



[TRANSLATION]

Citation: *SP v Canada Employment Insurance Commission*, 2022 SST 1558

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

## Decision

**Appellant:** S. P.  
**Representative:** Patrick Langis

**Respondent:** Canada Employment Insurance Commission

---

**Decision under appeal:** Canada Employment Insurance Commission reconsideration decision (446412) dated January 12, 2022 (issued by Service Canada)

---

**Tribunal member:** Normand Morin

**Type of hearing:** Videoconference  
**Hearing date:** April 26, 2022, and June 16, 2022  
**Hearing participants:** Appellant  
Appellant's representative

**Decision date:** July 29, 2022  
**File number:** GE-22-691

## Decision

[1] The appeal is allowed. I find that the Canada Employment Insurance Commission (Commission) didn't exercise its discretion judicially in deciding to verify and reconsider the Appellant's claim for benefits.<sup>1</sup> This means that the Commission could not retroactively determine that the Appellant wasn't entitled to Employment Insurance (EI) benefits.

## Overview

[2] In September 2020, the Appellant began full-time training at Université de X (New Brunswick). The training leads to a Master of Science in Management with a concentration in Marketing. The fall 2020 term ran from September 8, 2020, to December 21, 2020, and the winter 2021 term ran from January 11, 2021, to April 30, 2021.<sup>2</sup> The Appellant then studied full-time in the summer at the same institution, from May 3, 2021, to August 27, 2021.<sup>3</sup> She continued her studies full-time at the same place in September 2021.<sup>4</sup>

[3] From August 1, 2019, to August 28, 2020, inclusive, the Appellant worked as a research assistant for Université de X. She stopped working for that employer because of a shortage of work.<sup>5</sup>

[4] On October 2, 2020, the Appellant made an initial claim for EI benefits (regular benefits).<sup>6</sup> A benefit period was established effective September 27, 2020.<sup>7</sup>

[5] While in training, the Appellant had several periods of employment with Université de X. For example, she was a research assistant from November 2 to 6,

---

<sup>1</sup> See sections 52 and 153.161 of the *Employment Insurance Act* (Act).

<sup>2</sup> See GD3-12, GD3-13, GD3-63, GD3-64, GD11-2, and GD11-3.

<sup>3</sup> See GD3-63, GD3-64, GD11-2, and GD11-3.

<sup>4</sup> See GD3-22, GD3-23, GD3-63, GD3-64, GD11-2, and GD11-3.

<sup>5</sup> See GD3-21.

<sup>6</sup> See GD3-3 to GD3-12.

<sup>7</sup> See GD4-1.

2020; a scorer from March 9, 2021, to April 27, 2021; a research assistant from July 12 to 15, 2021; and a lecturer from September 7, 2021, to December 21, 2021.<sup>8</sup>

[6] On November 17, 2021, the Commission told her that it was unable to pay her EI benefits from September 28, 2020, because she was taking training on her own initiative and hadn't proven her availability for work. It said that, if she owed money, she would receive a notice of debt.<sup>9</sup>

[7] On January 12, 2022, after a request for reconsideration, the Commission told her that it was upholding the November 17, 2021, decision about her availability for work. According to the Commission, it had determined that she wasn't available for work during her "non-referred" training period, from the start of her claim for benefits. It said that, as a result, she wasn't entitled to benefits from September 28, 2020.<sup>10</sup>

[8] The Appellant says that she was entitled to benefits from the start of her training in September 2020.

[9] She says that, before applying for benefits, she contacted the Commission to find out whether she might be entitled to benefits, given her full-time training. She says that the Commission then referred her to the designated authority—the New Brunswick – Employment Insurance Connect (NB-EI Connect) program—to get, if appropriate, an authorization indicating that she was "referred" to take the training and that she could also get benefits during that training.

