Citation: *GV v Canada Employment Insurance Commission*, 2022 SST 872

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	G. V.
Representative:	Isaac Won
Respondent:	Canada Employment Insurance Commission
Representative:	Tiffany Glover

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (421712) dated April 26, 2021 (issued by Service Canada)

Tribunal member:	Audrey Mitchell
Type of hearing:	Videoconference
Hearing date:	June 2, 2022
Hearing participants:	Appellant Appellant's representative Respondent Respondent's representative
Decision date:	July 25, 2022
File number:	GE-22-14

Decision

[1] The appeal is dismissed with modification. The Tribunal disagrees with the Claimant.

[2] The Canada Employment Insurance Commission (Commission) has the power to disentitle the Appellant from receiving Employment Insurance (EI) benefits after benefits have been paid. In this case, the Commission exercised this power judicially.

[3] With the exception of the week of his winter break, the Claimant hasn't shown that he was available for work while in school. This means that he can't receive Employment Insurance (EI) benefits other than for the period December 25, 2020 to January 3, 2021

Overview

[4] The Claimant was studying in Canada as an international student. He had a work permit that allowed him to work limited hours while in school. He applied for and received EI benefits after losing his job due to the pandemic. The Commission decided that the Claimant is disentitled from receiving EI regular benefits from October 5, 2020 to February 26, 2021 because he wasn't available for work.

[5] The Claimant appealed the Commission's reconsideration decision to the General Division of the Social Security Tribunal. The General Division dismissed the appeal, finding that the Claimant wasn't available for work until March 1, 2021. However, the General Division found that the Claimant had proven his availability from December 25, 2020 to January 3, 2021, during his winter break from school.

[6] The Claimant then appealed the decision of the General Division to the Appeal Division of the Social Security Tribunal. He argued that the Commission couldn't disentitle him after it had paid him benefits. In other words, he said the Commission could not retroactively change its initial decision to pay him benefits.

[7] The Appeal Division returned the Claimant's appeal to the General Division. It found the General Division did not properly address "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".

Matters I have to consider first

Admissibility of affidavits submitted by the Commission

[8] I find that the affidavits submitted by the Commission are both relevant and admissible.

[9] The statutory interpretation of section 153.161 of the *Employment Insurance Act* (EI Act) is central to this appeal. The parties do not agree on what this section means. The Commission submitted evidence in support of its interpretation. This includes two affidavits of departmental officials from Employment and Social Development Canada.[1]

[10] Both affidavits list the roles of the affiants including at the time the EI Act was amended due to the COVID-19 pandemic. They give information about qualifying for and entitlement to EI benefits generally. They talk about requirements under the EI Act for claims that involve non-referred training and what officers do when they adjudicate such claims. Both refer to section 153.161 of the EI Act.

[11] The Claimant says I should treat the statements made in the affidavits with caution. He states the affidavits contain legal argument, which I should not consider. The Claimant cautions against deferring to the affiants' interpretation of section 153.161. He cites two Supreme Court of Canada (SCC) decisions in support of his position.[2] The Claimant argues I should apply legal principles of statutory interpretation to arrive at an understanding of the section.

[12] The Commission does not agree that the affidavits contain legal argument. It says the affidavits are provided to give relevant, factual evidence about how the EI Act is administered.

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[1] See affidavits of George Rae and Deanne Field, RGD22-112 to RGD22-116, and RGD22-121 to RGD22-125, respectively.
[2] *Rizzzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC), [1998 1 SCR 27; *Reference re Firearms Act (Can.)*, 2000 SCC 31 (CanLII), [2000] 1 SCR 783.

[13] The Claimant was an international student, taking non-referred training. He applied for benefits during the COVID-19 pandemic. So, I find the information in the affidavits is relevant and may be helpful to determine the intent of section 153.161 of the EI Act related to claims made during the pandemic involving non-referred training. I don't find that considering and giving appropriate weight to the affidavits is inconsistent with either SCC decision referred to by the Claimant.

