



Citation: *MA v Canada Employment Insurance Commission*, 2022 SST 1019

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

Decision

Appellant (Claimant): M. A.
Respondent (Commission): Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (448631) dated January 25, 2022 (issued by Service Canada)

Tribunal member: Gerry McCarthy
Type of hearing: Videoconference
Hearing date: March 31, 2022
Hearing participants: Appellant
Witness
Interpreter
Decision date: April 1, 2022
File number: GE-22-449

Decision

[1] The appeal is allowed. The Canada Employment Insurance Commission (Commission) did not exercise their discretion judicially when they reconsidered the Claimant's claim.

Overview

[2] The Claimant established an initial claim for regular Employment Insurance (EI) benefits on February 14, 2021. The Claimant worked for "X" until February 13, 2021. Based on the Claimant's Record of Employment, the Commission determined the Claimant was entitled to the maximum benefit rate of \$595.00. The Claimant subsequently received benefits from February 14, 2021, to November 27, 2021.

[3] The Claimant contacted the Commission in December 2021, because he noticed his benefits were reduced. The Commission advised the Claimant that his claim had been re-assessed. The Commission explained in the Appeal Record that they re-assessed the Claimant's claim after they reviewed an amended Record of Employment. The Claimant's amended Record of Employment (issued March 9, 2021) indicated that he accumulated 644 total insurable hours and \$12,613.59 total insurable earnings from September 26, 2020, to February 13, 2021 (GD3-26).

[4] The Commission re-assessed the Claimant's benefit period and determined his weekly benefits rate was \$425.00 per week. Due to the Emergency Response measures temporarily in place, the Claimant's benefit rate was increased to \$500.00 per week.

[5] On December 6, 2021, the Commission notified the Claimant in writing that his claim for benefits was re-assessed and his benefit rate changed from \$595.00 to \$500.00 per week. The decrease in the Claimant's weekly benefit rate of \$595.00 created an overpayment of \$3,895.00.

[6] The Claimant requested a reconsideration of the Commission's decision. The Commission maintained their position and issued two reconsideration decisions. The

first reconsideration decision was on the Claimant's weekly benefit rate which the Commission maintained (GD3-36). The second reconsideration decision indicated the Claimant had requested the Commission to write-off his overpayment. The Commission submitted the Claimant's request couldn't be granted because his benefits were received from February 14, 2021, to November 27, 2021, which was not more than 12-months before he was notified of the overpayment. The Commission's reconsideration decision indicated that if the Claimant disagreed with the overpayment decision he had 30-days following the receipt of their notice to file a Notice of Application for judicial review with the Federal Court.

[7] The Claimant says he was not appealing the calculation of the weekly benefit rate. The Claimant says he was appealing his overpayment and how it was created by the Commission. The Claimant says his amended Record of Employment from his employer was issued within 24-hours of the initial Record of Employment. He says he didn't learn about the lower weekly benefit rate until 10-months after his employment ended. He says he shouldn't be responsible for a Commission error. He further says the overpayment had caused him severe stress and anxiety. He also testified that he told the Commission he had no job and could not repay the overpayment.

[8] The Commission says the Claimant received benefits to which he was not entitled to and the reconsideration of the claim was within the 36-month timeframe. The Commission further says they exercised their authority under the law and considered the relevant four factors listed in their Supplementary Representations (GD7).

Issue

[9] Did the Commission exercise their discretion judicially when it reconsidered the Claimant's claim?

Analysis

[10] The law says the Commission may reconsider a claim for benefits within 36-months after the benefits have been paid or would have been payable.¹

[11] If the Commission decides that a person has received money by way of benefits for which the person was not qualified or to which the person was not entitled (or has not received money for which the person was qualified and to which the person was entitled) they must calculate the amount of the money and notify the claimant of its decision.²

[12] A recent decision from the Appeal Division of the Social Security Tribunal explained that the General Division's jurisdiction *required* that it consider whether the Commission had the power to disentitle retroactively the Claimant and if so, whether the Commission should act and acted "judicially" when deciding to reconsider the claim.³

[13] The case law indicates that the Commission's discretion must be exercised judicially.⁴ A discretionary power is not exercised judicially if it can be established that the decision-maker:

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

¹ Section 52(1) of the *Employment Insurance Act* says the Commission may reconsider a claim for benefits within 36-months after the benefits have been paid or would have been payable

² Section 52 (2) of the *Employment Insurance Act*.

³ *GP v Canada Employment Insurance Commission*, 2021 SST 791-21-263.

⁴ *Uppal v Canada (Attorney General of Canada)* 2008 FCA 388. Also: *Dunham v Canada (Attorney General of Canada)* A-708-95. In *Dunham*, the Federal Court of Appeal wrote: "Like any discretionary power, the Commission's discretion must be exercised in good faith and having regard to all the relevant factors, and without being influenced by irrelevant factors."

- acted in a discriminatory manner.⁵

Did the Commission exercise their discretion judicially when it reconsidered the Claimant's claim?

[14] I find the Commission did not exercise their discretion judicially for the following reasons:

[15] First: The Commission didn't take into account the Claimant's personal circumstances of unemployment and his inability to repay his overpayment. I realize the Commission submitted they exercised their authority under the law and considered a number of factors including whether the information presented warranted a reconsideration (GD7). Nevertheless, there was no reference in the Appeal Record that the Commission considered the Claimant's unemployment and financial circumstances when they reconsidered the claim.

[16] Second: The Commission didn't take into account the severe stress and anxiety the overpayment had caused the Claimant. Specifically, the Claimant testified that his overpayment had caused him severe anxiety and nightmares. I accept as credible the Claimant's testimony on this matter, because his statements were detailed, forthright and consistent. I realize the Commission submitted that under the law they can reconsider a claim for benefits within 36-months after the benefits have been paid or would have been payable. Nevertheless, I find the Commission did not exercise their discretion judicially when they reconsidered the claim because they didn't taken into account the Claimant's difficult personal and financial circumstances.

[17] Third: The Commission didn't take into account that the Claimant's amended Record of Employment was issued only twenty-fours after the Claimant's initial Record of Employment was issued on March 8, 2021 (GD3-17 and GD3-36). The Claimant testified the Commission didn't advise him about his reduced weekly benefit rate until December 2021. This was almost *10-months* after the amended Record of Employment

⁵ *Purcell v Canada (Attorney General of Canada)*, [1996] 1 FC 644.

was issued on March 9, 2021. In short, this was a relevant circumstance that should have been taken into account by the Commission when they reconsidered the claim.

Additional Testimony from the Claimant

[18] I realize the Claimant was asking that his overpayment be rescinded or written-off. However, I have no authority to reduce or write-off an overpayment under the law.⁶ Nevertheless, I have concluded the Commission did not exercise their discretion judicially when they reconsidered his claim.

Additional Submissions from the Commission

[19] I further realize the Commission submitted that the Claimant did not satisfy the provisions under the regulations and could not be granted any relief from the resulting overpayment (GD4-4 and GD3-38 and GD3-39).⁷ As mentioned above, I recognize I have no authority to reduce or write-off an overpayment. However, I have concluded the Commission ignored several relevant factors in this case and did not exercise their discretion judiciously when they reconsidered the Claimant's claim.

Conclusion

[20] The appeal is allowed.

Gerry McCarthy

Member, General Division – Employment Insurance Section

⁶ Section 112.1 of the *Employment Insurance Act*.

⁷ Paragraph 56(1)(e) and subsection 56(2) of the *Employment Insurance Regulations*.