[10] The Appellant explains that, before applying for benefits, she contacted NB-EI Connect to find out what to do to apply for an authorization and to be able to get benefits while taking training. According to her, NB-EI Connect told her that, if she got benefits after applying for benefits, this meant that her application for an authorization had been approved. She explains that she submitted her NB-EI Connect program application on October 2, 2020, but didn't get a confirmation that the application for an

---

<sup>8</sup> See GD11-2 and GD11-5 to GD11-8.

<sup>9</sup> See GD2-126, GD3-30, and GD3-31.

<sup>10</sup> See GD2-139, GD2-140, GD3-65, and GD3-66.

authorization had been approved. She says that she learned several months later that there was an error in the address she had used to email the application, which meant that the application wasn't sent to NB-EI Connect. She explains that, on October 5, 2020, she did, however, get a letter from the Commission with her access code to complete her claimant reports. She says that she started completing them the following week. She explains that, when she started getting benefits, she concluded that she was entitled to them.

[11] The Appellant argues that, on her application for benefits, she indicated that she had started training in September 2020. She points out that the Commission was aware of this situation and that her claim for benefits was approved. She explains that, on her claimant reports, she always indicated that she was taking training and that she was available for work, taking into account her course schedule and the fact that some of her courses required less work from her. She points out that she was honest when completing her claimant reports. She explains that, after completing them, she would get a confirmation that they had been successfully received. She says that she also made updates related to her training periods in her EI file ("My Service Canada Account"), which the Commission had access to.

[12] The Appellant explains that, while checking her EI file, she found out that, on September 19, 2021, the Commission was reviewing the information she had provided about her training.

[13] She says that, while she was speaking with a Commission representative over the phone on October 15, 2021, the representative explained that she needed proof that NB-EI Connect would have approved her in September 2020, since there was no such proof in her file. She says that the Commission representative told her that, if she were to provide this proof, the note that she wasn't available for work would be removed, and she would not have to pay back the benefits she had received.

[14] The Appellant explains that, in November 2021, she provided the Commission with information and documents from the NB-EI Connect program indicating that she

would have been authorized to take the training in September 2020, which meant that she would have been entitled to benefits if her application form had been sent to the right email address. She says that, despite the information and documents she sent, the Commission decided that she wasn't entitled to benefits.

[15] The Appellant says that she is confused by the inconsistent information she got from the Commission after it told her about its decision that she wasn't entitled to benefits and that she would have to pay back the benefits she had received. She points out that the Commission didn't explain why the information and documents she had given it showing that she would have been authorized to take the training could not have an impact so that she could be entitled to benefits retroactively.

[16] The Appellant argues that the Commission had ample opportunity to find out whether there might be a problem with her claim for benefits. She points out that, if the Commission had done this when her benefit period started, she could have provided sooner the information and documents authorizing her training under the NB-EI Connect program. She points out that the Commission waited until October 2021—about a year after it had started paying her benefits—to tell her that she wasn't entitled to benefits and that she would have to pay back the benefits she had received.

[17] The Appellant says that the Commission's decision penalized her. She argues that she should not have to pay back the benefits she received.

[18] On February 11, 2022, the Appellant challenged the Commission's reconsideration decision. That decision is now being appealed to the Tribunal.

## **Preliminary matters**

[19] In this case, the Appellant disputes having to pay back the benefits she was overpaid, despite the fact that she declared that she was taking training and that the Commission was aware of the situation. She points out that the Commission waited about a year before telling her that she wasn't entitled to benefits and that she had to

pay the benefits back. She says that she also provided the necessary evidence that she was authorized to take the training and that, as a result, she was entitled to benefits.

[20] The Commission, meanwhile, explains that it imposed on the Appellant a disentitlement to benefits retroactive to the start of her claim for benefits.<sup>11</sup> It says that it exercised its right and its authority, as set out in section 153.161 of the *Employment Insurance Act* (Act), by retroactively imposing this disentitlement.<sup>12</sup>

[21] So, my analysis and decision will take this situation into account.

