[TRANSLATION]

Citation: *Canada Employment Insurance Commission v OB*, 2022 SST 1371

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	Canada Employment Insurance Commission
Representative:	Mélanie Allen
Respondent:	O. B.

Decision under appeal:	General Division decision dated July 22, 2022 (GE-22-1098)

Tribunal member:	Pierre Lafontaine
Type of hearing:	Teleconference
Hearing date:	November 17, 2022
Hearing participant:	Appellant's representative
Date of decision:	November 21, 2022
File number:	AD-22-505

Decision

[1] The appeal is allowed on the issue of whether the Canada Employment Insurance Commission (Commission) used its discretion judicially.

[2] However, the file returns to the General Division to determine whether the Claimant was entitled to benefits from October 5 to December 21, 2020; January 15 to May 4, 2021, and September 7 to October 1, 2021, when he was taking training.

Overview

[3] The Appellant, the Commission, decided that the Respondent (Claimant) was not entitled to Employment Insurance (EI) regular benefits from October 5 to December 21, 2020; January 15 to May 4, 2021, and September 7 to October 1, 2021, because he was taking unauthorized training and was not available for work. The Claimant appealed the Commission's reconsideration decision to the General Division.

[4] The General Division determined that the Commission had not used its discretion judicially in deciding to verify and reconsider the Claimant's claim for benefits. It found that the Commission could not retroactively determine that the Claimant was not entitled to EI benefits.

[5] The Appeal Division granted the Commission leave to appeal the General Division decision. The Commission argues that the General Division made an error of law in its interpretation of section 153.161 of the *Employment Insurance Act* (EI Act).

[6] I have to decide whether the General Division made an error of law in its interpretation of section 153.161 of the EI Act.

[7] I am allowing the Commission's appeal.

Issue

[8] Did the General Division make an error of law in its interpretation of section 153.161 of the EI Act?

Analysis

Appeal Division's mandate

[9] The Federal Court of Appeal has established that the Appeal Division's mandate is conferred to it by sections 55 to 69 of the *Department of Employment and Social Development Act*.[1]

[10] The Appeal Division acts as an administrative appeal tribunal for decisions made by the General Division and does not exercise a superintending power similar to that exercised by a higher court.

[11] So, unless the General Division failed to observe a principle of natural justice, made an error of law, or based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it, I must dismiss the appeal.

Preliminary remarks

[12] The Claimant was not at the hearing. I was satisfied that the Claimant had received the notice of hearing, so I proceeded with the appeal in his absence.[2]

Did the General Division make an error in its interpretation of section 153.161 of the EI Act?

[13] The General Division determined that the Commission had used its powers under sections 52 and 153.161(2) of the EI Act to reconsider the Claimant's claim for benefits. It determined that the Commission had changed its decision, finding that the Claimant was not entitled to benefits.

[14] The General Division determined that the Commission had made a new decision in accordance with the procedure set out in section 52(2) of the EI Act. So, it was appropriate to consider whether the Commission had used its discretion to reconsider

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[1] *Canada (Attorney General) v Jean*, 2015 FCA 242; *Maunder v Canada (Attorney General)*, 2015 FCA 274.

[2] See section 12(1) of the *Social Security Tribunal Regulations*.

judicially. The General Division found that the Commission had not used its discretion judicially in deciding to verify and reconsider the Claimant's claim for benefits.

[15] The Commission argues that the General Division made an error of law in its interpretation of section 153.161(2) of Part VIII.5 of the EI Act by finding that this provision gives the Commission a power similar to the one it has under section 52(1) of the EI Act.

[16] The Commission argues that the General Division also made an error of law when it indicated that the Commission had changed its decision, finding that the Claimant was not entitled to benefits and that it had made a new decision in accordance with the procedure set out in section 52(2) of the EI Act.

[17] The Commission argues that entitlement decisions about availability, made under section 153.161(2) of the EI Act, are not reconsideration decisions under sections 52 or 112 of the EI Act.

[18] Before the General Division, the Claimant disputed the fact that he had to repay the benefits he was overpaid. He argued that his statements to the Commission were always honest and made in good faith. He said that he had told the Commission, and indicated in all of his claimant reports, that he was taking full-time training.

[19] To determine whether the General Division made an error, it is important to look at the Commission's reconsideration powers first before considering the impact of the temporary pandemic measures to facilitate access to benefits.

[20] The Commission's reconsideration powers are set out in section 52 of the EI Act. This section says that the Commission may reconsider a claim for benefits within 36 months after the benefits have been paid or would have been payable.[3]

[21] Case law has established that the only limitation on the Commission's reconsideration power under section 52 of the EI Act is time. This means that the

[3] In situations where the Canada Employment Insurance Commission (Commission) is of the opinion that a false or misleading statement has been made, the Commission has 72 months to reconsider a claim.

Commission may reconsider a claim under section 52 even if there are no new facts. In other words, it can withdraw its earlier approval and require claimants to repay the benefits paid under that approval.[4]

[22] During the pandemic, the government temporarily changed the EI Act. Section 153.161 was added to the EI Act and came into force on September 27, 2020. It applies to the Claimant, who made an initial claim for EI benefits on October 6, 2020.

[23] Section 153.161 of the EI Act says the following:

> **Availability**
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> **Course, program of instruction or non-referred training**
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> **153.161(1)** For the purposes of applying paragraph 18(1)(a), a claimant who attends a course, program of instruction or training to which the claimant is not referred under paragraphs 25(1)(a) or (b) is not entitled to be paid benefits for any working day in a benefit period for which the claimant is unable to prove that on that day they were capable of and available for work.
>
> **Verification**
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> **(2)** The Commission may, at any point after benefits are paid to a claimant, verify that the claimant referred to in subsection (1) 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.

