Citation: *RV v Canada Employment Insurance Commission*, 2022 SST 1543

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	R. V.
Representative:	D. M.
Respondent:	Canada Employment Insurance Commission
Representative:	Angèle Fricker

Decision under appeal:	General Division decision dated May 2, 2022 (GE-22-827)

Tribunal member:	Charlotte McQuade
Type of hearing:	Teleconference
Hearing date:	September 13, 2022
Hearing participants:	Appellant Appellant's representative Respondent's representative
Decision date:	December 30, 2022
File number:	AD-22-351

Decision

[1] The appeal is dismissed.

Overview

[2] R. V. is the Claimant. He was receiving Employment Insurance (EI) regular benefits from October 18, 2020, while attending full-time schooling. On January 10, 2022, the Canada Employment Insurance Commission (Commission), disentitled the Claimant from benefits from January 4, 2021, because he was taking a training course on his own initiative, and had not proven that he was available for work. This decision caused an overpayment of $17,000.00.

[3] The Claimant appealed the Commission's decision to the General Division. The General Division dismissed the Claimant's appeal, finding he had not proven his availability for work.

[4] The Claimant appealed the General Division's decision. He argues that the General Division made an error of fact when it decided that he was not making reasonable and customary efforts to obtain suitable employment. He says the General Division overlooked evidence that he was checking the job bank on a regular basis and had made one job application.

[5] The Claimant also argues that the General Division made an error of jurisdiction. He says he repeatedly declared his schooling to the Commission and was paid benefits. Then, over a year later, he was disentitled. The Claimant submits that the General Division made an error of jurisdiction by not considering whether the Commission had exercised its discretion improperly in reconsidering his claim by failing to have regard to its reconsideration policy.

[6] I am dismissing the appeal. The General Division did not overlook evidence of the Claimant's job search efforts. However, the General Division overlooked an issue it had to decide concerning whether the Commission had exercised its discretion judicially when it decided to verify the Claimant's entitlement and reconsider his claim.

[7] I have substituted my decision for the General Division. I find the Commission exercised its discretion in a judicial manner. So, I cannot interfere with the Commission's decision. Unfortunately, that means the Claimant's overpayment remains.

Issues

[8] The issues in this appeal are:

a) Was the General Division's finding of fact that the Claimant was not making reasonable and customary efforts to obtain suitable employment made without regard to evidence that the Claimant was checking the job bank on a regular basis and had applied for one job?

b) Did the General Division make an error of jurisdiction by not considering whether the Commission exercised its discretion judicially when it retroactively reviewed the Claimant's entitlement to benefits?

Analysis

[9] The Claimant argues that the General Division made an error of fact and an error of jurisdiction.

[10] If established, either of these types of errors would allow me to intervene in the General Division decision.[1]

The General Division did not base its decision on an error of fact

[11] Claimants of regular benefits must prove they are capable of and available for work but are unable to find suitable employment.[2]

[12] On January 20, 2022, the Commission disentitled the Claimant from receiving regular benefits from January 4, 2021, because he was taking a training course on his own initiative and had not proven that he was available for work.

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[1] See section 58(1) of the *Department of Employment and Social Development Act* (DESD Act).
[2] See section 18(1)(a) of the *Employment Insurance Act* (EI Act).

[13] The Claimant appealed the Commission's decision to the Tribunal's General Division.

[14] The General Division had to decide whether the Claimant had proven his availability for work.

[15] The law says that full-time students are presumed to be unavailable for work.[3]

[16] There are two ways that a person can rebut that presumption. One is by showing they have a history of working full-time while also in school.[4] The other way is by showing they have exceptional circumstances.[5]

[17] If a person rebuts the presumption, that just means they are not assumed to be unavailable for work. However, they still must prove they actually are available for work. The law says that availability is assessed considering three factors. These are whether the person:[6]

- wanted to go back to work as soon as a suitable job was available.
- expressed that desire through efforts to find a suitable job.
- didn't set personal conditions that might have unduly limited the person's chances of going back to work.