## Issues

[22] I have to determine whether the Commission had the power to retroactively decide whether the Appellant was entitled to benefits and, if so, determine whether it used its discretion judicially in deciding to verify and reconsider the Appellant's claim for benefits.<sup>13</sup>

[23] If that is the case, I have to determine whether the Appellant has shown that she was available for work from September 28, 2020, during her training.<sup>14</sup>

[24] I also have to determine whether the Appellant has to pay back the benefits that she was overpaid and that the Commission says she owes.<sup>15</sup>

---

<sup>11</sup> See GD14-2.

<sup>12</sup> See GD14-2.

<sup>13</sup> See sections 52 and 153.161 of the Act.

<sup>14</sup> See section 18(1)(a) of the Act, section 153.161 of Part VIII.5 of the Act, and sections 9.001 and 9.002(1) of the *Employment Insurance Regulations*.

<sup>15</sup> See sections 43, 44, and 52 of the Act.

## Analysis

### Exercise of the Commission's discretion in deciding to verify and reconsider a claim for benefits

#### Issue 1: Did the Commission have the power to retroactively verify and review the Appellant's claim for benefits?

[25] When it comes to the "reconsideration" of a claim, the Act says that the Commission has 36 months to reconsider a claim for benefits paid or payable to a claimant and that it has 72 months if, in its opinion, a false or misleading statement or representation has been made in connection with a claim.<sup>16</sup>

[26] If the Commission decides that a person has received an amount of money in benefits that they weren't qualified for or entitled to, it must calculate the amount of the money and notify the claimant of its decision.<sup>17</sup>

[27] Because of the COVID-19 pandemic, changes were made to the Act to facilitate access to benefits with the implementation of "temporary measures."

[28] Those changes include section 153.161 of Part VIII.5 of the Act. This section was in force from September 27, 2020, to September 25, 2021.

[29] This section says that the Commission may, at any point after benefits are paid to a claimant, verify that the claimant 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.<sup>18</sup>

[30] The Tribunal's Appeal Division (Appeal Division) found that the Tribunal's General Division (General Division) could not refuse to exercise its jurisdiction to determine whether the Commission had the power to retroactively disentitle the claimant to benefits.<sup>19</sup>

---

<sup>16</sup> See section 52 of the Act.

<sup>17</sup> See section 52(2) of the Act.

<sup>18</sup> See section 153.161(2) of Part VIII.5 of the Act.

<sup>19</sup> See the Appeal Division decision in *GP v Canada Employment Insurance Commission*, 2021 SST 791.

[31] In this case, the Appellant applied for benefits on October 2, 2020, and a benefit period was established effective September 27, 2020.<sup>20</sup>

[32] The Appellant says that she received benefits from October 2020 to the end of August 2021.<sup>21</sup>

[33] On November 17, 2021, the Commission informed her of the decision about her availability for work.<sup>22</sup>

[34] The Commission argues as follows:

- a) The Commission may, at any point after benefits are paid to a claimant, verify that the claimant was entitled to those benefits by asking them to prove that they were capable of and available for work on any day of their benefit period.<sup>23</sup>
- b) When a claimant indicates, on their claimant reports or while talking to an agent, that they aren't available for work because of training, a decision has to be duly made about availability, and a retroactive disentitlement has to be imposed if availability isn't proven.<sup>24</sup>
- c) The Commission had to impose on the Appellant a disentitlement to benefits retroactive to the start of her claim for benefits.<sup>25</sup>
- d) The Commission exercised its right and its authority, as set out in section 153.161 of the Act, by retroactively imposing this disentitlement.<sup>26</sup>

---

<sup>20</sup> See GD3-3 to GD3-20 and GD4-1.

<sup>21</sup> See GD2-1 to GD2-17, GD2-55, GD2-56, GD2-141, GD2-142, and GD3-32 to GD3-35.

<sup>22</sup> See GD3-34 and GD3-35.

<sup>23</sup> See GD4-5.

<sup>24</sup> See GD4-6.

<sup>25</sup> See GD14-1.

<sup>26</sup> See GD14-1.