[24] This temporary provision says that the Commission may **verify** whether a claimant is entitled to benefits by requiring proof of their **availability** for work at any point after benefits are paid. This means that the **verification of entitlement** can happen only after benefits are paid. Section 52 of the EI Act is written differently. It says that the Commission may **reconsider** a claim for benefits within 36 months of an earlier approval.

[25] The Commission argues that the Claimant's entitlement was not verified until December 2021. But I find no evidence before the General Division that the entitlement

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[4] *Brisebois v Canada (Employment and Immigration Commission)*, A-582-79; *Brière v Commission, (Attorney General)*, A-637-86.

decision was delayed.[5] Instead, the Claimant's evidence before the General Division shows that he received benefits after completing a training form on October 14, 2020, and after discussing his school situation with an agent on October 23, 2020.

[26] I am of the view that the evidence before the General Division shows, on a balance of probabilities, that the Commission had already verified the Claimant's entitlement after speaking with the Claimant after he filed his training questionnaire and in approving the payment of benefits.

[27] That being said, I am of the view that section 153.161 has to be read together with section 52 of the EI Act. One section allows the Commission to verify entitlement to benefits if it has not done so, and if it has, the other section allows it to reconsider. Both sections are concerned with recovering amounts that claimants should not have received.

[28] In addition, the decision to carry out a verification under section 153.161 or to reconsider under section 52 is discretionary. This means that, although the Commission has the power to carry out a verification or to reconsider, it does not have to do so.

[29] The law says that discretionary powers must be exercised judicially. This means that, when the Commission decides to reconsider a claim, it cannot act in bad faith or for an improper purpose or motive, take into account an irrelevant factor or ignore a relevant factor, or act in a discriminatory manner.[6]

[30] The Commission has developed a policy to help it exercise its discretion to reconsider decisions under section 52 of the EI Act. The Commission says that the reason for the policy is "to ensure a consistent and fair application of section 52 of the EIA and to prevent creating debt when the claimant was overpaid through no fault of their own." The policy says that a claim will only be reconsidered when:

- benefits have been underpaid

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[5] The Commission's submissions to the General Division are not evidence of the facts that they summarize: See *MM v Canada Employment Insurance Commission*, 2015 SSTAD 1045.
[6] See *Canada (Attorney General) v Purcell*, 1995 CanLII 3558 (FCA).

- benefits were paid contrary to the structure of the [EI 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 received[7]

[31] The policy says that a period of non-availability is not a situation where benefits were paid contrary to the structure of the EI Act.[8] The Claimant did not make any false or misleading statements and could not have known that he was not entitled to the benefits received. None of the factors mentioned in the Commission's policy justify reconsidering the Claimant's claim.

[32] I have no doubt that the Claimant acted in good faith and repeatedly reported his training to the Commission. The Commission reconsidered the claim based on the facts before it when the initial entitlement decision was made and benefits were paid.

[33] In the absence of section 153.161 of the EI Act, I agree that the Commission should have considered the above factors and its own policy in exercising its discretion to reconsider the Claimant's claim.

[34] However, I am of the view that during the temporary pandemic measures, the Commission's discretion to reconsider a claim had to be exercised with the legislative intent of section 153.161 of the EI Act in mind.

[35] In implementing this section during the pandemic, Parliament clearly wanted to **insist** on the Commission's power to verify whether a claimant taking a course, program of instruction, or training was entitled to EI benefits, even after benefits are paid. The Commission therefore exercised its discretion to reconsider the Claimant's claim within the parameters set by Parliament during the pandemic.

[36] One of the principles of interpreting laws is that Parliament does not speak unnecessarily. In implementing section 153.161 of the EI Act, Parliament clearly

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[7] See Digest of Benefit Entitlement Principles, Chapter 17 – Section 17.3.3.
[8] See Digest of Benefit Entitlement Principles, Chapter 17 – Section 17.3.3.2.

decided that the reconsideration of an initial decision about the entitlement of a student during the pandemic outweighed the importance of the initial decision being final.

[37] Considering the above factors, I find that the General Division made an error in deciding that the Commission had not exercised its power judicially and therefore could not retroactively determine that the Claimant was not entitled to EI benefits.

[38] This means that I am justified in intervening.

Remedy

[39] For the above reasons, I find that the Commission used its discretion judicially under sections 52 and 153.161 of the EI Act.

[40] The Commission considered all the relevant information in reconsidering the Claimant's claim. No new relevant facts were provided at the General Division hearing that the Claimant had not already provided to the Commission. There is no evidence that the Commission considered irrelevant information or acted in bad faith or in a discriminatory manner. The Commission also acted for a proper purpose in verifying the Claimant's entitlement to benefits.

[41] However, given the General Division's erroneous findings, the file has to return to the General Division to determine whether the Claimant was entitled to benefits for the period from October 5 to December 21, 2020; January 15 to May 4, 2021; and September 7 to October 1, 2021, when he was taking training.

Conclusion

[42] The appeal is allowed on the issue of whether the Commission exercised its discretion judicially.

[43] However, the file returns to the General Division to determine whether the Claimant was entitled to benefits for the period from October 5 to December 21, 2020; January 15 to May 4, 2021; and September 7 to October 1, 2021, when he was taking training.

Pierre Lafontaine
Member, Appeal Division