judicial manner or acted in a perverse manner without regard to the material before it.

The rules the Commission established for itself

[18] The Commission established an administrative policy to determine the circumstances where it can exercise its discretion. The Reconsideration Policy is presented in Chapter 17 of the Digest. The Commission describes four operations that help it decide whether to reconsider:

- decide whether or not to exercise its discretion to reconsider (that is, 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
- notify the claimant of the decision

[19] When the Commission considered whether to reconsider the Appellant's files, it decided that the information presented warranted reconsideration and that it was within

³ As indicated in the following decisions: *Attorney General of Canada v Hudon*, 2004 FCA 22; and *Attorney General of Canada v Gagnon*, 2004 FCA 351.

the time frame. In accordance with its Policy, it made its decision, calculated the amount to be repaid, and notified the Claimant of the decision.

Conditions according to the Digest

[20] The Commission says that the conditions to reconsider were met: an interruption of earnings (qualification) and the Appellant's self-employment (entitlement).

[21] According to the Digest, the conditions to reconsider include an interruption of earnings, but they can also include self-employment if one of the conditions is met.

[22] In Chapter [sic] 17.3.2.1 of the Digest, the Commission indicates that it will only reconsider if one of the situations described in Chapter [sic] 17.3.3 of the Digest exists. The Commission's Reconsideration Policy says that it will reconsider when:

1. benefits have been underpaid
2. benefits were paid contrary to the structure of the Act
3. benefits were paid as a result of a false or misleading statement
4. the claimant ought to have known there was no entitlement to the benefits received

1. Underpayment of benefits

[23] According to the Commission's calculation, this situation resulted in a benefit overpayment of \$13,826. The Commission is asking the Appellant to repay that amount.

[24] In its arguments, the Commission indicates that it can reconsider a benefit period if benefits have been overpaid or underpaid. I agree with the Commission.

[25] However, the Appellant is right on this particular point: The headings in the Digest indicate that the Commission will reconsider only when benefits have been underpaid.

[26] This is confusing and inconsistent with all the explanations in the Digest, which says, for example, that the Commission calculates the amount to be recovered or to be paid. What the Commission is actually explaining in section 17.3.3.1 of the Digest is that it always reconsiders files where benefits have been underpaid.

[27] We have to deduce that, when benefits have been overpaid, the Commission *may* reconsider the file, as set out in section 52 of the Act. This, again, confirms the discretionary nature of its decisions about reconsidering benefit periods both within 36 months and within 72 months.

2. Structure of the Act

[28] The Commission can only reconsider if a person did or didn't receive benefits because of an issue relating to qualification or entitlement.

[29] On this point, in Chapter [sic] 17.3.1 of the Digest, the Commission says that qualification includes the presence of an interruption of earnings for the claimant.

[30] It also says that entitlement includes a claimant's self-employment.

[31] In Chapter [sic] 17.3.3.2 of the Digest, the Commission says that it will reconsider a claim when benefits were paid contrary to the structure of the Act. It explains that "structure of the Act" refers to *the basic elements required to set up a claim and pay benefits*.

[32] Although it says that the structure of the Act doesn't include [elements such as] a benefit period established for a self-employed person, it clearly states that these elements *represent situations that may affect whether benefits can be paid* and that these elements *can be reconsidered as long as they meet one of the other conditions set out under the policy*.

[33] For example, if false or misleading statements have been made, the Commission can reconsider a benefit period established for a self-employed person.

[34] The Appellant argues that the Commission didn't exercise its discretion judicially when it reconsidered his unemployed status. His position is that unemployment isn't a structural element of the Act. He relies on a decision of the Tribunal's General Division.⁴

[35] That decision says that the structure of the Act doesn't include unemployment, that the Commission didn't follow its own rules, and that this means it didn't exercise its discretion judicially.

[36] Given the facts in the record and the current explanation in the Digest, I can't apply this same reasoning to the Appellant's case for this aspect because the Digest mentions that the Commission can review a benefit period for a self-employed person in some cases.

[37] As the Commission points out, there was an issue relating to qualification when it made its decisions about the interruption of earnings, and there was an issue relating to entitlement when it made its decisions about self-employment. It could reconsider according to this criterion.

