[TRANSLATION]

Citation: *SF v Canada Employment Insurance Commission*, 2022 SST 1095

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	S. F.
Representative:	J. D.
Respondent:	Canada Employment Insurance Commission
Representative:	Dani Grandmaître

Decision under appeal:	General Division decision dated January 27, 2022 (GE-21-2562)

Tribunal member:	Jude Samson
Type of hearing:	Teleconference
Hearing date:	September 13, 2022
Hearing participants:	Appellant's representative Respondent's representative
Decision date:	October 25, 2022
File number:	AD-22-143

Decision

[1] S. F. is the Claimant in this case. I am dismissing his appeal.

Overview

[2] The Claimant applied for Employment Insurance (EI) regular benefits. The Canada Employment Insurance Commission (Commission) paid him benefits from September 2020.

[3] About a year later, the Commission found that the Claimant wasn't available for work while in university. This meant that he wasn't entitled to the benefits he had received during those periods.[1] The Commission's decision created an overpayment on the Claimant's account.

[4] The Claimant argues that he should not have to pay back the overpayment, since the Commission knew from the beginning that he was a full-time student. He gave the Commission information about his studies several times during his benefit period.

[5] The Claimant appealed the Commission's decision to the Tribunal's General Division. It dismissed the appeal, saying that the Claimant wasn't available for work while in school. The General Division also found that it didn't have jurisdiction to decide the issue of writing off the overpayment.

[6] The Claimant is now appealing the General Division decision to the Appeal Division. He argues that the General Division didn't consider a relevant issue.

[7] I agree. But I agree with the conclusion that the General Division reached. For this reason, I am dismissing the Claimant's appeal.

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[1] Sections 18(1)(a) and 153.161(1) of the *Employment Insurance Act* (EI Act) say that a person isn't entitled to be paid benefits unless they can prove (among other things) that they were available for work.

Issues

[8] I have to consider these issues:

a) Can I consider new evidence?

b) Did the General Division make an error of jurisdiction by failing to consider whether the Commission used its discretion judicially when it found, in October 2021, that the Claimant wasn't available for work while in school, from September 2020?

c) If so, what is the best way to fix the General Division's error?

d) Did the Commission use its discretion judicially?

Analysis

I have considered the G. R. and D. F. affidavits

[9] The Appeal Division's limited role normally prevents me from considering new evidence.[2] New evidence is evidence that the General Division didn't have in front of it when it made its decision.

[10] The law says that I must focus on whether the General Division made a relevant error.[3] And that assessment is usually based on the evidence that the General Division had in front of it. I can't take a fresh look at the case and come to my own conclusions based on more recent and stronger evidence.[4]

[11] There are exceptions to the general rule against considering new evidence.[5] For example, I can consider new evidence that provides general background information only.

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[2] The Appeal Division's role is mostly defined by sections 58 and 59 of the *Department of Employment and Social Development Act* (DESD Act).
[3] The relevant errors, formally known as "grounds of appeal," are listed under section 58(1) of the DESD Act.
[4] See *Gittens v Canada (Attorney General)*, 2019 FCA 256 at paragraph 13.
[5] See *Sibbald v Canada (Attorney General)*, 2022 FCA 157 at paragraphs 35 to 40.

[12] I accept the Commission's argument that G. R.'s and D. F.'s affidavits provide general background information that might assist me in understanding some of the changes that were made to the law because of the COVID-19 pandemic. In addition, the affidavits don't discuss the Claimant's particular situation, and he doesn't object to my considering them.

The General Division made an error of jurisdiction by failing to consider a relevant issue

[13] The Claimant has always criticized the time it took the Commission to make its disentitlement decision when it had all the relevant information needed from the beginning. In other words, the Commission incorrectly paid benefits.

[14] The General Division found that it didn't have jurisdiction to decide the issue of writing off the overpayment.

[15] But, it didn't first consider whether the Commission had used its discretion judicially when it made, in October 2021, a decision about the Claimant's availability from September 2020.

[16] The Claimant raised this issue in his notice of appeal, even though he didn't express himself like someone with a legal background would.[6]

[17] The Commission argues that the General Division implicitly accepted that it had judicially used its power to consider the Claimant's availability after he had received benefits. In its view, there was nothing in the way it had used its discretion that gave the General Division cause for concern.[7]

[18] I can't accept the Commission's arguments on this point. On the contrary, the General Division noted several concerns about the Commission's decision.[8]

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[6] The Claimant's notice of appeal is numbered GD2 in the appeal record. The decisions in *Karadeolian v Canada (Attorney General)*, 2016 FC 615 at paragraph 10 and in *Duverger v 2553-4330 Québec Inc (Aéropro)*, 2015 FC 1071 at paragraph 19 tell us that a party's arguments should be read generously.
[7] See the Commission's arguments at AD1A-4 in the appeal record.
[8] See the General Division decision at paragraphs 40 to 43.