[18] The General Division decided the Claimant had not shown evidence of any exceptional circumstances that would rebut the presumption of non-availability.

[19] Having regard to the three factors noted above, the General Division concluded the Claimant had not proven his availability for work.

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[3] See *Canada (Attorney General) v Cyrenne*, 2010 FCA 349.
[4] See *Canada (Attorney General) v Rideout*, 2004 FCA 304.
[5] See *Canada (Attorney General) v Cyrenne*, 2010 FCA 349.
[6] See *Faucher v Canada (AG),* A-56-96.

[20] Specifically, the General Division decided the Claimant had not shown a sincere desire to return to the labour market, given his lack of actions in making reasonable and customary efforts to obtain suitable employment.[7]

[21] With respect to the second factor, the General Division referred to the Claimant's testimony about a job application the Claimant made for a job in Labrador. The General Division noted the Claimant was seeking employment and was successful in his efforts upon completion. However, the General Division decided there was no evidence that would show a continued effort to obtain employment throughout the entire period whereby the Claimant would leave his course of instruction to accept such employment. The General Division found that the Claimant had not shown that he was making reasonable and customary efforts to obtain suitable employment.[8]

[22] The General Division noted the Claimant was only available for work upon completion of his daily course schedule as well as on weekends. Concerning the third factor, the General Division decided that the Claimant had set personal conditions that might unduly limit his chances of returning to the workforce. The General Division decided this was because the Claimant would not abandon his course to accept employment and was only available around his required course schedule, which the General Division found put serious restrictions on his availability.

[23] The Claimant submits that the General Division made an error of fact when it decided that he was not making reasonable and customary efforts to obtain suitable employment. He says the General Division made this factual finding without regard to evidence that he had made one job application and he had been regularly looking for work on the job bank.

[24] The Commission argues that the General Division did consider evidence about the Claimant's job search. The Commission says the General Division specifically noted the Claimant's testimony that he was seeking employment and had been successful in

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[7] See paragraphs 20 and 21 of the General Division decision.
[8] See paragraphs 18 to 20 of the General Division decision.

his efforts albeit upon his completion.[9] However, the Commission submits, the General Division decided that there was no evidence of a continued effort to obtain employment throughout the entire period, whereby the Claimant would leave his schooling to accept that employment.

[25] The General Division need not refer in its reasons to each and every piece of evidence before it. The General Division is presumed to have considered all evidence before it.[10]

[26] The Appeal Division can intervene only in certain kinds of errors of fact. The Appeal Division can intervene where the General Division based its decision on an erroneous finding of fact that it made perversely, capriciously, or without regard for the material before it.[11]

[27] A perverse or capricious finding of fact is one where the finding squarely contradicts or is unsupported by the evidence.[12]

[28] Factual findings being made without regard to the evidence would include circumstances where there was no evidence to rationally support a finding or where the decision maker failed to reasonably account at all for critical evidence that ran counter to its findings.[13]

[29] The General Division did not make an error of fact. The General Division's finding that the Claimant was not making reasonable and customary efforts to find suitable employment was supported by the evidence.

[30] The General Division did not overlook evidence of the Claimant's job search. The General Division acknowledged that the Claimant had made one job application and that he had been job searching. While the General Division did not refer explicitly to the

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[9] See paragraph 19 of the General Division decision.
[10] See *Simpson v Canada (Attorney General),* 2012 FCA 82.
[11] See section 58(1)(c) of the DESD Act.
[12] See *Garvey v Canada (Attorney General)*, 2018 FCA 118; See also *Walls v Canada (Attorney General)*, 2022 FCA 47 (CanLII).
[13] See *Walls v Canada (Attorney General),* 2022 FCA 47(CanLII) at paragraph 41.

method the Claimant was using to job search, being the job bank, the General Division was aware the Claimant was job searching.