[38] The Digest says that the Commission can reconsider in the presence of an interruption of earnings, and it will reconsider a benefit period established for a self-employed person if one of the conditions is met.

[39] In this case, the Commission was following its own rules when it decided to reconsider according to this criterion.

3. Was a false or misleading statement made in connection with the Appellant's August 27, 2017, claim for benefits?

[40] The Commission may reconsider any claim for benefits within 36 months after the benefits have been paid. If, in the opinion of the Commission, a false statement has been made, the time can be extended to 72 months.⁵

⁴ *AB v Canada Employment Insurance Commission*, SST GE-21-650 and GE-21-654.

⁵ Section 52(5) of the *Employment Insurance Act* (Act).

[41] If it reconsiders a benefit period within 72 months, the Commission doesn't have the burden of proving that the appellant "knowingly" made false statements to reconsider; it has that burden when it imposes a penalty.⁶ So, the Commission may reconsider a claim for benefits within that time frame if, "in its opinion," a false or misleading statement has been made.⁷

[42] The file shows that the Appellant submitted his claimant reports and answered "no" to the question: "Are you self-employed, other than fishing or farming?"⁸ In addition, he didn't declare the income he received as a benefit, that is, the use of a cell phone. The Appellant answered "no" to the question: "Is there any other money that you have not previously told us about, that you received or will receive ...?"

[43] On September 8, 2017, a Commission agent asked the Appellant some questions. He answered the questions, saying that nothing had changed in his employer-employee relationship since he had last spoken with an agent. He also said that the number of shares he held in the business hadn't changed over the previous three years. He holds one third of the shares.

[44] On September 4, 2019, during a conversation with a Commission agent, the Appellant was asked about the use of an employer-provided cell phone for the first time. He said he used it for personal use and for work. He then indicated that he used the cell phone to solicit clients during downtime.

[45] At the hearing, the Appellant explained that he hadn't disclosed these things earlier because he didn't know he had to. He indicates that, in 2017, the Internet provider gave the business a credit for two months of payments and that the business didn't pay a monetary amount for the use of his cell phone in August 2017 and September 2017.

⁶ See *Langelier*, 2002 FCA 157.

⁷ This principle was determined in the following decisions: *Dussault*, 2003 FCA 372 (CanLII); and *Attorney General of Canada v Pilote*, (1998) 243 NR 203 (FCA).

⁸ GD3-9.

[46] In the decision the Appellant cited, from the Tribunal's General Division, it was decided that no false or misleading statement had been made, since the appellant could not have known that he was making a false or misleading statement.⁹

[47] The Appellant wants this decision, which deals with a similar case, to be applied the exact same way.

[48] On this point, I can't agree with this broad interpretation, since case law teaches us that the false or misleading statement doesn't have to come from the appellant. That a false or misleading statement has been made is enough to meet this criterion.¹⁰

[49] It is true that the Appellant was never asked about the use of his cell phone, that he didn't know that he was considered self-employed, but that he indicated that he was running a business and that he provided all the details he considered relevant or that the Commission had asked for.

[50] But there is no notion of wrongful intent in this determination. A false or misleading statement was made. The Appellant answered "no" when asked whether he was self-employed, and he didn't disclose the benefit he had of using a cell phone that the company provided year-round.

[51] The Appellant is self-employed as defined in the Digest, whose basic concepts include this definition.

[52] For the purposes of this decision, I accept the definition given in section 152.01 of the Act to establish what constitutes a self-employed person:

[A]n individual who

(a) is or was engaged in a business; or

⁹ *AB v Canada Employment Insurance Commission*, SST GE-21-650 and GE-21-654.

¹⁰ This principle is explained in the following decisions: *Dussault*, 2003 FCA 372 (CanLII); and *Attorney General of Canada v Pilote*, (1998) 243 NR 203 (FCA).

(b) is employed but does not have insurable employment by reason of paragraph 5(2)(b).

[53] The Appellant was running a business, and he is a self-employed person within the meaning of the Act.

[54] Then there is the Appellant's use of a cell phone that the company provided year-round. As he told the Commission, he used it for personal use and for work. During slow periods, he would sometimes use this cell phone to solicit clients.