[19] Whatever concerns it may have had, the General Division had to grapple with the key issues that the Claimant had raised.[9] So, it made an error by failing to consider whether the Commission had used its discretion judicially.

[20] The error of jurisdiction that the General Division made justifies my intervention in this case.

I will give the decision that the General Division should have given

[21] At the hearing, the parties disagreed on the best way to fix the error in this case.[10] The Commission argues that I should send the matter back to the General Division, while the Claimant argues that I should give the decision that the General Division should have given.

[22] I agree with the Claimant's arguments.

[23] The parties aren't arguing that they were prevented from presenting their case in any way. The main facts aren't in dispute, and the issue is a rather narrow one.

[24] This means that I can decide whether the Commission used its discretion judicially.

The Commission used its discretion judicially

– The Commission has the power to retroactively verify a disentitlement and to assess an overpayment

[25] The parties agree that the Commission used its discretion when considering, in October 2021, the Claimant's availability from September 2020.[11] But they don't seem to agree on the source of this discretion.

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[9] See *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paragraphs 127 and 128.
[10] Sections 59(1) and 64(1) of the DESD Act give me the power to fix the General Division's errors in this way. Also, see *Nelson v Canada (Attorney General)*, 2019 FCA 222 at paragraphs 16 to 18.
[11] See, for example, the Commission's submissions at AD1A-4, AD1A-5, and AD7-16 in the appeal record.

[26] For example, the Commission says that it made its October 2021 decision about the Claimant's availability under section 153.161(2) of the *Employment Insurance Act* (EI Act). In its view, it was able to pay the Claimant benefits because he met the minimum conditions and to later verify whether he was entitled to those benefits due to the changes made to the law in response to the circumstances of the pandemic.

[27] In other words, the Commission argues that the October 2021 decision was the first one about the Claimant's availability, despite the fact that he had provided a lot of information about this and had discussed it with Commission agents throughout his benefit period.

[28] The Claimant, meanwhile, argues that section 153.161 of the EI Act is a temporary measure that ceased to apply on September 25, 2021. In addition, the section is limited in scope. The Claimant argues that the section gives the Commission the power to verify, but not to create an overpayment retroactively once a claim has been approved based on complete information.[12]

[29] To begin with, I find that section 153.161 of the EI Act is still relevant in this case, considering when the Claimant's claim for benefits was made effective: September 27, 2020.[13]

[30] I am not persuaded by the Commission's arguments that it could split its decision-making responsibility into two steps and indefinitely postpone making a decision about the Claimant's entitlement to EI benefits.

[31] The Commission can't pay someone benefits without any evidence that this person is entitled to them. Section 153.161(1) of the EI Act, like section 18(1), says that a person isn't entitled to be paid benefits until they have proven that they were available for work (among other things).

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[12] According to the Claimant, such a statutory provision has to be interpreted narrowly: See *Canada (Attorney General) v Laforest*, A-607-87.
[13] See section 333 of the *Budget Implementation Act, 2021, No. 1*.

[32] In addition, contrary to the Commission's arguments, section 7 of the EI Act isn't the only provision that determines when EI benefits become payable to someone.[14]

[33] The Commission's making an automated decision based on an incomplete assessment of the information the Claimant had provided about his availability doesn't change the fact that a decision was made. Under the modified operational approach introduced because of the pandemic, the Commission paid the Claimant benefits based on statements from him about his entitlement and postponed considering the issue in more detail.

[34] But, even if the Commission had already made a decision about the Claimant's availability, the law gives it fairly broad powers to revisit that decision.[15] These powers are exercised as part of the Commission's mandate to financially manage the EI program and maintain its integrity so that only those entitled receive benefits.[16]

[35] The Claimant says that I should give a narrow interpretation to the Commission's power to verify under section 153.161(2) of the EI Act. But that interpretation renders the provision almost useless.

[36] On the contrary, in a case bearing some similarity to this one, the Federal Court of Appeal recently considered the government's power to investigate a person's entitlement to benefits. The Court interpreted the relevant provision broadly, saying that the power also included that of changing an earlier decision.[17]

[37] In short, sections 52 and 153.161(2) of the EI Act give the Commission the discretion to retroactively verify a claimant's entitlement to the benefits they received and to assess an overpayment, if appropriate.

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[14] See, for example, sections 9 and 12 of the EI Act.
[15] See sections 52, 111, and 153.161(2) of the EI Act.
[16] See paragraph 15 of D. F.'s affidavit, which starts at AD7-102 in the appeal record.
[17] See *Canada (Attorney General) v Burke*, 2022 FCA 44.