[35] As for the Appellant, on her October 2, 2020, application for benefits, she indicated that she had been taking training since September 8, 2020, and that she spent 25 or more hours per week on it.<sup>27</sup>

[36] On her claimant reports for the period from September 27, 2020, to September 25, 2021, which she started completing on October 13, 2020, the Appellant indicated that she attended school during the periods of those reports.<sup>28</sup> She also indicated that she was ready and willing to work and capable of working each day, Monday through Friday, during the periods of those reports.<sup>29</sup> And she reported the number of hours worked for some of those periods.<sup>30</sup>

[37] The Appellant says that, between October 5, 2020, when she got a letter with her access code to complete her claimant reports,<sup>31</sup> and September 19, 2021, when her claim started being reviewed, according to information in her EI file,<sup>32</sup> she didn't get any more information from the Commission about her claim.

[38] The Appellant explains that the Commission didn't contact her for information about her training until October 14, 2021.<sup>33</sup>

[39] She says that the Commission waited about a year before telling her that she wasn't entitled to benefits and that she had to pay back the benefits she had received since the start of her benefit period.

[40] The provisions of section 52 of the Act and those of section 153.161(2) of Part VIII.5 of the Act, despite being temporary, applied to the Appellant's case for her October 2, 2020, claim for benefits.

---

<sup>27</sup> See GD3-12.

<sup>28</sup> See GD2-39 to GD2-46, GD2-49 to GD2-54, GD2-57 to GD2-68, GD2-71, GD2-72, GD2-75, GD2-76, GD2-79 to GD2-82, GD2-87 to GD2-102, and GD14A-1 to GD14A-131.

<sup>29</sup> See GD2-39 to GD2-46, GD2-49 to GD2-54, GD2-57 to GD2-68, GD2-71, GD2-72, GD2-75, GD2-76, GD2-79 to GD2-82, GD2-87 to GD2-102, and GD14A-1 to GD14A-131.

<sup>30</sup> See GD2-39 to GD2-46, GD2-49 to GD2-54, GD2-57 to GD2-68, GD2-71, GD2-72, GD2-75, GD2-76, GD2-79 to GD2-82, GD2-87 to GD2-102, and GD14A-1 to GD14A-131.

<sup>31</sup> See GD2-37 and GD2-38.

<sup>32</sup> See GD2-19 and GD2-20.

<sup>33</sup> See GD3-22 and GD3-23.

[41] I find that the Commission's decision is based on sections 52 and 153.161(2) of the Act.

[42] Even though the Commission hasn't said that it relied on section 52 of the Act in making its decision, I find that the provisions of this section continue to apply despite those of section 153.161(2) of the Act.

[43] Section 52 of the Act shows that the Commission has the discretion to reconsider a claim for benefits.

[44] Section 153.161(2) of the Act gives the Commission a power similar to the one it has under section 52(1) of the Act. The only difference between these two sections is that, under the provisions of section 153.161(2) of the Act, the Commission's power isn't time-limited, but it is in the case of a reconsideration under section 52(1) of the Act.

[45] Under section 153.161(2) of the Act, the Commission may, at any point after benefits are paid to a claimant, verify that the claimant is entitled to those benefits.<sup>34</sup> This section also shows that the Commission has the discretion to decide to verify a claim for benefits.

[46] Under section 52 of the Act, the Commission may reconsider a claim for benefits within 36 months after the benefits have been paid or would have been payable, or within 72 months if, in its opinion, a false or misleading representation has been made.<sup>35</sup>

[47] While section 153.161(2) is broader in time than section 52 of the Act, the question remains whether the Commission used its discretion to reconsider judicially.

[48] In making its decision, the Commission used its powers under section 153.161(2) of the Act. As a result of its verification, it changed its decision, finding that the Appellant wasn't entitled to benefits. It made a new decision in accordance with the procedure set out in section 52(2) of the Act.

---

<sup>34</sup> See section 153.161(2) of the Act.

<sup>35</sup> See sections 52(1) and 52(5) of the Act.