[55] At the hearing, the Appellant explained that, during layoff periods, he would use this cell phone only to read the news and that he had another phone at home.

[56] The Appellant says that it is a minor benefit and that he didn't know he had to declare this use as earnings received, since there is no amount on his pay stubs or tax slips.

[57] Section 52(5) of the Act refers to a false or misleading statement in connection with a benefit period. This provision doesn't say that the appellant needs to have made the false statement knowingly.

[58] I find that a false or misleading statement was made in connection with the Appellant's claim for benefits effective August 27, 2017.

Was the Commission within the time frame when it reconsidered the Appellant's benefit periods?

[59] The Commission may reconsider any claim for benefits within 36 months after the benefits have been paid. On this point, the Commission may, *at any time in a specific period, reconsider its decision and, if it decides that a person has received money for which they were not qualified, it must calculate the amount due or payable and notify the claimant.*¹¹

¹¹ As indicated in *Brière v Attorney General of Canada*, A-637-86.

[60] If, in the opinion of the Commission, a false statement has been made, the time can be extended to 72 months.¹²

[61] The Commission finds that the Appellant made a false or misleading statement when he didn't disclose that he was self-employed and when he didn't disclose the benefit he had of using an employer-provided cell phone.

[62] The Appellant says that the Commission could not reconsider its decisions after 36 months. More specifically, he says that the Commission can't ask him to repay benefits paid before January 14, 2018, because no false or misleading statements had been made.

[63] For file GE-21-1557, where the benefit period started on July 22, 2018, the Commission explains that it calculated the 36-month period for reconsidering the Appellant's file in this way:

[translation]

week coded 2271 (December 30, 2020) + 1 week (time to send notice of decision) – 156 weeks (3 years) = week coded 2116 (January 7, 2018). The 36-month reconsideration period is from January 7, 2018, to January 2, 2021.

[64] For file GE-21-1205, where the benefit period started on August 27, 2017, the Commission explains that false or misleading statements had been made and that it calculated the 72-month period in this way:

[translation]

week coded 2271 (December 30, 2020) + 1 week (time to send notice of decision) – 312 weeks (6 years) = week coded 1960 (January 11, 2015).

¹² Section 52(5) of the Act.

[65] I agree with the Commission: Given that false or misleading statements had been made, it could reconsider the Appellant's benefit period starting August 27, 2017, within 72 months.

[66] For that benefit period, the decision was made on December 30, 2020, and the Commission could retroactively reconsider the benefits paid as far as January 11, 2015.

[67] For the benefit period starting July 22, 2018, the Commission's decision was also made on December 30, 2020, and, in that case, the Commission calculates that it could reconsider the Appellant's benefit period as far as January 7, 2018, even without considering that he had made false statements.

[68] Since false or misleading statements had been made, the Commission could reconsider the benefit period starting August 27, 2017, as far as January 11, 2015, and it could reconsider the claim for benefits effective July 22, 2018, as far as January 7, 2018.

[69] I also point out that the Commission can reconsider weeks of benefits included in a claim for benefits.

[70] I find that the Commission was within the 72-month time frame for reconsidering the benefit period starting August 27, 2017.

[71] I also find that the Commission was within the 36-month time frame for the benefit period starting July 22, 2018.

4. The Appellant ought to have known there was no entitlement to the benefits received

[72] The last criterion the Commission established in its Digest to justify reconsidering a benefit period is when the claimant ought to have known there was no entitlement to the benefits received. On this point, I find that the Appellant could not have assumed that there was no entitlement to the benefits received for the reasons that follow.

[73] It seems that, before even investigating the Appellant's situation, that is, when making its initial decision in this file, the Commission had already contacted the Appellant various times to check his status as a business operator.

[74] As the Appellant testified, the Commission initially checked the insurable status of his employment because he was running a business. The Appellant applies for benefits seasonally every year, and each year, an agent asks him questions, and his status is checked.

[75] This means that, each year, the Appellant indicated that he was running a business. And each year, he asked a Commission agent for help to report properly. If the Commission agent didn't give adequate answers to the worker, who was looking for answers to report properly, it is unsafe to fault the Appellant for this situation: The Commission is asking the Appellant to repay benefits for a situation that it tolerated for many years and that it itself had checked over time. The Appellant's status wasn't new when he applied for benefits on September 7, 2017.