[14] The Commission cited an Appeal Division decision to show that the Tribunal has accepted affidavits from departmental officials in the past.[3] It also points to the related Federal Court of Appeal decision that affirmed the Appeal Division decision in its own statutory interpretation of the legislation in question.[4]

[15] The Commission is right when it says that strict rules of evidence do not apply to administrative tribunals, unless expressly prescribed.[5] As guided by the SCC, my role is to listen to both parties, and give them a fair opportunity to address any relevant statement contrary to their view.[6]

[16] I find that the affidavits submitted by the Commission are consistent with those accepted by the Tribunal in the past. I find that they are relevant and reliable as evidence to help with statutory interpretation of section 153.161 of the EI Act. I find that accepting them as evidence does not prevent the Claimant from arguing as to the weight I should assign to them. So, I find that the affidavits are admissible as evidence in this appeal.

Post-hearing document

[17] The Commission referred to a document at the hearing that was not included in the joint book of documents. It is a letter sent by email to the Claimant. It concerns the end of the Canada Emergency Response Benefit and applying for EI benefits if he

[3] *MB v Minister of Employment and Social Development*, 2020 SST 22.
[4] *Canada (Attorney General) v Burke*, 2022 FCA 44.
[5] *SB v Minister of Employment and Social Development*, 2017 SSTADIS 110.
[6] *Kane v University of British Columbia*, [1980] 1 S.C.R. 1105.

needs financial assistance. The Commission says the letter is not determinative; rather, the value of the document is to complete the evidentiary record.

[18] The Claimant responded to the letter after the hearing. His position is that the document has little probative value. As a result, he will not make submissions on it.

[19] In the circumstances, I accept the document as evidence.

Issues

[20] I have to decide the following three issues:

a) Does the Commission have the power under the EI Act to disentitle the Claimant after benefits have been paid?

b) If so, did the Commission exercise its discretion judicially?

c) Is the Claimant entitled to receive EI benefits?

Analysis

Does the Commission have the power under the EI Act to disentitle the Claimant after benefits have been paid?

[21] Yes, the Commission has the power under the EI Act to disentitle the Claimant after benefits have been paid.

[22] In response to the COVID-19 global pandemic, the government of Canada amended the EI Act using a series of interim orders. The stated purpose of these orders is to mitigate the economic effects of COVID-19. The interim orders could add provisions to, adapt provisions or cause provisions of the EI Act not to apply.[7]

[7] Subsection 153.3(1) of the EI Act.

[23] Under Interim Order No. 10, the EI Act was amended by adding a new section. Section 153.161 of the EI Act states:

> ## Availability
>
> ### Course, program of instruction or non-referred training
>
> **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] The related paragraph 18(1)(a) of the EI Act states:

> **18 (1)** A claimant is not entitled to be paid benefits for a working day in a benefit period for which the claimant fails to prove that on that day the claimant was
>
> > **(a)** capable of and available for work and unable to obtain suitable employment;

– **What does section 153.161 of the EI Act mean?**

[25] As noted above, the parties don't agree on what this new section means.

[26] To determine the meaning of section 153.161 of the EI Act, I am guided by the SCC that said:

> "[T]he words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament".[8]

[8] *Rizzzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC)

[27] So, I will look first at what the words of the section mean, what the context is, and what Parliament intended.

[28] The Claimant says that a plain reading of section 153.161 of the EI Act reveals that it allows the Commission to verify entitlement to EI benefits by getting proof from a claimant to confirm the accuracy of the evidentiary record based on which the claimant's "eligibility" is based. He adds that the section doesn't have powers to reconsider, amend or vary an existing decision.[9]

[29] The Commission says that on plain reading, section 153.161 of the EI Act says that verification of entitlement to EI benefits may not happen until after benefits payments have been made. It contrasts this with the language in paragraph 18(1)(a) of the EI Act, in that failing to prove entitlement under latter section can be fatal to being paid benefits.[10]

[30] Section 153.161 concerns claimants who attend school without a referral from the Commission. The first part refers to paragraph 18(1)(a) of the EI Act and says that a non-referred student claimant is not entitled to EI benefits where they can't prove they are capable of and available for work. The second part talks about verifying that a student claimant is entitled to EI benefits and how and when the Commission may do this.

[31] The Claimant argues first that what section 153.161 seeks to verify is that information that has already been provided is complete and accurate. He refers to definitions of the word verify in the *Firearms Registration Certificates Regulations*, and the process of verification in the *Employment and Assistance Act* to support this view.[11] Both definitions refer to verifying information.