[31] However, the General Division simply did not consider the Claimant's efforts to amount to a reasonable and customary job search.[14]

[32] The General Division's decision was consistent with the Claimant's statements and the evidence on file. The evidence does not show a sustained effort to find employment, given the Claimant had only made one job application and used only one method to search for work.

The General Division made an error of jurisdiction

[33] The Claimant submits that he asked the General Division to decide whether the Commission had failed to exercise its discretion properly under section 52 of the *Employment Insurance Act* (EI Act) when it decided to reconsider his claim. However, the General Division did not decide this issue.

[34] The Claimant submits that he argued before the General Division that the Commission had not followed its reconsideration policy.[15] That policy provides that a claim should not be reconsidered where the Commission had all the relevant information it needed to make a decision but incorrectly paid benefits.[16] The Claimant says the policy also says the Commission should warn a claimant about their restricted availability before disentitling the claimant.[17]

[35] The Claimant says the evidence before the General Division was that he provided accurate information about his schooling throughout his claim and he was never warned there was a problem with his availability.

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[14] Section 9.001 of the *Employment Insurance Regulations* (EI Regulations) describes criteria for determining whether efforts a claimant is making to obtain suitable employment constitute reasonable and customary efforts.
[15] The Claimant refers to the Commission's reconsideration policy found in the *Digest of Benefit Entitlement Principles* (Digest), section 17.3.3.
[16] GD2-7 to GD2-8.
[17] The Claimant refers to section 10.4.2 of the Digest.

[36] The Claimant points out that the Commission told the General Division that it had reconsidered the claim under section 52 of the EI Act and now, before the Appeal Division, the Commission is referring to section 153.161 of the EI Act.

[37] The Commission submits that the General Division did not make an error of jurisdiction. The Commission says that is because it did not reconsider the claim under section 52 of the EI Act. Rather, the Commission argues, the Claimant was paid benefits based on meeting the qualifying requirements. However, no entitlement decision was made until January 10, 2022, when it decided the Claimant could not be paid benefits from January 4, 2021.

[38] The Commission refers to section 153.161 of the EI Act, which came into effect on September 27, 2020. The Commission says this provision modified how EI claims for claimants attending non-referred training were processed in response to the Covid-19 pandemic. The Commission says this provision allowed benefits to be paid to claimants who declared non-referred training, on the basis of qualification, but the entitlement decision was deferred until the Commission could later verify the claimant's entitlement.

[39] The Commission maintains that section 153.161(2) gives the Commission the authority to review a claimant's availability retroactively and to then impose a disentitlement under section 18(1)(a) of the EI Act. The Commission says, a warning about restricting availability is not required by law and, in any event, in the context of the change in legislation and procedure, a warning becomes irrelevant.

[40] The Commission says, although it referred to section 52 of the EI Act and not section 153.161 in its submissions to the General Division, that submission was in error.

[41] The Commission maintains that the General Division implicitly confirmed that the Commission had exercised its discretion judicially when the Commission verified the Claimant's availability and made a decision about his entitlement since the General Division assessed the relevant factors pertaining to the claimant's availability, did not consider irrelevant factors, and arrived at the same conclusion as the Commission.

– The General Division did not decide an issue it had to decide

[42] Respectfully, the General Division overlooked an issue it had to decide. The General Division had to decide whether the Commission's decision to disentitle the Claimant from January 4, 2021, was an initial entitlement decision or was a result of the Commission's reconsideration of the claim. If the latter, the General Division then had to decide whether the Commission had exercised its discretion judicially in reconsidering the claim.

[43] The Commission's reconsideration powers are set out in section 52 of the EI Act. This section provides that the Commission may reconsider a claim for benefits within 36 months of the benefits having been paid or payable unless the Commission is of the opinion that a false or misleading statement or representation has been made in which case the Commission has 72 months to reconsider a claim.[18]

[44] Section 153.161(1) of the EI Act provides that, for the purpose of applying paragraph 18(1)(a) of the EI Act, a claimant who attends a non-referred course, program of instruction or training 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.

