



Citation: *Canada Employment Insurance Commission v MA*, 2022 SST 1018

Social Security Tribunal of Canada Appeal Division

Decision

Appellant: Canada Employment Insurance Commission
Representative: Gilles-Luc Bélanger

Respondent: M. A.

Decision under appeal: General Division decision dated April 1, 2022
(GE-22-449)

Tribunal member: Shirley Netten

Type of hearing: Teleconference

Hearing date: July 7, 2022

Hearing participants: Appellant's representative

Respondent

Interpreter

Decision date: October 14, 2022

File number: AD-22-268

Decision

[1] The Canada Employment Insurance Commission's (Commission's) appeal is allowed. The General Division decision is rescinded (cancelled), and the Commission's reconsideration decision of January 25, 2022 is confirmed.¹ This means that the notice of debt remains in place. The Claimant, M. A., can still ask the Commission to write off his debt based on undue hardship.

Overview

[2] The Claimant lost his job in February 2021. The Commission² paid him employment insurance (EI) regular benefits at a rate of \$595 per week. This rate was calculated using the information in a Record of Employment dated March 8, 2021.

[3] The Claimant's employer issued an amended Record of Employment the next day, on March 9, 2021. In December 2021, the Commission reconsidered the claims for benefits on its own initiative. Based on the amended Record of Employment, the Commission decided that the Claimant's benefit rate was actually \$500 per week.³ This resulted in an overpayment of \$3,895.⁴

[4] The Claimant did not dispute the revised calculation of the benefit rate. He objected to having to pay for the Commission's mistake.

[5] The Commission maintained its decision when the Claimant asked for reconsideration. On appeal, the General Division decided that the Commission didn't properly exercise its discretion to reconsider the claims in December 2021. The General Division allowed the Claimant's appeal.

¹ This is the decision at GD3-36. There is a different decision of the same date at GD3-38, which is not part of this appeal.

² Service Canada acts on behalf of the Commission. For simplicity, this decision refers only to the Commission.

³ Temporary measures associated with the pandemic increased the Claimant's benefit rate from 55% of his weekly insurable earnings to \$500. See section 153.192 of the *Employment Insurance Act* (Act).

⁴ This represents \$95 per week for 41 weeks, from February 14 to November 27, 2021.

[6] The Commission now appeals to the Appeal Division, saying that the General Division made an error of law in the test for whether the Commission exercised its discretion judicially. I have found that the General Division erred, and that the Commission properly exercised its discretion to reconsider. While I sympathize with the Claimant's situation, I must allow the Commission's appeal.

Preliminary matter: the appeal is not moot

[7] An appeal is moot if the decision will have no practical effect on the rights of the parties.⁵ Here, I considered whether the Claimant would keep the higher benefit rate regardless of my decision, possibly making this appeal moot.

[8] The law says that benefits are payable in accordance with the General Division decision if it allows a claim for benefits and if (as in this case) the Commission doesn't bring its appeal within 21 days.⁶

[9] The Commission argues that no benefits were "payable" under the General Division decision, and so the Claimant can't benefit from this provision. I agree that the law doesn't help the Claimant in this case. The General Division decision allowed the Claimant to keep benefits previously received (by not letting the Commission reconsider their decision). It did not allow a claim for benefits, and no benefits had to be paid to the Claimant as a result of the decision.

[10] Since my decision will have a practical effect on the rights of the parties, this appeal will not be dismissed as moot.

Issues

[11] The issues in this appeal are:

⁵ *Borowski v Canada (Attorney General)*, 1989 CanLII 123 (SCC)

⁶ This is the effect of section 114(1) of the Act together with section 80 of the *Employment Insurance Regulations*.

- a) Did the General Division make an error of law in assessing whether the Commission properly exercised its discretion to reconsider the Claimant's benefits?
- b) If so, how should the error be fixed? Did the Commission exercise its discretion judicially?

Analysis

The General Division made a legal error

[12] One of the grounds of appeal to the Appeal Division is that the General Division made an error of law.⁷ The Commission says that the General Division made a legal error in the way it decided whether the Commission properly exercised its discretion to reconsider the Claimant's benefit rate.

[13] The facts in this matter are straightforward. It is a clear case of Commission error. Despite receiving an amended Record of Employment quickly, the Commission did not realize for almost nine months that it was paying the Claimant the wrong benefit rate. The law gives the Commission up to three years to correct this kind of mistake. That is what the Commission did in December 2021.

– The Commission's discretion must be exercised judicially

[14] Section 52 of the *Employment Insurance Act* (Act) says that the Commission "may reconsider a claim for benefits" within certain timeframes.⁸ This is a discretionary power: the Commission can choose whether or not it will reconsider the claim.

[15] The Commission's representative acknowledges that the discretion must be exercised "judicially."⁹ This means that a decision made in bad faith, for an improper

⁷ *Department of Employment and Social Development Act*, section 58(1)(b)

⁸ The timeframe is within three years after the benefits were paid or payable, extended to five years in cases of false or misleading statements or representations. See section 52(1), (5) of the Act.

