



[TRANSLATION]

Citation: *PJ v Canada Employment Insurance Commission*, 2022 SST 1312

**Social Security Tribunal of Canada
General Division – Employment Insurance Section**

Decision

Appellant: P. J.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (453351) dated February 2, 2022 (issued by Service Canada)

Tribunal member: Normand Morin

Type of hearing: Teleconference

Hearing date: May 25, 2022

Hearing participant: Appellant

Decision date: June 29, 2022

File number: GE-22-788

Decision

[1] The appeal is allowed. I find that the Canada Employment Insurance Commission (Commission) didn't exercise its discretion judicially in deciding to verify and reconsider the Appellant's claim for benefits.¹ This means that the Commission could not retroactively determine that the Appellant wasn't entitled to Employment Insurance (EI) benefits.

Overview

[2] From early September 2020 until February 26, 2021, the Appellant worked on a replacement contract for the employer X, a hazardous waste management (water treatment) company.

[3] On March 10, 2021, the Appellant made an initial claim for EI benefits (regular benefits). A benefit period was established effective March 7, 2021.²

[4] On March 15, 2021, the Appellant began full-time personal insurance training with the Autorité des marchés financiers [Financial markets authority] (AMF) in X. The training leads to certification as a financial security advisor and ran from March 15, 2021, to June 11, 2021.³

[5] The Appellant then decided to become self-employed as a financial security advisor beginning June 12, 2021, after his training.⁴ On September 4, 2021, he stopped being self-employed and made efforts to find a job.⁵

[6] On November 24, 2021, the Commission told him that it wasn't able to pay him benefits from March 8 to 12, 2021, because he said he wasn't available for suitable full-time employment, to prepare for his training or internship. It also told him that it wasn't able to pay him EI benefits from March 15, 2021, to June 11, 2021, because he

¹ See sections 52 and 153.161 of the *Employment Insurance Act* (Act).

² See GD3-3 to GD3-13 and GD4-1.

³ See GD2-6.

⁴ See GD3-27 to GD3-29.

⁵ See GD3-43.

was taking a training course on his own initiative and that he hadn't shown that he was available for work. The Commission told him that it considered him unavailable for work. In addition, it told him that it wasn't able to pay him EI benefits from June 14, 2021, to September 17, 2021, given that he was self-employed as a financial security advisor and that it considered that he wasn't unemployed during that period. It told him that he would receive a notice of debt if he owed money.⁶

[7] On February 2, 2022, after a request for reconsideration, the Commission informed him that it had rescinded the November 24, 2021, decision about his availability for work from March 8 to 12, 2021. It told him that it was upholding the November 24, 2021, decision about his availability for work while taking training from March 15, 2021, to June 11, 2021. It also told him that a new decision had replaced the November 24, 2021, decision about weeks of unemployment. It said that the new decision was that he wasn't entitled to benefits from June 14, 2021, to September 4, 2021.⁷

[8] The Appellant says that he received benefits after applying for benefits and after telling the Commission that he was taking training full-time. He says that he reported being in training on all his claimant reports and that his claims for benefits were approved. His claimant reports also indicate the hours he worked as a self-employed person. He says that, several months after paying him benefits, the Commission told him that he wasn't entitled to benefits. He argues that, if he had been unable to get benefits, he would have abandoned his training or taken it while remaining available for work. He says that he could have taken his training part-time. He argues that he should not be penalized for an error by the Commission (Service Canada). On March 2, 2022, the Appellant challenged the Commission's reconsideration decision. That decision is now being appealed to the Tribunal.

⁶ See GD3-34 and GD3-35.

⁷ See GD2A-2, GD2A-3, GD3-44, and GD3-45.

Preliminary matters

[9] In this case, the Appellant disputes having to pay back the benefits he was overpaid. He argues that he should not be penalized for the Commission's error, even though it found, several months after paying him benefits, that he wasn't entitled to those benefits.

[10] The Commission, on the other hand, argues that section 153.161 of the *Employment Insurance Act* (Act) says that it may, at any point after benefits are paid to a claimant, verify that the claimant is entitled to those benefits by requiring proof that they were capable of and available for work on any working day of their benefit period.⁸

[11] So, my analysis and decision will take this situation into account.

Issues

[12] I have to determine whether the Commission had the power to retroactively decide whether the Appellant was entitled to benefits and, if so, determine whether it used its discretion judicially in deciding to verify and reconsider the Appellant's claim for benefits.⁹

[13] If that is the case, I have to determine whether the Appellant:

- a) has shown that he was available for work while taking training during the period from March 15, 2021, to June 11, 2021¹⁰
- b) worked full working weeks during the period from June 14, 2021, to September 4, 2021, and whether the disentanglement to benefits imposed on him for that period for failing to show he was unemployed is justified¹¹

⁸ See GD4-9.

