[TRANSLATION]

Citation: *Canada Employment Insurance Commission v SP*, 2022 SST 1557

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	Canada Employment Insurance Commission
Representative:	Josée Lachance
Respondent:	S. P.
Representative:	Patrick Langis

Decision under appeal:	General Division decision dated July 29, 2022 (GE-22-691)

Tribunal member:	Pierre Lafontaine
Type of hearing:	Teleconference
Hearing date:	December 13, 2022
Hearing participants:	Appellant's representative Respondent Respondent's representative
Decision date:	December 30, 2022
File number:	AD-22-624

Decision

[1] The Commission's appeal is allowed on the issue of whether it exercised its discretion judicially.

[2] The file returns to the General Division to determine whether the Claimant was taking unauthorized training and, if so, whether she was available for work from September 28, 2020.

Overview

[3] The Appellant, the Canada Employment Insurance Commission (Commission), decided that the Respondent (Claimant) was not entitled to Employment Insurance (EI) regular benefits from September 28, 2020, because she 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 on the issue of whether it exercised its discretion judicially.

[8] The file returns to the General Division to determine whether the Claimant was taking unauthorized training and, if so, whether she was available for work from September 28, 2020.

Issue

[9] 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

[10] 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]

[11] 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.

[12] 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.

Did the General Division make an error of law 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.

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

[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 judicially. The General Division found that the Commission had not used its discretion judicially when it decided to verify the Claimant's claim for benefits and when it reconsidered the claim.

[15] The Commission says 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 says 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] The Claimant argues that the Commission should have verified her claim when her benefit period started. If it had, she could have sought confirmation that NB-EI Connect had approved her application for an authorization. But the Commission waited until November 2021—about a year after it had started paying her benefits—to tell her that she would have to pay back the benefits she had received.

[19] The Claimant says that the General Division did not make an error in finding that the Commission had not exercised its power judicially, since she was taking referred training. She was also transparent by indicating that she was taking training full-time on her application and reports.

[20] To determine whether the General Division made errors, 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.

[21] 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.[2]

[22] Case law has established that the only limitation on the Commission's power to reconsider under section 52 of the EI Act is time. This means that the 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.[3]

[23] 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, whose initial claim for EI benefits was established effective September 27, 2020.

[24] 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.

[2] In situations where the Commission is of the opinion that a false or misleading statement has been made, the Commission has 72 months to reconsider a claim.
[3] *Brisebois v Canada (Employment and Immigration Commission)*, A-582-79; *Brière v Commission, (Attorney General)*, A-637-86.

> **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.

[25] This temporary provision says that the Commission may verify that 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.

[26] Despite these differences, 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 its decision. Both sections are concerned with recovering amounts claimants should not have received.

[27] The evidence shows that the Claimant's availability was verified for the first time on October 15, 2021. She said that she was in school full-time and that her priority was to finish her training. There is no evidence before the General Division that the Claimant talked with a Commission agent or that her availability was verified before that.

[28] In my view, section 153.161 of the EI Act allowed the Commission to verify that the Claimant was entitled to benefits. Proof of availability was certainly not required given her admission that her priority was to finish her training.

[29] However, 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.

[30] 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.[4]

[31] I note that the Commission 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 [EI Act] 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
- 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[5]

[32] 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.[6] The Claimant did not make any false or misleading statements and could not have known that she was not entitled to the benefits received. None of the factors mentioned in the Commission's policy justify reconsidering the Claimant's claim, since she acted in good faith and repeatedly reported her training to the Commission.

[33] Did the Commission have to apply the section 52 policy to help it exercise its discretion under section 153.161 of the EI Act? I do not think so.

[34] In my view, during the temporary pandemic measures, the Commission's discretion to decide to verify a claimant's availability had to be exercised with the legislative intent of section 153.161 of the EI Act in mind.

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[4] See *Canada (Attorney General) v Purcell*, 1995 CanLII 3558 (FCA).
[5] See Digest of Benefit Entitlement Principles, Chapter 17 - Section 17.3.3.
[6] See Digest of Benefit Entitlement Principles, Chapter 17 - Section 17.3.3.2.

[35] In implementing this section during the pandemic, Parliament clearly wanted to **insist** on the Commission's power to verify that a claimant taking a course, program of instruction, or training was entitled to EI benefits, even after the payment of benefits.

[36] I find that the Commission exercised its discretion within the parameters set by Parliament during the pandemic.

[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 section 153.161 of the EI Act.

[40] The Commission considered all the relevant information in deciding to verify the Claimant's availability. No new relevant facts were provided at the General Division hearing that the Claimant had not already provided to the Commission. There is no indication 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 returns to the General Division to determine whether the Claimant was taking unauthorized training and, if so, whether she was available for work from September 28, 2020.

Conclusion

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

[43] The file returns to the General Division to determine whether the Claimant was taking unauthorized training and, if so, whether she was available for work from September 28, 2020.

Pierre Lafontaine
Member, Appeal Division