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[9] See RGD22-55, paragraph 45.
[10] See RGD22-32, paragraph 22.
[11] See RGD22-56 and RGD22-57.

[32] I don't agree with the Claimant's first argument. On the question of the definition of the word verify, the EI Act doesn't define it like the pieces of legislation the Claimant relies on. But I don't find the definitions the Claimant relies on helpful.

[33] The *Firearms Registration Certificates Regulations* definition refers specifically to the completeness and accuracy of information submitted in support of an application for a registration certificate. Subsection 153.161 of the EI Act does not use this kind of language. I do not understand from the language used that it refers to completeness and accuracy of information submitted in support of an application for EI benefits; rather, I find that it refers to the truth of a claimant's entitlement as the thing that is to be verified.

[34] Similarly, the *Employment and Assistance Act* refers to the ability of its minister to direct a person to supply information and seek verification of it. This is for the purpose of making decisions under that legislation. Again, I do not find this helpful. The EI Act uses language that speaks to a claimant proving their capability of and availability for work for the purpose of deciding whether they are entitled to EI benefits.

[35] The Commission cited a dictionary definition of the word verify. According to this definition, verify means "to prove that something exists or is true, or make certain that something is correct".[12] I find this definition helpful.

[36] The Claimant argues that the Commission's definition supports his position. He says that it presupposes the existence of something to verify, and that something is "the Claimant's assertion of his eligibility".[13]

[37] I don't agree with this argument. Subsection 153.161(2) of the EI Act talks about entitlement. I find that on plain reading, this is what it seeks to verify. In other words, the Commission may verify, yes or no, if a student claimant is entitled to benefits. It may ask a claimant to prove that it is true, certain, or correct that they are entitled to EI benefits. I don't find that it matters what they may have asserted in the past.

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[12] "verify." *Cambridge.org*. 2022. https://www.dictionary.cambridge.org (19 July 2022).
[13] See RGD22-70, paragraphs 30 and 31.

– **Does the Commission paying EI benefits to a student claimant enrolled in non-referred training necessarily mean it has already verified entitlement?**

[38] No, I don't find that it does. I have found based on a plain reading of the law in question that even if the Commission has paid a claimant benefits, it may verify entitlement. I find context supports this.

[39] The Claimant argues that section 153.161 of the EI Act doesn't give the Commission authority to reconsider, amend or vary an existing entitlement decision. He says any new, relevant information the Commission receives could justify reconsidering a claim using sections 52 and 111 of the EI Act, but the Commission can't change their decision retroactively without new evidence.[14]

[40] This argument suggests that the act of paying student claimants EI benefits is a decision by the Commission that they are entitled to them. The Claimant uses the word "eligibility" when arguing this is a decision that the Commission can't reconsider absent new information. He points to several Canadian Umpire Benefits (CUB) decisions that say the Commission can't change its decision based on the same facts.[15]

[41] In respect of the Claimant's argument, I find the context around how the EI Act operates, why Interim Order 10 and section 153.161 of the EI Act were created, and how they interact with other parts of the law are helpful.

[42] Among other things, the EI Act details requirements for claimants to receive EI benefits. Its purpose is to compensate those who have lost their jobs and are temporarily out of work.[16] It is essentially an insurance plan where claimants have to meet the conditions of the plan to receive benefits.[17]

[43] Section 153.161 sits in the Part VIII.5 of the EI Act, titled "Temporary Measures to Facilitate Access to Benefits". This is consistent with the government of Canada's overall approach through the EI Act as noted above; namely, it is to help get benefits to

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[14] See RGD22-57, paragraphs 53 and 56.
[15] *Wanek* CUB 37680A; *Desmarais* CUB 17341; *Eden* CUB 4262; *Boucher* CUB 5664.
[16] See *Caron v. Canada (Employment and Immigration Commission)*, [1991] 1 S.C.R. 48.
[17] See *Pannu v. Canada (AG)*, 2004 FCA 90.

claimants who need them. But claimants still have to meet requirements to get benefits under the temporary measures, as detailed in this part of the law.