⁹ See sections 52 and 153.161 of the Act.

¹⁰ See sections 18(1)(a) and 153.161 of the Act and sections 9.001 and 9.002(1) of the *Employment Insurance Regulations* (Regulations).

¹¹ See sections 9 and 11 of the Act and section 30 of the Regulations.

- c) has to pay back the benefits that he received and that the Commission says he owes¹²

Analysis

Exercise of the Commission’s discretion in deciding to verify and reconsider a claim for benefits

Issue 1: Did the Commission have the power to retroactively verify and review the Appellant’s claim for benefits?

[14] When it comes to the “reconsideration” of a claim, the Act says that the Commission has 36 months to reconsider a claim for benefits paid or payable to a claimant and that it has 72 months if, in its opinion, a false or misleading statement or representation has been made in connection with a claim.¹³

[15] If the Commission decides that a person has received an amount of money in benefits that they weren’t qualified for or entitled to, it must calculate the amount of the money and notify the claimant of its decision.¹⁴

[16] Because of the COVID-19 pandemic, changes were made to the Act to facilitate access to benefits with the implementation of “temporary measures.”

[17] Those changes included section 153.161 of Part VIII.5 of the Act. This section was in force from September 27, 2020, to September 25, 2021.

[18] This section says that the Commission may, at any point after benefits are paid to a claimant, verify that the claimant is entitled to those benefits by requiring proof that they were capable of and available for work on any working day of their benefit period.¹⁵

[19] The Tribunal’s Appeal Division (Appeal Division) found that the Tribunal’s General Division (General Division) could not refuse to exercise its jurisdiction to

¹² See sections 43, 44, and 52 of the Act.

¹³ See section 52 of the Act.

¹⁴ See section 52(2) of the Act.

¹⁵ See section 153.161(2) of Part VIII.5 of the Act.

determine whether the Commission had the power to retroactively disentitle the claimant to benefits.¹⁶

[20] In this case, the Appellant applied for benefits on March 10, 2021, and a benefit period was established effective March 7, 2021.

[21] On November 24, 2021, the Commission informed him of the decisions made in his case about his availability for work and that it considered that he wasn't unemployed, since he was working full weeks as a financial security advisor.¹⁷

[22] The Commission argues that section 153.161 of the Act (Temporary Measures to Facilitate Access to Benefits) gives it the power to verify, at any point after benefits are paid to a claimant, that the claimant in question is entitled to those benefits by requiring proof that they were capable of and available for work on any working day of their benefit period.¹⁸

[23] As for the Appellant, in his April 8, 2021, statement to the Commission, he indicated that he had been taking training full-time since March 15, 2021, and that he spent 25 or more hours per week on it.¹⁹

[24] On August 23, 2021, he told the Commission that he had begun self-employment activities on August 8, 2021, after his training, and that he spent more than 15 hours per week on them but hadn't been paid for them yet.²⁰ He also said that he wasn't prepared to work any hours outside his self-employment business.²¹

¹⁶ See the Appeal Division decision in *GP v Canada Employment Insurance Commission*, 2021 SST 791.

¹⁷ See GD3-34 and GD3-35.

¹⁸ See GD4-9.

¹⁹ See GD3-14 to GD3-16.

²⁰ See GD3-17 and GD3-18.

²¹ See GD3-17 and GD3-18.

[25] On his claimant reports for the period from August 8 to 21, 2021, the Appellant reported working 15 hours in each of the two weeks in question and not receiving any earnings.²² He also indicated that he was available for work during that period.²³

[26] On October 5, 2021, he told the Commission that he wasn't interested in self-employment anymore and that he was looking for a job.²⁴

[27] In his request for reconsideration and his notice of appeal, the Appellant explained that, if he hadn't had access to EI, he would have abandoned his training or taken it while being available for work.²⁵

[28] At the hearing, the Appellant also said that he could have taken his training part-time.

[29] In this case, for the claim made on March 10, 2021, the Appellant was subject to the provisions of section 153.161(2) of Part VIII.5 of the Act, despite the temporary nature of that section, and to those of section 52 of the Act.

[30] I find that the Commission's decision is based on sections 153.161(2) and 52 of the Act.

[31] I find that, although the Commission says that it relied on section 153.161 of the Act in making its decision, the provisions of section 52 of the Act continue to apply.