[45] Section 153.161(2) provides that the Commission may, at any point after benefits are paid to a claimant verify that a claimant who is attending a non-referred course, program of instruction or training, is entitled to those benefits by requiring proof that they were capable of and available for work on any working day in their benefit period.

[46] In its decision, the General Division referred to the change in the Commission's operating procedure as of September 27, 2020, whereby a claimant's availability for work was not reviewed when a claimant reported on their application for benefits or biweekly claimant reports that they were attending training but were still available for work. The General Division noted, however, the Commission still had the authority to

[18] See section 52(1) of the EI Act.

review a claimant's availability and impose a retroactive or current disentitlement if it determined that a claimant had not proven their availability for work.[19]

[47] The General Division alluded to section 153.161 in its decision but did not explicitly refer to it. The General Division did not consider whether the Commission's decision of January 10, 2022, was an initial entitlement decision or whether the Commission had reconsidered the claim under section 52 of the EI Act and if so, whether the Commission had exercised its discretion judicially.

[48] One of the Claimant's key arguments was that the Commission had not exercised its discretion properly in reconsidering the claim and assessing the overpayment. This argument was relevant to the issue of the overpayment. So, it was necessary for the General Division to decide it.

[49] It is not enough to implicitly consider an issue so central to the appeal. The General Division must explicitly address key issues raised before it.[20]

Remedy

[50] Since the General Division has made a reviewable error, I can intervene in the case.[21]

[51] To fix the General Division's error, I can either refer the matter back to the General Division for reconsideration or I can give the decision the General Division should have given.[22]

[52] Both parties want me to make the decision the General Division should have given. Neither party has any further evidence to provide about the jurisdictional issue and they have made their arguments about this issue. I agree it is appropriate for me to substitute my decision for that of the General Division.

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[19] See section 30 of the General Division decision.
[20] See *Turner v Canada (Attorney General),* 2012 FCA 159 (CanLII).
[21] See section 58(1) of the DESD Act.
[22] See section Sections 59(1) of the DESD Act.

[53] The Commission wants me to dismiss the appeal. The Commission says it exercised its discretion properly in seeking verification of the Claimant's entitlement pursuant to section 153.161(2) of the EI Act and making an initial entitlement decision that the Claimant was not entitled to EI benefits from January 4, 2021.

[54] The Claimant wants me to allow his appeal. He says the initial entitlement decision was made when his application was submitted, and benefits were paid. He maintains that the Commission verified his claim on three separate occasions when he completed training questionnaires with Service Canada agents and was not alerted to any issues with his availability. He argues the decision to disentitle him from benefits from January 4, 2021, was based on the Commission's reconsideration of his claim under section 52 of the EI Act.

[55] The Claimant agrees the Commission has the authority to reconsider his claim under section 52 of the EI Act, but he says the Commission did not exercise its discretion judicially in doing so. He maintains the Commission did not follow its own reconsideration policy. He says that policy would not have allowed reconsideration of the claim, in his circumstances.

– The Commission reconsidered the claim under section 52 of the EI Act

[56] I find the January 10, 2022, decision disentitling the Claimant from benefits from January 4, 2021, was a result of the Commission's reconsideration of the claim under section 52 of the EI Act.[23] It was not an initial entitlement decision.

[57] The Claimant applied for EI benefits on October 20, 2020, and his claim began on October 18, 2020. The Claimant attended full-time schooling from January 4, 2021, to September 17, 2021.[24] He completed training questionnaires on January 16, 2021, and July 18, 2021, and on September 12, 2021. He declared his schooling and schedule on each of these questionnaires.

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[23] GD3-40.
[24] GD3-24.