[49] I also note that, even though section 153.161(2) of the Act says that the Commission may, “at any point” after benefits are paid to a claimant, “verify” that the claimant is entitled to benefits, this section specifies that the Commission may do so, but “by requiring proof” that the claimant was capable of and available for work on any working day of their benefit period.<sup>36</sup>

[50] I find that the Commission didn’t verify the Appellant’s entitlement to benefits under section 153.161(2) of the Act. It didn’t apply the related provisions of this section. It didn’t ask the Appellant to prove her entitlement to benefits under section 153.161(2) of the Act.

[51] Based on the summary on file of the Commission’s conversation with the Appellant when it called her on October 15, 2021, I note that they primarily discussed the proof required from the Appellant that she was taking training she had been referred to under the NB-EI Connect program.<sup>37</sup> During that conversation, the Appellant said that she was in school full-time and wasn’t looking for a full-time job.<sup>38</sup>

[52] I find that, before making its decision on November 17, 2021, more than a year after the Appellant applied for benefits, the Commission didn’t tell her about the job search required to show her availability for work or about the proof she had to provide, before retroactively disentitling her from receiving benefits.

[53] Having established that the Commission reconsidered the Appellant’s claim for benefits under section 52 of the Act, while relying on the provisions of section 153.161(2) of the Act, I now have to determine whether it exercised its discretion judicially when it decided to retroactively verify the claim, reconsider it, and change its decision.

---

<sup>36</sup> See section 153.161(2) of the Act.

<sup>37</sup> See GD2-22 and GD2-23

<sup>38</sup> See GD2-22 and GD2-23.

**Issue 2: Did the Commission exercise its discretion judicially when it decided to retroactively verify the Appellant's claim for benefits, reconsider it, and change its decision?**

[54] The Federal Court of Appeal (Court) has held that there is no authority to interfere with discretionary decisions of the Commission unless it can be shown that the Commission "exercised its discretionary power in a non-judicial manner or acted in a perverse or capricious manner without regard to the material before it."<sup>39</sup>

[55] It is up to the Commission to show that it exercised its discretion judicially. In other words, the Commission has to show that it acted in good faith, considered all relevant factors, and ignored irrelevant ones.<sup>40</sup>

[56] Since the Commission's power to reconsider is discretionary, its decisions can be interfered with only if it didn't exercise this power judicially.<sup>41</sup>

[57] The Court has recognized various times that the fact that the Commission has guidelines or guides dealing with its discretion helps to make that discretion consistent.<sup>42</sup>

[58] The Digest of Benefit Entitlement Principles (Digest), a document prepared by the Commission, sets out conditions for reconsideration to determine whether the Commission considered all relevant factors in exercising its discretion.

[59] This document says that the Commission will reconsider a claim when:

- benefits have been underpaid
- benefits were paid contrary to the structure of the Act

---

<sup>39</sup> The Federal Court of Appeal (Court) established this principle in *Uppal*, 2008 FCA 388.

<sup>40</sup> The Court established or reiterated this principle in the following decisions: *Uppal*, 2008 FCA 388; *Tong*, 2003 FCA 281; *Dunham*, A-708-95; and *Purcell*, A-694-94.

<sup>41</sup> See the Court's decisions in *Chartier*, A-42-90; and *Uppal*, 2008 FCA 388.

<sup>42</sup> This principle was established or reiterated in the following decisions: *Hudon*, 2004 FCA 22; and *Gagnon*, 2004 FCA 351.

- 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<sup>43</sup>

– **Benefits underpaid**

[60] I find that the benefit “underpayment” factor doesn’t apply to the Appellant.

[61] Based on the documents the Commission submitted and its calculations, the Appellant was overpaid \$24,088.00 (overpayment) in benefits as a result of the review of her file.<sup>44</sup> In this case, it isn’t that “benefits have been underpaid.”