[32] Section 52 of the Act applies to the issues of availability for work and whether the Appellant worked full working weeks for the weeks he was self-employed.

[33] When it comes to assessing availability for work, section 153.161(2) of the Act gives the Commission a power similar to the one it has under section 52(1) of the Act. The only difference between these two sections is that, under the provisions of

²² See GD3-24.

²³ See GD3-24.

²⁴ See GD3-25.

²⁵ See GD2-6 and GD3-40.

section 153.161(2) of the Act, the Commission's power isn't time-limited, but it is in the case of a reconsideration under section 52(1) of the Act.

[34] Under section 153.161(2) of the Act, the Commission may, at any point after benefits are paid to a claimant, verify that the claimant is entitled to those benefits.²⁶

[35] Under section 52 of the Act, the Commission may reconsider a claim for benefits within 36 months after the benefits have been paid or would have been payable, or within 72 months if, in its opinion, a false or misleading representation has been made.²⁷

[36] In making its decision, the Commission used its powers under sections 52 and 153.161(2) of the Act. Upon reconsideration and verification, it changed its decision, finding that the Appellant wasn't entitled to benefits. It made a new decision in accordance with the procedure set out in section 52(2) of the Act.

[37] In this case, the question is whether the Commission used its discretion to reconsider judicially.

[38] On the issue of availability for work, I would also point out that, even though section 153.161(2) of the Act says that the Commission may, "at any point" after benefits are paid to a claimant, "verify" that the claimant is entitled to benefits, this section specifies that the Commission may do so, but "by requiring proof" that the claimant was capable of and available for work on any working day of their benefit period.²⁸

[39] I find that the Commission didn't verify the Appellant's entitlement to benefits under section 153.161(2) of the Act. It didn't apply the related provisions of this section.

[40] The Commission didn't ask the Appellant to prove his entitlement to benefits under section 153.161(2) of the Act.

²⁶ See section 153.161(2) of the Act.

²⁷ See sections 52(1) and 52(5) of the Act.

²⁸ See section 153.161(2) of the Act.

[41] I find that, before making its decision on November 24, 2021, more than eight months after the Appellant applied for benefits, the Commission didn't inform him of the job search required to show his availability for work or of the proof he had to provide, before retroactively disentitling him to benefits.

[42] Having established that the Commission reconsidered the Appellant's claim for benefits under section 52 of the Act, while relying on the provisions of section 153.161(2) of the Act, I now have to determine whether it exercised its discretion judicially when it decided to retroactively verify the claim, to reconsider it, and to change its decision.

Issue 2: Did the Commission exercise its discretion judicially when it decided to retroactively verify the Appellant's claim for benefits, to reconsider it, and to change its decision?

[43] The Federal Court of Appeal (Court) has held that there is no authority to interfere with discretionary decisions of the Commission 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."²⁹

[44] It is up to the Commission to show that it exercised its discretion judicially. In other words, the Commission has to show that it acted in good faith, considered all relevant factors, and ignored irrelevant ones.³⁰

[45] Since the Commission's power to reconsider is discretionary, its decisions can be interfered with only if it didn't exercise this power judicially.³¹

²⁹ The Federal Court of Appeal (Court) established this principle in *Uppal*, 2008 FCA 388.

³⁰ The Court established or reiterated this principle in the following decisions: *Uppal*, 2008 FCA 388; *Tong*, 2003 FCA 281; *Dunham*, A-708-95; and *Purcell*, A-694-94.

³¹ See the Court's decisions in *Chartier*, A-42-90; and *Uppal*, 2008 FCA 388.

[46] 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.³²

[47] The *Digest of Benefit Entitlement Principles*, a document prepared by the Commission, sets out conditions for reconsideration to determine whether the Commission considered all relevant factors in exercising its discretion.

[48] This document says that the Commission will reconsider a claim when:

- benefits have been underpaid
- benefits were paid contrary to the structure of the Act
- 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 received³³

– **Benefits underpaid**

[49] I find that the benefit “underpayment” factor doesn’t apply to the Appellant.

[50] In its November 24, 2021, decision, the Commission told the Appellant that he would receive a notice of debt if he owed money.³⁴

[51] The Appellant says that he asked for a suspension of the debt the Commission referred to in its decision.

[52] In this case, I consider that it isn’t that “benefits have been underpaid,” since the Commission is asking the Appellant to pay back money.

³² This principle was established or reiterated in the following decisions: *Hudon*, 2004 FCA 22; and *Gagnon*, 2004 FCA 351.