[58] On January 6, 2022, the Commission contacted the Claimant by phone to discuss his availability. The Commission obtained information concerning the Claimant's hours of availability and his job search.[25]

[59] On January 10, 2022, the Commission notified the Claimant by letter that it was unable to pay the Claimant EI benefits from January 4, 2021, because he was taking a training course on his own initiative and had not proven his availability for work. On January 15, 2022, the Claimant was sent a notice of debt for $17,000.00. This decision was confirmed upon reconsideration on February 11, 2022.[26]

[60] In my view, section 153.161 of the EI Act does not permit a delayed entitlement decision, as the Commission suggests. What it permits is delayed verification of an initial entitlement decision that has already been made based on statements made by a claimant in their application.

[61] Section 153.161 was implemented on September 27, 2020, as part of Interim Order No. 10.[27] As explained in the Explanatory Note to Interim Order 10, Interim Order 10 was made for the purpose of mitigating the economic effects of Covid-19. The Explanatory Note also provided that section 153.161 allowed a modified operational approach to the assessment of availability for claimants who were not referred to a course of instruction per section 25 of the EI Act.[28]

[62] Section 153.161 was in force until September 25, 2021, but continued to apply to benefit periods beginning between September 27, 2020, and September 25, 2021.[29] So, it is relevant to the Claimant's situation.

[63] The text of section 153.161(2) says the Commission may, at any point after benefits are paid to a claimant, verify that the claimant is entitled to those benefits by

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[25] GD3-24.
[26] GD3-36. I am referring here to a reconsideration decision under section 112 of the EI Act, not a reconsideration of a claim under section 52 of the EI Act.
[27] See Canada Gazette, Part II, volume 154, No. 21, Interim Order No. 10 at pages 2423–2424.
[28] See, Canada Gazette, Part II, volume 154, No. 21, Interim Order No. 10, Explanatory Note at pages 2427 to 2428.
[29] See section 333 of the *Budget Implementation Act, 2021*, No. 1 (S.C. 2021, c. 23).

requiring proof that they were capable of and available for work on any working day of their benefit period.

[64] The text is clear that verification of entitlement may not happen until after benefit payments have been paid. However, there is nothing in the text of section 153.161 which suggests it the Commission can delay or forego making an initial decision. It speaks to verifying “entitlement.” This implies that a previous entitlement decision has already been made.

[65] The text also says the Commission “may” verify entitlement so the power to verify is discretionary. A discretionary authority is inconsistent with the Commission’s position that this provision allows a delayed entitlement decision to be made. If the Commission were to not exercise its discretion to verify the claim this would mean, in some cases, the Commission would never make any decision respecting benefit entitlement. That cannot be what was intended.

[66] The Commission says that payment was based on “qualification” for benefits and not “entitlement.” The qualifying requirements to establish a claim are set out in section 7 of the EI Act. The basis requirements are having an interruption of earnings and the required number of insurable hours.

[67] However, the text of section 153.161(1) of the EI Act is inconsistent with the notion that payment is made based on qualifying requirements only. Section 153.161(1) says that a person is not entitled to be paid benefits for any working day in a benefit period for which they are unable to prove they are capable of and available for work. This provision suggests the Commission cannot pay benefits without any evidence a person was available for work. Payment must be based on some evidence of availability.

[68] I have also considered section 153.161 in the context of section 52 of the EI Act. As above, section 52(1) provides the Commission with a discretion to reconsider a claim for benefits within 36 months after benefits have been paid or payable. Section 52(2) says that 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 is not entitled, the Commission must calculate the amount of the money and notify the claimant of its decision.

[69] If section 153.161 was interpreted to allow the Commission to make a delayed initial entitlement decision after seeking verification of a claimant's availability that the claimant was not entitled to benefits, there does not appear to be a corresponding statutory mechanism, to allow the Commission to calculate an overpayment and notify the claimant of the overpayment.

[70] This also suggests to me that section 153.161(2) does nothing more than allow the Commission to verify a claimant can prove their availability for work after an initial entitlement decision has already been made based on the limited information provided in the application for benefits.

[71] Considering the text of section 153.161 of the EI Act and having regard to the context of section 52 of the EI Act, I find that section 153.161 allows the Commission to make an initial entitlement decision based on the statements made by a Claimant in the application for benefits. However, the Commission can postpone its verification of a claimant's entitlement to a later date.