[62] The Digest says that the Commission always reconsiders if the claimant has been denied benefits that may become payable as the result of reconsideration.<sup>45</sup>

[63] In the case of an overpayment, the Commission may reconsider a claim for benefits, as set out in the Act.<sup>46</sup>

[64] The provisions of section 52 of the Act confirm the discretionary nature of the Commission’s decisions about reconsidering benefit periods within the time allotted to it.

[65] The provisions of section 153.161 of the Act also confirm the discretionary nature of the Commission’s power to decide to verify a claim for benefits.

– **Benefits were paid contrary to the structure of the Act**

[66] I find that, when the Appellant’s claim was set up and she was paid benefits, this was done in accordance with the “structure of the Act,” that is, in accordance with the related basic elements of the Act.

[67] The Digest says that a “period of non-availability” falls outside the definition of *Structure of the Act*. But it says that this element can be reconsidered as long as it

---

<sup>43</sup> See section 17.3.3 of the Digest of Benefit Entitlement Principles (Digest).

<sup>44</sup> See GD2-130 to GD2-138 and GD3-67 to GD3-69.

<sup>45</sup> See section 17.3.3 of the Digest.

<sup>46</sup> See section 52 of the Act.

meets one of the other conditions set out under the policy that deals with this (Commission's Reconsideration Policy).<sup>47</sup>

[68] I find that the Commission didn't make a decision contrary to the structure of the Act.

– **Benefits were paid as a result of a false or misleading statement**

[69] When benefits were paid as a result of false or misleading statements, the Commission may reconsider the claim for benefits.

[70] The Commission may reconsider a claim for benefits within 36 months after the benefits have been paid or would have been payable to a claimant.<sup>48</sup> If, in its opinion, a false or misleading statement or representation has been made in connection with a claim, the Commission has 72 months after the benefits have been paid or would have been payable to reconsider the claim.<sup>49</sup>

[71] The Commission hasn't made any arguments to show that the Appellant may have made false or misleading statements about her training or about her availability for work during the training.

[72] As for the Appellant, she argues that she was always honest about her training, whether on her application for benefits, on her claimant reports, or in the updates in her EI file ("My Service Canada Account").<sup>50</sup> She points out that she [translation] "never lied about anything" and "never tried to defraud the system."<sup>51</sup>

[73] The Appellant says that, on her claimant reports, she indicated that she was taking training and that she was available for work. She specifies that she was available for work, taking into account her course schedule and the fact that some of her courses

---

<sup>47</sup> See section 17.3.3.2 of the Digest.

<sup>48</sup> See section 52(1) of the Act.

<sup>49</sup> See section 52(5) of the Act. See also the Court's decisions in *Dussault*, 2003 FCA 372; and *Pilote*, A-868-97.

<sup>50</sup> See GD2-9, GD2-14, and GD3-32 to GD3-35.

<sup>51</sup> See GD2-17 and GD3-35.

required less work from her. She explains that she reported the days and periods she had worked and indicated the number of hours worked.<sup>52</sup>

[74] I find that the Commission wasn't faced with false or misleading statements in connection with the Appellant's claim. In my view, it hasn't shown this.

[75] The factor for benefits being paid as a result of a false or misleading statement doesn't apply to the Appellant. I find that she was always honest about her training and her availability for work, whether on her application for benefits or on her claimant reports.

[76] I find that, despite this situation, the Commission could reconsider or verify the Appellant's claim for benefits.

– **The claimant ought to have known there was no entitlement to the benefits received (knowledge that there is no entitlement)**

[77] I find that there is no evidence that the Appellant ought to have known (had "knowledge") that she wasn't entitled to the benefits received.

[78] In this case, the Tribunal asked the Commission how the situation described by the Appellant concerning her application for an authorization to take her training, and the documents she had submitted about it,<sup>53</sup> could support a finding that she had been authorized to take the training retroactively to September 2020. This would mean that, under section 25 of the Act, she was attending a program of instruction or training she had been referred to by the Commission or by an authority that it designates, that is, through the NB-EI Connect program.<sup>54</sup>

---

<sup>52</sup> See GD3-32 to GD3-35.