[76] On this point, as the Appellant points out, the Commission says in the Digest that it won't reconsider a benefit period in the event of a Commission error:

A Commission error occurs when the Commission has all the relevant information needed to make a decision but the final decision is not supported by the information. The error can occur in the adjudication process or in failing to enter a decision into the computer system.

*If the Commission erred in denying benefits, these benefits will be paid. If the Commission incorrectly paid benefits, the error will be corrected currently and no overpayment will be created. The only exception is when the Commission error resulted in a decision that is contrary to the structure of the [Act] , in which case the Commission corrects retroactively, even if an overpayment occurs*¹³

¹³ Digest of Benefit Entitlement Principles, available online: <https://www.canada.ca/en/employment-social-development/programs/ei/ei-list/reports/digest.html>

[77] With that in mind, the decisions aren't contrary to the structure of the Act. There was an issue relating to qualification for the Commission's decisions about the interruption of earnings, and there was an issue relating to entitlement for its decisions about self-employment, which justifies the creation of an overpayment.

[78] However, I am satisfied that the Appellant could not have assumed that there was no entitlement to the benefits received.

[79] To begin with, as mentioned earlier, the Appellant applies for benefits seasonally every year. In fact, he argues that the Commission contacted him in 2016 to confirm his unemployment because it was aware of the nature of the employer-employee relationship and his involvement in the business's share structure.

[80] In this case, concerning self-employment: The Appellant told the Commission that he was running a business. The Commission checked the insurable status of his employment, and, over the years, the Appellant had talked to the Commission about the fact that he was running a business and about how to report.

[81] On his application for benefits made on September 7, 2017, the Appellant clearly indicated that he was running a business for which he worked.¹⁴ On September 8, 2017, when a Commission agent asked him whether anything had changed compared to the previous three years concerning the employer-employee relationship, his one-third share in the business, or other conditions on the insurability of his employment, the Appellant answered "no," and he specified that the situation hadn't changed.

[82] The Appellant indicated that he was running a business, and I find that he didn't know there was no entitlement to the benefits received. I also want to elaborate later on the clarity of the questions the Commission asked him.

[83] But before that, concerning the Appellant's use of a cell phone, a benefit that is considered earnings,¹⁵ the Commission's file shows that the Appellant submitted his

¹⁴ GD3-8.

¹⁵ Section 35(10)(d) of the *Employment Insurance Regulations* (Regulations).

claimant reports and answered that he hadn't received any other earnings during his layoff period. The Appellant didn't disclose the benefit of an employer-provided cell phone when asked: "Is there any other money that you have not previously told us about, that you received or will receive ...?"

[84] As he points out, the use of a cell phone is a benefit that is considered earnings under the *Employment Insurance Regulations* (Regulations), but it isn't money that he receives. And there is no amount related to this benefit on his pay stubs or tax slips.

[85] I agree with the Appellant on this point, not so much about whether earnings under the Regulations include the use of a cell phone as about the ambiguity of the question. The question the Appellant had to answer wasn't unambiguous, and it is true that "any doubt arising from the difficulties of the language should be resolved in favour of the claimant."¹⁶

[86] The earnings question as phrased in the Commission's claimant report form is ambiguous. It is unclear how to interpret it—even for a reasonable person who contacts the Commission every year to make sure they are declaring their income properly. And, as the Appellant points out, before 2019, he was never clearly told that earnings included the use of a company-provided cell phone. The Commission's question doesn't clearly say this.

[87] The same applies to the self-employment question when the Appellant clearly indicated that he was running a business.

[88] Given that he answered "no" to the question of whether he had worked or received any earnings during the period in question, and that he didn't answer that he was self-employed despite answering that he was running a business, I am satisfied that the Appellant could not have assumed that he would get benefits he wasn't entitled to. This question remains ambiguous.

¹⁶ *Abrahams v Attorney General of Canada*, [1983] 1 SCR 2.

[89] I must admit that I actually agree with the Appellant: The use of a cell phone isn't an actual amount of money that he receives, and the accountant doesn't indicate it on his pay stubs or tax slips.