[72] This interpretation is also consistent with a modified operational approach. Due to the extraordinary circumstances of the pandemic, the legislature recognized it was not possible for the Commission to verify entitlement at the time of application and so permitted a delayed verification. But that does not mean that an initial decision was not made by the Commission, based on the limited information provided in the application for benefits.

[73] The Commission refers to the Tribunal decisions of *GVP v Canada Employment Insurance Commission*,[30] *Canada Employment Insurance Commission v SL*[31] and *Canada Employment Insurance Commission v EN*[32], as confirming its interpretation that

[30] See *GVP v Canada Employment Insurance Commission, GE-22-14 (unpublished)* at AD3-22.
[31] See *Canada Employment Insurance Commission v SL*, 2022 SST 556.
[32] See *Canada Employment Insurance Commission v EN, AD-21-434 (unpublished),* at AD3-10.

section 153.161 permitted the payment of benefits based on a claimant meeting the qualifying requirements with the entitlement decision being made later.

[74] I would note that these issues were not argued in the *EN* case. That case involved a Commission appeal about a claimant's availability for work. In the *SL* case, the Appeal Division decided the Commission could consider and reconsider the Claimant's availability under either section 52 or section 153.161 of the EI Act. However, no specific finding was made as to what provision the reconsideration had occurred under.

[75] With respect to *GVP*, I am not bound by decisions made by the General Division. I do note that in *GVP*, the Commission's proposed interpretation was not considered in light of the discretionary nature of section 153.161 and the implication that the Commission's interpretation could mean in some cases no entitlement decision would be made. So, I find it distinguishable on that basis.

[76] The Appeal Division has recently considered section 153.161 in *SF v Canada Employment Insurance Commission.*[33] There, the Appeal Division decided that section 153.161 should not be interpreted to mean that the Commission could split its decision-making responsibility into two parts and indefinitely postpone making a decision about the Claimant's entitlement to benefits.

[77] In *SF*, the Appeal Division decided the Commission made a decision based on statements made by the claimant and, under its modified operational approach, paid benefits based on those statements and postponed considering the issue in more detail. I prefer and adopt the reasoning in *SF* case. As above, I find such an interpretation to be consistent with the text of the provision, the context of section 52 of the EI Act and the modified operational approach allowed by the legislature.

[78] However, I do agree, as was found in the *SF* case, that section 153.161 is still relevant to the question of the overpayment. Together, section 52 and section 153.151

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[33] See *SF v Canada Employment Insurance Commission*, 2022 SST 1095.

give the Commission the power to retroactively verify a claimant's entitlement and to assess an overpayment, if appropriate.

[79] Specifically, the Commission has the discretionary authority to seek verification of entitlement after benefits were paid under section 153.161(2) of the EI Act. If that verification is sought and the Commission decides a Claimant hasn't proven their availability for work, then the Commission has the discretion to decide under section 52 whether it is going to reconsider the claim. It must exercise its discretion judicially in making that decision.

[80] Having regard to the above, I find the Commission made an initial entitlement decision after the Claimant applied for benefits, based on the statements in his application.

[81] On January 6, 2022, the Commission sought to verify the Claimant was entitled to the benefits he had been paid. On that date, the Claimant was asked about the specific hours he attended school, the time spent in total per week on his schooling, the specific hours the Claimant was available to work, and questions about the Claimant's job search. The Claimant was also asked to provide a job search. In short, the Commission sought to verify the Claimant could prove his availability for work.[34] The Commission was not satisfied the Claimant had proven his availability.

[82] Having decided that, the Commission then exercised its discretion to reconsider the Claimant's claim. The Claimant was advised on January 10, 2022, that he was not entitled to benefits from January 4, 2021. The overpayment was calculated, and a notice of overpayment was subsequently issued.