<sup>53</sup> See GD2-121, GD3-27, GD3-62, GD9-2, and GD9-3.

<sup>54</sup> See GD13-2.

[79] In its response to that query, the Commission says that it was [translation] “truly unfortunate” that the information provided by the Appellant could not affect the reconsideration request.<sup>55</sup>

[80] The Commission also argues as follows:

- a) It is understandable that the Appellant thought she had been approved under the NB-EI Connect program, given that her claim for benefits was active and she was getting benefits. She submitted her NB-EI Connect program application on October 2, 2020. But she never got a confirmation that her application or email had been received or approved by the program.<sup>56</sup>
- b) A claimant who attends a course, program of instruction, or training they aren't referred to under section 25 of the Act isn't entitled to benefits for any working day in a benefit period for which they are unable to prove that, on that day, they were capable of and available for work.<sup>57</sup>
- c) Claimants who haven't been referred to training by a designated authority still have to show that they are unemployed, ready to work, capable of working, and actively looking for a suitable job. Claimants have to make arrangements to work if offered a job and must be prepared to abandon their training to accept a job.<sup>58</sup>
- d) On her reports, the Appellant indicated that she was in school and available for work. But the information on file doesn't support that she was available for work.<sup>59</sup>
- e) The Appellant has failed to rebut the presumption that she wasn't available for work when taking full-time courses on her own initiative. Her classes were

---

<sup>55</sup> See GD14-1.

<sup>56</sup> See GD14-1.

<sup>57</sup> See GD4-5.

<sup>58</sup> See GD4-5.

<sup>59</sup> See GD14-1.



from Monday to Friday. She worked only a few hours per week while in training. She was in school full-time and didn't intend to abandon her training. She hasn't shown that her main intention was to find a job. She wasn't looking for a full-time job.<sup>60</sup>

[81] The Appellant's testimony and statements indicate the following:

- a) The Commission told her that she had to contact the authority designated for this purpose—the NB-EI Connect program—for information. Which is what she did before applying for benefits.<sup>61</sup>
- b) NB-EI Connect told her that she had to submit an application to them to find out whether she could get benefits during her training, but that the Commission had [translation] “the final say” on the payment of benefits. NB-EI Connect told her that, if she got benefits after applying for an authorization, this meant that the application in question had been approved.<sup>62</sup>
- c) On October 2, 2020, she submitted her application to the NB-EI Connect program.<sup>63</sup> But there was an error in the address she used to email the application. Her application wasn't sent to the NB-EI Connect program.<sup>64</sup> So, she didn't get a confirmation that the application had been approved. She also didn't get a message in her email inbox saying that the email to NB-EI Connect hadn't been delivered to the recipient.<sup>65</sup>
- d) On October 5, 2020, the Appellant got a letter from the Commission with her access code to complete her claimant reports.<sup>66</sup> She started completing them

---

<sup>60</sup> See GD4-5 and GD14-1.

<sup>61</sup> See GD2-9 to GD2-17 and GD3-32 to GD3-35.

<sup>62</sup> See GD3-32 to GD3-35.

<sup>63</sup> See GD2-22 to GD2-31, GD2-111, and GD3-41 to GD3-51.

<sup>64</sup> See GD2-22, GD2-111, GD2-114, and GD3-41.

<sup>65</sup> See GD2-9 to GD2-17, GD3-32 to GD3-35, and GD3-41 to GD3-51.