– **The Commission acted in a judicial manner when it exercised its discretion**

[38] The Commission's powers under sections 52 and 153.161(2) of the EI Act are discretionary. The Commission **may** reconsider a claim for benefits and **may** verify a person's entitlement to benefits they have already received, but it doesn't have to.

[39] The Commission has to use its discretion judicially. The Tribunal can set aside a discretionary decision if, for example, a person can establish that the Commission:[18]

- acted in bad faith
- acted for an improper purpose or motive
- took into account an irrelevant factor
- ignored a relevant factor
- acted in a discriminatory manner

[40] In this case, the Claimant argues that the Commission ignored the relevant factors set out in the Commission's reconsideration policy, found in Chapter 17 of the *Digest of Benefit Entitlement Principles*.[19] It reads:

> **17.3.3 Reconsideration policy**
>
> The Commission has developed a policy to ensure a consistent and fair application of section 52 of the EIA [*Employment Insurance Act*] and to prevent creating debt when the claimant was overpaid through no fault of their own. A claim will only be reconsidered when:
>
> - benefits have been underpaid
> - benefits were paid contrary to the structure of the EIA

[18] See *Canada (Attorney General) v Purcell*, 1995 CanLII 3558 (FCA).
[19] See, for example, *MD and JD v Canada Employment Insurance Commission*, 2020 SST 1163; *JP v Canada Employment Insurance Commission*, 2021 SST 109; and *SL v Canada Employment Insurance Commission*, 2021 SST 889. They support the Claimant's argument.

- 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

[41] The Commission's policy also says that no overpayment will be created if the Commission incorrectly paid benefits.[20]

[42] So, the Claimant argues that the Commission could not make a retroactive decision without departing from its reconsideration policy. Specifically, it made an error by paying the Claimant benefits, a situation created through no fault of his own.

[43] The Commission, meanwhile, argues that its reconsideration policy isn't relevant, since section 153.161 of the EI Act applies to this situation (not section 52). In addition, it notes that its reconsideration policy should not be elevated to the status of a legislative authority, which could have the effect of unduly limiting its discretionary powers.[21]

[44] Overall, the Claimant hasn't persuaded me that the Commission acted in a non-judicial manner.

[45] The Commission's reconsideration policy was developed well before the COVID-19 pandemic. Because of this, it doesn't take into account section 153.161 of the EI Act or the Commission's modified operational approach. So, I agree that accepting the Claimant's arguments could overly limit the Commission's powers.

[46] In addition, I have difficulty finding that the Commission made an error by paying the Claimant benefits. It actually took into account information provided by the Claimant and postponed considering all the relevant factors in more detail.

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[20] See section 17.3.2.2 of the Commission's policy. There is an exception in cases where the Commission error resulted in a decision that is contrary to the structure of the EI Act. But that exception doesn't apply here.

[21] In support of its arguments, the Commission cites *Maple Lodge Farms v Government of Canada*, 1982 CanLII 24 (SCC); and *Stemijon Investments Ltd v Canada (Attorney General)*, 2011 FCA 299.

[47] Although this approach may have had a negative impact on the Claimant, the Commission felt that it would allow it to save processing time and pay benefits more efficiently.

[48] I realize that the Commission's approach will saddle the Claimant with a debt that will be difficult for him to pay back. But he isn't alone in this, and the Commission has some means to lighten his load.[22]

[49] As I have already noted, the Commission was in a position to consider and reconsider the Claimant's availability.[23] Unfortunately, the Tribunal can't address the criticisms of how the Commission handled the Claimant's file or make a decision about writing off his debt.[24]

[50] Applying the law can sometimes give rise to some harsh results that appear to be at odds with the government's objectives. But the Tribunal can't rewrite or circumvent the law, even in very sympathetic situations or cases of misinformation from the Commission.[25]

Conclusion

[51] The General Division made a relevant error by failing to consider an issue. Still, after considering that issue, I have reached the same conclusion as the General Division. For this reason, I am dismissing the Claimant's appeal.

Jude Samson
Member, Appeal Division

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[22] For example, he can ask to pay back his debt over a longer period or that his debt be reduced because of his financial hardship.
[23] See sections 18(1), 52, and 153.161(2) of the EI Act.
[24] See *Faullem c Canada (Attorney General)*, 2022 FCA 29.
[25] See *Canada (Attorney General) v Shaw*, 2002 FCA 325; *Canada (Attorney General) v Knee*, 2011 FCA 301; and *Nadji v Canada (Attorney General)*, 2016 FC 885.