[83] The Claimant argues that the Commission had already verified and accepted his entitlement when he completed his training questionnaire on January 16, 2021, and again on July 18, 2021, and on September 12, 2021. He was not alerted to any issues with his availability and payment continued.

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[34] GD3-24 to GD3-25.

[84] However, the training questionnaires and ongoing payment do not amount to verification. The questionnaires provide limited information about the factors relevant to proving availability. For example, there are no detailed questions about a job search or specific hours of availability. The training questionnaire reminds claimants that a job search record must be kept. The training questionnaire also contains a message, "Remember you must still be available for and looking for work." This statement implies that there are still availability requirements that a claimant must meet beyond the questions addressed in the training questionnaire.

– The Commission exercised its discretion judicially when it decided to verify entitlement

[85] The Commission's powers under sections 52 and 153.161(2) of the EI Act are discretionary. This means that the Commission may verify a person's entitlement to benefits they have already received and may reconsider a claim, but it doesn't have to.

[86] Discretionary powers must be exercised in a judicial manner. This means when the Commission decides to verify entitlement or to reconsider a claim, the Commission's decision can be set aside if the Commission:[35]

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

[87] The Commission acted judicially when it sought to verify the Claimant's entitlement. The Commission received a training questionnaire on September 12, 2021, providing that the Claimant was in school full time, in the morning and afternoon Monday to Friday. He would only accept full-time work if he could delay the start to

[35] See *Canada (Attorney General) v Purcell*, 1995 CanLII 3558 (FCA).

allow him to finish the program. [36]This prompted the Commission to contact the Claimant on January 6, 2022, to seek verification of his entitlement.

[88] The training questionnaire identified a demanding course schedule, and that the Claimant was unwilling to leave his schooling for work. The questionnaire, therefore, raised questions about the Claimant's availability.

[89] There is no indication that the Commission took into account irrelevant factors or ignored relevant factors or acted in a discriminatory manner when it decided to verify the Claimant's entitlement to benefits. It acted upon the relevant information in the training questionnaire that called into question the Claimant's entitlement to benefits.

[90] Although the Commission did not verify the claimant's availability until the third questionnaire, section 153.161(2) allows that verification to occur "at any point" after benefits are paid. So, the delay cannot be said to amount to "bad faith."

– The Commission exercised its discretion judicially when it decided to reconsider the claim

[91] The Claimant has not persuaded me that the Commission exercised its discretion in a non-judicial manner in reconsidering the claim under section 52 of the EI Act.

[92] The Commission has a policy to help guide its exercise of discretion in reconsidering a claim under section 52 of the EI Act.[37] The policy provides that if the Commission incorrectly paid benefits, the error will be corrected currently and no overpayment will be created unless the error resulted in a decision that is contrary to the EI Act. The policy provides that a claim will only be reconsidered when:

- benefits have been underpaid
- benefits were paid contrary to the structure of the EI Act (the policy notes this does not include a decision about availability)

[36] GD3-22.
[37] Digest, section 17.3.3.

- 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.

[93] The policy provides the Commission will only impose a retroactive decision which results in an overpayment if one of the situations described above applies.

[94] The Claimant argues the Commission did not follow its own policy when it reconsidered the claim. He submits that the overpayment arose through no fault of his own. He says he honestly declared his schooling on three separate questionnaires and did not make any false or misleading statements. He was not warned that his job search needed to be expanded, as the Commission's policy also provides for.[38] He argues, according to the policy, the claim should not have been reconsidered.

[95] The Commission argued before the General Division that although the Claimant stated on his questionnaire that he was looking for work, when contacted he admitted he had not applied for any jobs prior to November 2021, and was only willing to work evenings and weekends, as his priority was his course. The Claimant was asked for a job search but was unable to provide one. The Commission explained that when the Claimant applied for benefits, he accepted his Rights and Responsibilities where the job search requirements were explained, and he was advised he must keep his job search record for 6 years.