[44] The Commission says qualification and entitlement are two legally distinct concepts in the EI Act, and that the word “eligible” does not appear in sections 7, 18(1)(a) and 153.161. It says that the legal requirements for each are different for non-referred student claimants.[18]

[45] The Commission argues that usually, under paragraph 18(1)(a), an entitlement decision is made before benefits are paid. But under section 153.161, the entitlement decision is made after benefits have been paid. It states that the respective entitlement decisions made under these two sections of the law are the first ones made on a claimant’s entitlement. It is in support of this argument that the Commission submitted two affidavits.

[46] I find the two affidavits helpful. I find from the roles of the affiants that both have knowledge of EI policy and procedures. For this reason, I give a lot of weight to the general information they give about how claims are processed.

[47] The first affidavit speaks to two determinations made by the Commission; whether a claimant qualifies for benefits and whether a claimant is entitled to benefits.[19] It states that claimants who qualify for benefits can be disqualified or disentitled from receiving those benefits. Failing to prove availability for a working day in a benefit period is a reason for which a claimant is disentitled to EI benefits.

[48] I find that the description in this portion of the first affidavit is consistent with the scheme of the EI Act, which speaks first about qualifying for benefits in section 7, and later moves to ways that claimants can be disentitled or disqualified from receiving those benefits. So, I agree and find that the Commission first makes a decision on qualification.

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[18] See RGD22-81 and RGD22-82, paragraphs 4 and 6.
[19] See RGD22-112 to RGD22-113, paragraphs 2 to 6.

[49] The second affidavit talks about the normal adjudication process for student claimants taking non-referred training. It also gives information about the process used under section 153.161 of the EI Act.[20] Unlike in the normal process, under section 153.161, it says the Commission did not immediately conduct fact-finding to determine entitlement to benefits; rather, it issued payments to claimants first.

[50] The Claimant argues that this affidavit contains legal argument at paragraphs 7 to 10, and at 12 and 13. At these paragraphs, the affiant refers to the difference in timing that the Commission verifies entitlement under paragraph 18(1)(a) versus section 153.161 of the EI Act as referred to above.

[51] I don't agree with the Claimant. Again, I have found that a plain language reading of section 153.161 of the EI Act means that the Commission can ask a claimant to prove that it is true, certain, or correct that they are entitled to EI benefits. And I find subsection 153.161(2) allows the Commission to do this even after it has paid benefits. I find that the process the Commission used as detailed in this second affidavit is consistent with what the law allows.

[52] As noted already, interim orders and section 153.161 of the EI Act were enacted in response to the COVID-19 global pandemic. The law itself refers to their purpose as "mitigating the economic effects of the coronavirus disease 2019". I find that this is consistent with the process used by the Commission to pay qualified claimants benefits up-front and then assess entitlement at a later date as described in the both affidavits.[21]

[53] The Claimant argues that deferring the assessment of entitlement to benefits seems to contradict section 18(1) of the EI Act. I don't find this is the case. Rather, I find sections 18(1) and 153.161 of the EI Act complimentary, with the latter providing for a first-time entitlement decision after the Commission has paid benefits.

[54] I find that section 153.161 of the EI is consistent with the Commission's modified approach to entitlement decisions concerning student claimants enrolled in non-referred

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[20] See RGD22-121 – RGD22-124.
[21] See RGD22-114, paragraphs 10 and 11.

training in the pandemic context. Specifically, the Commission may verify that such claimants are entitled to benefits, even after benefits have been paid.

Did the Commission exercise its discretion under section 153.161 of the EI Act judicially?

[55] Yes, the Commission exercised its discretion judicially.

[56] The Commission's decision to verify entitlement under section 153.161 of the EI Act is discretionary.[22] Discretionary decisions should not be disturbed unless the Commission failed to act in a judicial way. This means acting in good faith, having regard to all the relevant factors and ignoring any irrelevant factors.[23]

[57] The Claimant says that before applying for EI benefits, he spoke to an officer at Service Canada. He told the officer that he was a student and could work only limited hours. On October 7, 2020, he applied for EI benefits and gave information about his studies.

[58] The Claimant completed claimant reports. In each report where the Claimant said he was in school, he said he was ready, willing and capable of working each day.

[59] The Commission spoke to the Claimant on March 17, 2021 about his non-referred training. The Claimant told the Commission about school, including his study and work permit, classes and time spent studying, tuition and ability to accept a full-time job. The Commission decided that the Claimant was not entitled to EI benefits while in school.