³³ See section 17.3.3 of the *Digest of Benefit Entitlement Principles*.

³⁴ See GD3-34 and GD3-35.

[53] The *Digest of Benefit Entitlement Principles* says that the Commission always reconsiders if the claimant has been denied benefits that may become payable as the result of reconsideration.³⁵

[54] In the case of an overpayment, the Commission may reconsider a claim for benefits, as the Act states.³⁶

[55] The provisions of section 52 of the Act confirm the discretionary nature of the Commission's decisions about reconsidering benefit periods within the time allotted to it.

[56] The provisions of section 153.161 of the Act also confirm the discretionary nature of the Commission's power to decide to verify a claim for benefits.

– **Benefits were paid contrary to the structure of the Act**

[57] I find that, when the Appellant's claim was set up and he was paid benefits, this was done in accordance with the "structure of the Act," that is, in accordance with the related basic elements of the Act.

[58] The *Digest of Benefit Entitlement Principles* says that a "period of non-availability" and a "period of self-employment" fall outside the definition of *Structure of the Act*. But it says that these elements can be reconsidered as long as they meet one of the other conditions set out under the policy that deals with this (Commission's Reconsideration Policy).³⁷

[59] I find that the Commission didn't make a decision contrary to the structure of the Act.

– **Benefits were paid as a result of a false or misleading statement**

[60] When benefits were paid as a result of false or misleading statements, the Commission may reconsider the claim for benefits.

³⁵ See section 17.3.3 of the *Digest of Benefit Entitlement Principles*.

³⁶ See section 52 of the Act.

³⁷ See section 17.3.3.2 of the *Digest of Benefit Entitlement Principles*.

[61] The Commission may reconsider a claim for benefits within 36 months after the benefits have been paid or would have been payable to a claimant.³⁸ If, in its opinion, a false or misleading statement or representation has been made in connection with a claim, the Commission has 72 months after the benefits have been paid or would have been payable to reconsider the claim.³⁹

[62] The Court tells us that the Commission may reconsider a claim for benefits within 72 months if, in its opinion, a false or misleading statement has been made.⁴⁰

[63] The Commission says that the Appellant doesn't meet the requirements under the Act to show that he was available for work.⁴¹

[64] It says that the Appellant did report his training on his claimant reports, but he also indicated that he was available when he wasn't.⁴²

[65] According to the Commission, the Appellant knew that he wasn't available given that he had to concentrate on his training and that he had completed an internship.⁴³

[66] It says that the Appellant did mention that he didn't intend to work as an employee.⁴⁴

[67] In his statement to the Commission on April 8, 2021, the Appellant indicated that he had been taking training since March 15, 2021, and that he spent 25 or more hours per week on it.⁴⁵ He said that his training would end on June 6, 2021.⁴⁶

[68] He argues that he reported being in training on all his claimant reports.

³⁸ See section 52(1) of the Act.

³⁹ See section 52(5) of the Act.

⁴⁰ The Court established or reiterated this principle in the following decisions: *Dussault*, 2003 FCA 372; and *Pilote*, A-868-97.

⁴¹ See GD4-6 to GD4-9.

⁴² See GD3-24 and GD4-9.

⁴³ See GD3-43 and GD4-9.

⁴⁴ See GD3-28 and GD4-9.

⁴⁵ See GD3-14 and GD3-16.

⁴⁶ See GD3-16.

[69] The Appellant's claimant reports for the period from August 8 to 21, 2021, also specify the number of hours he worked as a self-employed person during that period.⁴⁷

[70] I find that no false or misleading statements were made in connection with the Appellant's claim.

[71] I also find ironic the Commission's argument that the Appellant indicated he was available for work when—according to the Commission—he wasn't, referring to his claimant reports for the period from August 8 to 21, 2021.⁴⁸ I note that he reported working 15 hours for each of the two weeks in question after starting his self-employment, which shows that he worked.⁴⁹

[72] The factor for benefits being paid as a result of a false or misleading statement doesn't apply to the Appellant. I find that he was always honest in his statements by indicating that he was in training or self-employed.

[73] I find that, despite this situation, the Commission could reconsider or verify the Appellant's claim for benefits.

– **The claimant ought to have known there was no entitlement to the benefits received (knowledge that there is no entitlement)**

[74] In my view, there is no evidence that the Appellant ought to have known—and therefore had “knowledge”—that he wasn't entitled to the benefits received.

[75] The Appellant's testimony and statements indicate the following:

- a) He wonders why the Commission approved his claim and, several months after paying him benefits, told him that he could not get benefits anymore, that it [translation] “wasn't right anymore.”