⁹ See the Commission's arguments at AD2-3,4.

purpose, in a discriminatory manner, considering irrelevant factors, or failing to consider relevant factors, must be set aside.¹⁰ The General Division correctly stated this test.¹¹

[16] The General Division went on to decide that certain factors — inability to repay, severe stress, and Commission error — were relevant to the exercise of discretion. Since the Commission hadn't considered all these factors, the General Division decided that it hadn't exercised its discretion judicially.¹²

[17] The Commission argues that the General Division was wrong to add inability to repay and severe stress as relevant factors when deciding whether to reconsider claims for benefits. I agree with the Commission.

– **Personal circumstances are not relevant to this discretionary decision**

[18] The law doesn't direct the Commission to reconsider every claim for benefits that may have been overpaid. Rather, the Commission has the power to choose whether or not to reconsider a claim for benefits. That choice reflects the tension between finality (claimants should be able to rely on decisions made about their benefits) and accuracy (mistakes and misrepresentations should be corrected).

[19] The law also doesn't tell the Commission **how** to decide whether to reconsider a claim for benefits, or what factors to consider. In my view, factors that could favour either finality or accuracy, helping to resolve that tension in a particular case, are relevant factors.¹³

¹⁰ See *Suresh v Canada (Minister of Citizenship and Immigration)*, [2000] 2 FC 592, *Canada (Attorney General) v Purcell*, 1995 CanLII 3558 (FCA), [1996] 1 FC 644, and *Canada (Attorney General) v Uppal*, 2008 FCA 388. These cases are consistent with but more recent than the one cited by the Commission's representative, *Portelance v Canada (Employment and Immigration Commission)*, T-1765-89. The Commission's representative didn't want to focus on *Uppal* because it talks about mitigating circumstances in the context of a penalty, but the General Division only relied on *Uppal* for the test for the judicial exercise of discretion.

¹¹ See paragraph 13 of the General Division decision, and the related footnote.

¹² Despite that finding, the General Division didn't go on to make the discretionary decision itself as it should have. By allowing the appeal, it is implicit that the General Division decided against reconsidering the claims for benefits.

¹³ The courts have approved consideration of the "sound policy" of finality when exercising an implicit reconsideration power: see *Zutter v British Columbia (Council of Human Rights)*, 1995 CanLII 1234 (BCCA), cited by the Federal Court in *Merham v Royal Bank of Canada*, 2009 FC 1127 at paragraph 23. It follows that the importance of finality is also relevant when the discretionary power is explicit.

[20] In the absence of guidance in the law, the Commission developed an internal policy for its agents. I have taken official notice of its contents.¹⁴ The Commission's policy requires consideration of whether:

- benefits have been underpaid;
- benefits were paid contrary to the structure of the Act (in other words, the basic elements of a claim weren't met, such as an interruption of earnings, insurable hours, conditions for special benefits);
- 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.¹⁵

[21] Although this type of internal guideline is not binding, the courts have repeatedly supported the use of such guidelines "to guarantee some consistency nationally and avoid arbitrariness."¹⁶ The Tribunal's General Division has previously decided that the policy factors are relevant to the discretionary decision.¹⁷ I agree that the policy sets out relevant factors to be **considered** when deciding whether or not to exercise the discretion to reconsider.

[22] The policy does not take into account a claimant's personal circumstances, such as ability to pay or stress. But Commission policy isn't binding.¹⁸ There may be relevant factors that aren't listed in that policy.

¹⁴ The Appeal Division has previously taken official notice of Commission policy (see for example *DS v Canada Employment Insurance Commission* 2015 STAD 1486). I can take official notice of something that can be confirmed by "readily accessible sources of indisputable accuracy" (see *R v Find*, 2001 SCC 32). The Commission publishes its policy online at [Digest of Benefit Entitlement Principles - Canada.ca](#). When it comes to the contents of its own policy, I consider this to be a source of indisputable accuracy.

¹⁵ See Chapter 17.3.3 of the *Digest of Benefit Entitlement Principles*.

¹⁶ For example, *Canada (Attorney General) v Gagnon*, 2004 FCA 351, *Baker v Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC).

¹⁷ For example, *SL v Canada Employment Insurance Commission*, 2021 SST 889 and *JP v Canada Employment Insurance Commission*, 2021 SST 109). The Commission did not appeal these decisions.

¹⁸ See *Maple Lodge Farms Ltd v Canada*, 1982 CanLII 24 (SCC), *Stemijon Investments Ltd v Canada (Attorney General)*, 2011 FCA 299.

[23] Are personal circumstances also relevant when deciding whether to reconsider benefits? In my view, they are not.

[24] There are two ways that a claimant can avoid having to repay benefits that were overpaid:

- The Commission can exercise its discretion **not to reconsider** the claim for benefits under section 52 of the Act. The claim for benefits is not reopened, the previous decision remains in place, an overpayment is not created, and there is no debt.