[60] The Claimant asked the Commission to reconsider its initial decision. He said he had provided accurate and complete information in his application for benefits. The Commission spoke to the Claimant again and on April 26, 2021, maintained its initial decision.

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[22] *Daley v. Canada (AG)*, 2017 FC 297
[23] *Canada (AG) v. Sirois*, A-600-95; *Canada (AG) v. Chartier*, A-42-90

[61] The Claimant argues that the Commission's "decision to retroactively disentitle him was a perverse exercise of discretion".[24] He says the Commission made its decision without regard to four relevant considerations:

- the effect of having to repay the overpayment;
- the Claimant's attempts to provide all relevant information up-front;
- relying on information the Commission's officers gave him; and,
- the delay in verifying the Claimant's eligibility, which resulted in the large overpayment.[25]

[62] The Commission says the Claimant hasn't shown what relevant consideration was overlooked and what irrelevant consideration was considered when it decided that he did not meet the statutory criteria to receive EI benefits.[26]

[63] It is true that the Claimant gave the Commission true and accurate information from the time he applied for benefits. I also accept as fact that he spoke to officers at Service Canada and understood that he could apply for EI benefits after which a decision would be made on his application.

[64] As noted above, the discretionary decision the Commission made was whether the Claimant had proven his availability for work. I don't find that taking six months to make this decision or looking at the effect of having to repay a large overpayment are relevant considerations.

[65] Even though the Claimant was consistently truthful with the Commission, once the Commission undertook to verify his entitlement to EI benefits, the Claimant had to prove that he was capable of and available for work. I find that the Commission looked

[24] See RGD22-59, paragraph 65.
[25] See RGD22-60, paragraph 71.
[26] See RGD22-85, paragraph 15.

at relevant factors to make the decision on the Claimant's availability, including details of studies, efforts made to find work, and any limitations to working.

[66] I don't know what the Service Canada officer told the Claimant. It appears that he understood that he was approved to receive the benefits paid to him. Even if the Commission through Service Canada gave the Claimant information that was unclear or misleading, misinformation is no basis for relief from the operation of the EI Act. The law has to be followed even if the Commission made a mistake.[27]

[67] It is unfortunate that the Commission paid the Claimant more than $10,000 before it disentitled him from receiving benefits. The Claimant has spoken about the challenge he will face having to repay the overpayment. I sympathize with him. But I see no evidence that the Commission acted in bad faith when deciding if he had proven his availability for work.

[68] For reasons above, I find that the Commission exercised its discretion judicially when it verified the Claimant's entitlement to EI benefits.

Is the Claimant entitled to receive EI benefits?

[69] The Claimant hasn't proven he was available for work, except for the period December 25, 2020 to January 3, 2021, and as of March 1, 2021.

[70] In its June 30, 2021 decision, the General Division found that the Claimant wasn't available for work until March 1, 2021. But, it found that the Claimant had proven his availability from December 25, 2020 to January 3, 2021, during his winter break from school.

[71] The Claimant makes an alternative argument to his main one that the Commission doesn't have the power to disentitle him after benefits have been paid. He says that the General Division's finding that the Claimant was available during his winter

[27] *Canada (Attorney General) v. Levesque*, 2001 FCA 304

break should be reinstated. He says this because his study permit allowed him to work full-time in this period.

[72] The Commission says that I should adopt the findings of fact in the June 30, 2021 General Division decision.

[73] I have reviewed all evidence before the General Division in the first hearing of this appeal. Given this, and the findings I have made on first two issues above, I find that the Claimant wasn't available for work until March 1, 2021. But I also find that since his study permit allowed him to work full-time during his winter break from school, he has proven his availability from December 25, 2020 to January 3, 2021.

Conclusion

[74] The Commission has the power to disentitle the Claimant after EI benefits have been paid. It exercised its discretion under the EI Act judicially. Except for the period from December 25, 2020 to January 3, 2021, and after March 1, 2021, the Claimant hasn't shown that he was available for work within the meaning of the law.

[75] This means that the appeal is dismissed with modification.

Audrey Mitchell

Member, General Division – Employment Insurance Section