⁴⁷ See GD3-24.

⁴⁸ See GD3-24.

⁴⁹ See GD3-24.

- b) He told the Commission that he was taking training full-time and mentioned this on all his claimant reports.⁵⁰
- c) His claimant reports indicate the hours he worked as a self-employed person.⁵¹
- d) If he had been unable to get benefits, he would have abandoned his training or taken it while being available for work.⁵² In general, the training was from 9 a.m. to 4 p.m., Monday to Friday.⁵³ He could have taken it part-time.
- e) He should not be penalized for a Commission error.⁵⁴
- f) He learned from the Commission that it had approved the claims of many people in training.

[76] In my view, the Commission hasn't shown that the Appellant could assume there was no entitlement to the benefits received.

[77] I find that the Commission didn't exercise its discretion judicially in deciding to verify and reconsider the Appellant's claim for benefits.

[78] I am of the view that the Commission hasn't shown that the Appellant ought to have known or had "knowledge" that there was no entitlement to the benefits received—one of the rules set out in the *Digest of Benefit Entitlement Principles* to show that it exercised its discretion judicially.

[79] I find that the Commission didn't follow the "Reconsideration Policy" it developed to ensure a consistent and fair application of section 52 of the Act and to prevent

⁵⁰ See GD2-6, GD3-14 to GD3-16, and GD3-36 to GD3-39.

⁵¹ See GD3-24.

⁵² See GD2-6 and GD3-36 to GD3-39.

⁵³ See GD3-30 and GD3-42.

⁵⁴ See GD2-6 and GD3-36 to GD3-39.

creating debt when the claimant was overpaid through no fault of their own, as the policy states.⁵⁵

[80] In my view, all the elements were there for the Commission to set up the Appellant's claim and pay him benefits.

[81] I find the Appellant's testimony credible and place the most weight on it. The Appellant was consistent in his statements that he reported his training and subsequent self-employment.

[82] I find that the Appellant was transparent about this.

[83] I am of the view that the Appellant could reasonably believe that, when his claim for benefits was approved and he started receiving benefits, this meant he was entitled to those benefits.

[84] In summary, given the evidence and the particular circumstances of this case, I find that the Commission didn't use its discretion judicially in deciding to verify and reconsider the Appellant's claim for benefits.

[85] I find that the Commission didn't consider all relevant factors in doing so. These factors refer to all the information the Appellant gave in his April 8, 2021, statement to the Commission about the training he had started, and the information he gave on his claimant reports about his training and self-employment.

[86] In my view, the Commission failed to apply its own rules in doing so. I find that it didn't use its discretion properly.

[87] I find that a reconsideration of the Appellant's claim for benefits is unwarranted, even if done within the time set out in the Act.

[88] Because of this, I won't review the initial decision in the Appellant's case.

⁵⁵ See section 17.3.3 of the *Digest of Benefit Entitlement Principles*.

Availability for work, working full working weeks (self-employment), and paying back benefits

[89] Since I have found that the Commission didn't exercise its discretion judicially in deciding to verify and reconsider the Appellant's claim for benefits, there is no need to review the initial decision in his case.

[90] This means that there is no need to determine whether the Appellant was available for work while taking training during the period from March 15, 2021, to June 11, 2021.⁵⁶

[91] And there is no need to determine whether the Appellant worked full working weeks during the period from June 14, 2021, to September 4, 2021, and whether the disentanglement to benefits imposed on him for that period for failing to show he was unemployed is justified.⁵⁷

[92] There is no need to determine whether the Appellant has to pay back the benefits that he received and that the Commission says he owes.⁵⁸

Conclusion

[93] I find that the Commission didn't use its discretion judicially in deciding to verify and reconsider the Appellant's claim for benefits. This means that the Commission could not retroactively determine that the Appellant wasn't entitled to EI benefits.

[94] So, there is no need to determine whether he was entitled to benefits for the period from March 15, 2021, to June 11, 2021, when he was taking training, and for the period from June 14, 2021, to September 4, 2021, when he was self-employed. And there is no need to decide whether the Appellant has to pay back the amount of money that he was overpaid in benefits and that the Commission says he owes.

⁵⁶ See sections 18(1)(a) and 153.161 of the Act and sections 9.001 and 9.002(1) of the Regulations.

⁵⁷ See sections 9 and 11 of the Act and section 30 of the Regulations.

⁵⁸ See sections 43, 44, and 52 of the Act.

[95] This means that the appeal is allowed.

Normand Morin
Member, General Division – Employment Insurance Section