OR

- **After** an overpayment has been created (resulting from a section 52 reconsideration or otherwise¹⁹), the Commission can exercise its discretion to **write off** the associated debt in certain circumstances.²⁰ The debt exists but is forgiven.

[25] The law tells the Commission when it can consider a write off. Among other options, the Commission can write off a debt if repayment “would result in undue hardship to the debtor.”²¹ This suggests to me that the right time to consider a claimant’s personal circumstances is not when deciding whether to reconsider their benefits, but when deciding whether to forgive their debt.

[26] This makes sense, because personal circumstances go to the question of ability to pay (can this person pay the debt?), rather than the importance of finality in decision-making (should the previous decision be reopened?). In other words, the extent to which claimants should be able to rely on decisions about their benefits should not change according to their financial situation. And, on a practical level, the Commission

¹⁹ An overpayment may also arise, for example, in the case of an allocation of earnings under section 45 of the Act.

²⁰ The circumstances are set out in section 56 of the *Employment Insurance Regulations*. This discretionary decision cannot be appealed to the Social Security Tribunal: see sections 112, 112.1 and 113 of the Act.

²¹ Section 56(1)(f)(ii) of the *Employment Insurance Regulations*.

would not ordinarily be in a position to assess a claimant's personal circumstances at the stage of deciding whether to reconsider a claim for benefits. In contrast, the Commission **is** in a position to assess the nature of the error and the context surrounding that error.

[27] For these reasons, I agree with the Commission that the General Division erred by basing its decision on factors that weren't relevant to the discretionary reconsideration decision.

How to fix the error: I can give the decision the General Division should have given

[28] When the General Division makes an error, my options are to return the matter to the General Division, or to decide the matter myself.²² The Appeal Division will usually make the decision itself, so long as the parties have already had a full and fair opportunity to present their evidence. This is the case here.

– The Commission exercised its discretion properly

[29] The evidence before the General Division was that the agent had decided to reconsider the claim, taking into consideration that “the information presented warrants a reconsideration.”²³ The specific rationale for exercising the discretion to reconsider was not documented.

[30] Based on the underlying facts of this case, I find it more likely than not that the Commission exercised its discretion properly – that is, there was no bad faith, improper purpose, discrimination, consideration of irrelevant factors, or failure to consider relevant factors.

[31] Certainly, the Commission was responsible for a long delay in recalculating the Claimant's benefit rate. The Commission reconsidered its earlier decision some nine months after receiving the amended Record of Employment. Under section 52, the

²² These options are set out in section 59(1) of the *Department of Employment and Social Development Act*.

²³ See GD7-1.

Commission had up to three years to fix its mistake. While the delay was unfortunate, there is no basis for me to conclude that the Commission's decision was made in bad faith, for an improper purpose or in a discriminatory manner.

[32] Similarly, there is no indication in the evidence, or any suggestion from the Claimant, that the Commission considered irrelevant factors when making its decision.

[33] I also can't conclude that the Commission likely failed to consider relevant factors: while the Commission's error was relevant, so was the fact that the wrong benefit rate was used. The benefit rate is a basic element in the structure of the Act, and there is no discretion or judgment in its calculation.²⁴ The Claimant hasn't identified any other relevant factors that the Commission failed to consider.

[34] For all these reasons, I conclude that the Commission more likely than not exercised its discretion properly. This means that its decision – to reduce the Claimant's benefit rate retroactively and issue a notice of debt for the amount overpaid – remains in place.

The Claimant can still request a write-off

[35] In January 2022 the Commission decided that it couldn't write off the Claimant's debt under section 56(1)(e) or section 56(2) of the *Employment Insurance Regulations* (Regulations). This must have been confusing for the Claimant, because he doesn't seem to have asked for a write off under those sections. Rather, the Claimant expressed concerns about his ability to pay the debt. Despite this, the Commission did not consider whether it could write off the debt under **section 56(1)(f)(ii)** of the Regulations. This is the section that talks about undue hardship.

[36] Even if the Commission delegates this task to the Canada Revenue Agency, it is obliged under the Regulations to give the Claimant a decision about such a write off. I understand that the Commission can forward a recommendation from the Social Security Tribunal to the Canada Revenue Agency to consider a write-off request.²⁵ I

²⁴ See sections 14 and 153.192 of the Act.

²⁵ The form I have seen is ESDC S&P5018 (2017-07-008) E.

recommend that this be done in this case, and that the Claimant be given the opportunity to support his claim of undue hardship. If the Claimant is not successful in getting a write off, his recourse is at the Federal Court (not the Social Security Tribunal).

Conclusion

[37] The Commission's appeal is allowed. The General Division decision is rescinded and the Commission's reconsideration decision of January 25, 2022 is confirmed.

Shirley Netten
Member, Appeal Division