[90] As the Appellant points out, even section 35(10)(d) of the Regulations doesn't clearly say that the use of an employer-provided cell phone is considered earnings under the Regulations.

[91] This means that, without giving more detailed explanations on its claimant report form, the Commission expects a claimant to read the case law on this topic, which, again, seems unsafe to me. The question asked doesn't mention the use of an employer-provided cell phone or vehicle. Even if this benefit is earnings, the question isn't simple.

[92] However, you would expect a claimant to contact the Commission to find out how to proceed, as a reasonable person would.

[93] That is what the Appellant did. He followed up, and the Commission also checked his status over the years.

[94] Each case has to be considered individually, but concerning the two cases here, I am of the view that, given the facts presented, that is, the Appellant's specific statements about running his business, the information he gave about his status, the Commission's checks, and the ambiguity of the questions he had to answer, I can't find that he knew there was no entitlement to the benefits received.

[95] In exercising its discretion, the Commission has to make sure it doesn't unduly create debt when a claimant received benefits through no fault of their own. The Commission itself acknowledges it in its Digest.

[96] I can only conclude that the Commission had all the information it needed when it made its initial decision. It had had all the information since at least 2016, and it knew that the Appellant was running a business. It had checked the Appellant's status over

the years using various methods, and the Appellant was contacted by the Commission or contacted the Commission himself during each benefit period to make sure he was reporting properly. The Commission can't change its mind at the Appellant's expense without considering the consequences that this entails.

[97] On this point, the file doesn't show that the Commission considered any extenuating circumstances when it made its decisions.

[98] The facts show that, before 2019, the Commission never clearly asked the Appellant about benefits received, such as the use of a cell phone, despite all the actions taken and despite updating his file as a business operator over time. The Appellant was transparent, and he sent all the documents the Commission had requested before 2017 to sort out his status and report correctly. The Commission updated the Appellant's status, it checked it, and, in 2017, the Appellant replied to the Commission agent that his situation hadn't changed.

[99] The Commission tolerated the situation by intervening as late as it did despite having everything it needed to do so when updating the Appellant's file in 2016.

[100] After all the questions he was subjected to and the checks into his claims for benefits over time, and because of how the questions were phrased in the claimant reports, I am of the view that the Appellant could not have known there was no entitlement to the benefits received. On the contrary, the Appellant was transparent about the business he is running.

[101] I find that the Appellant could not have assumed that there was no entitlement to the benefits received.

So, did the Commission exercise its discretion judicially when it reconsidered the Appellant's files?

[102] The Commission itself acknowledges that it established a review policy to make consistent and fair decisions and to prevent creating debt when a claimant was overpaid through no fault of their own.

[103] As mentioned earlier, acting in a non-judicial manner may mean acting in bad faith [or] for an improper purpose or motive, taking into account irrelevant factors, ignoring a relevant factor, or acting in a discriminatory manner.¹⁷

[104] I am of the view that the Commission didn't take into account all relevant factors when it decided to exercise its discretion to reconsider. The Commission had checked the Appellant's status over the years, and especially in 2016. It can't act retroactively when it carried out checks, was aware of the Appellant's status as a business operator, and tolerated this situation.

[105] In addition, this situation has caused financial hardship for the Appellant, who, as he explained at the hearing, runs a business and has an annual salary of about \$40,000. Faced with this hardship, the Appellant is thinking of not running his business anymore and finding a job with an employer as an employee.

[106] When it decided to reconsider both of the Appellant's files, the Commission didn't exercise its discretion judicially because it didn't consider all relevant factors before making its decisions.

[107] This situation resulted in an overpayment of \$13,826. The Commission included details of the amounts to be repaid, but I would go so far as to say that the Commission didn't explain to the Appellant the reasons that had prompted it to reconsider.

[108] The Commission's authority to reconsider is discretionary, regardless of whether it makes its decisions within 36 months or 72 months. The Commission acted arbitrarily by not taking all the relevant circumstances into account when exercising its discretion.

[109] For this reason, I find that it didn't exercise its discretion judicially.

¹⁷ This principle is explained in the following decisions: *Dunham*, A-708-95; and *Purcell*, A-694-94.

Conclusion

[110] The appeal is allowed.

Josée Langlois

Member, General Division – Employment Insurance Section