[96] The Commission explained further that on each of the three training questionnaires the Claimant completed, he stated he was available for and capable of working under the same conditions as before he started his course, and that he had made efforts to find work since the start of his course, or since being unemployed. However, when he was asked to support his statements with a job search, he admitted he had not been looking for work while in school and was unable to provide a job search.

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[38] Digest, section 10.4.2.

[97] I find the Commission exercised its discretion judicially when it decided to reconsider the claim.

[98] The Commission's reconsideration policy reflects the notion that claimants should generally be able to rely on decisions made by the Commission as being final.

[99] The Commission does not appear to have considered its reconsideration policy. Absent section 153.161 of the Act, I would agree that the Commission had exercised its discretion improperly by failing to have regard to its policy.

[100] However, the Commission's policy was developed prior to the addition of section 153.161 to the EI Act. The policy does not refer to section 153.161 of the EI Act or provide any guidance on how section 153.161 should inform the Commission's exercise of discretion under section 52 of the EI Act.

[101] Section 153.161 was added to the EI Act in the extraordinary circumstances of the pandemic. The legislature approved a modified operating procedure on the part of the Commission. The legislature specifically gave the Commission the power in section 153.161 to delay verification of entitlement even after benefits have been paid.

[102] So, I find the notion of a warning about restricted availability as provided for in the policy was not relevant in the context of the Commission's statutory authority to delay verification of entitlement.

[103] It is important to note that section 153.161 does not refer to verification of the accuracy of information provided by a claimant, but rather verification of entitlement. This tells me that the legislature specifically contemplated the possibility of the Commission reconsidering claims for students in non-referred training, even if a claimant had provided accurate information previously, and even after benefits were paid.

[104] In other words, in the specific circumstances of the pandemic, with the implementation of section 153.161, the legislature signalled its intention that

reconsidering a claim in circumstances where verification is sought and a claimant cannot prove their entitlement, outweighs the principle of finality.

[105] In deciding whether to reconsider the claim, therefore, the Commission had to exercise its discretion, keeping in mind the legislative intent of section 153.161 of the EI Act.

[106] Although the Commission did not refer to section 153.161 in its submissions to the General Division, the Commission did make clear that the motivating factor in its reconsideration of the claim was that the Claimant was not able to prove his availability for work. The Commission decided the Claimant was not able support his prior statements of availability with proof of an adequate job search. The Claimant was not able to prove his availability before the General Division either.

[107] I find the Commission exercised its discretion judicially, having regard to the legislative intent of section 153.161 of the EI Act. Even though the Claimant repeatedly provided his training information to the Commission, the Commission decided the Claimant had not proven his availability for work when verification was sought.

[108] Claimants are obligated to repay benefits paid to the Commission to which they are not entitled. [39]So, reconsidering a claim where it appears a claimant may not be entitled to benefits is a proper purpose.

[109] The Commission considered all the relevant information in deciding to reconsider the claim. There were no new facts relevant to the exercise of discretion provided by the Claimant at the General Division hearing. There is no indication that the Commission considered irrelevant information or acted in bad faith or in a discriminatory manner.

[110] The Commission reconsidered the claim within the permitted 36-month period. There was no suggestion by the Claimant that the delay in reconsidering the claim compromised the Claimant's ability to prove his availability for work.

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[39] See section 43 of the EI Act.

[111] Since the Commission exercised its discretion judicially, I cannot intervene in that decision.

[112] There is no doubt that this situation has caused the Claimant hardship. I am sympathetic to the Claimant's situation. However, I cannot remedy it. As the General Division pointed out, the Tribunal has no authority to write off a debt. The General Division noted in its decision various options the Claimant could pursue concerning the debt.

Conclusion

[113] The General Division did not make an error of fact.

[114] The General Division overlooked an issue it had to decide. I have substituted my decision to find that the Commission exercised its discretion judicially when it decided to verify the Claimant's entitlement and reconsider the claim. This means I cannot interfere with the Commission's decision. So the overpayment remains.

[115] The appeal is dismissed.

Charlotte McQuade
Member, Appeal Division