<sup>66</sup> See the Commission's letter to the Appellant dated October 4, 2020—GD2-37 and GD2-38.

the following week. When she started getting benefits, she concluded that she was entitled to them.<sup>67</sup>

- e) The Commission was aware of her training. She reported it on her application for benefits, and her claim was approved. On her claimant reports, she always indicated that she was taking training and that she was available for work, because she was able to work, given her course schedule and the fact that some of her courses were less demanding. She also indicated her periods of employment and the number of hours worked, which shows that she was available for work.<sup>68</sup> She points out that she was honest when completing her claimant reports and when she made updates related to her training periods in her EI file (“My Service Canada Account”), which the Commission had access to.<sup>69</sup> After completing her claimant reports, she would get a confirmation that they had been successfully received. While checking her EI file, she found out that, on September 19, 2021, the Commission was reviewing the information she had provided about her training.
- f) On October 15, 2021, the Commission told her that a disentitlement to benefits was going to be imposed on her and that she had been overpaid benefits (overpayment) and would have to pay them back.<sup>70</sup> It explained to her that, because of the COVID-19 pandemic, changes had been made to make it easier to process the claims of people taking training. It also told her that it no longer waited to receive an authorization from the NB-EI Connect program before paying benefits to people taking training. After she explained to it that she had, in fact, submitted an NB-EI Connect program application on October 2, 2020, the Commission asked her for proof of that application. She says that the Commission also told her that, if she were to provide it with

---

<sup>67</sup> See GD2-9 to GD2-17 and GD3-32 to GD3-35.

<sup>68</sup> See GD2-9, GD2-39 to GD2-46, GD2-49 to GD2-54, GD2-57 to GD2-68, GD2-71, GD2-72, GD2-75, GD2-76, GD2-79 to GD2-82, and GD2-87 to GD2-102.

<sup>69</sup> See GD2-9 to GD2-17 and GD2-19 to GD2-21.

<sup>70</sup> See GD2-9 to GD2-17, GD3-22, GD3-23, and GD3-32 to GD3-35.

- proof that she would have been approved under the NB-EI Connect program, the note in her file that she wasn't available for work would be removed, and there would be no overpayment in her case. On October 15, 2021, and several times after that, she contacted a representative from the NB-EI Connect program to get proof of her application or to get an authorization for her training, retroactive to September 2020.<sup>71</sup>
- g) In November 2021, the NB-EI Connect program representative informed her that she was entitled to EI benefits during her training. The representative told her that she wasn't sent a confirmation to that effect because NB-EI Connect hadn't received her application form. The representative said that, despite this situation, she would have been referred or authorized to take the training she had started in September 2020 and would have been entitled to benefits during her training. The Appellant says that this shows that she was entitled to benefits during her training.<sup>72</sup>
- h) The Appellant received documents from the NB-EI Connect program showing that she would have been referred or authorized under that program. These documents also say that, because of an error in the address she used to email her application, NB-EI Connect didn't receive them [*sic*], but she did qualify for the program.<sup>73</sup> She sent these documents to the Commission.<sup>74</sup>

---

<sup>71</sup> See GD2-9 to GD2-17, GD3-28, GD3-29, GD3-32 to GD3-35, GD2-113 to GD2-125, and GD9-1 to GD9-6.

<sup>72</sup> See GD2-9 to GD2-17 and GD3-32 to GD3-35.

<sup>73</sup> See GD3-25, GD3-32 to GD3-35, GD3-62, and GD3-63.

<sup>74</sup> See the November 16, 2021, email to the Appellant from the Government of New Brunswick's Post-Secondary Education, Training and Labour/*Éducation postsecondaire, Formation et travail* (PETL/EPFT) department, which tells her that, if the NB-EI Connect program had received her program application, she would have qualified for a PETL/EPFT authorization to get benefits during her training, for the period determined by Service Canada. The document says that, because of an error in the address used by the Appellant to email the forms in question, PETL/EPFT didn't receive them, but she did qualify for the NB-EI Connect program—GD2-121, GD2-124, GD3-27, GD3-62, GD9-3, and GD9-4. See also the May 11, 2022, email to the Appellant from PETL/EPFT, which tells her that her application for an authorization to take her training could not be approved retroactively and that Service Canada could reconsider its decision—GD9-2 and GD9-3.

- i) Despite the information and documents from the NB-EI Connect program that were sent to it, the Commission decided that the Appellant wasn't entitled to benefits.<sup>75</sup> She questions why the information she provided can't affect her reconsideration request, as the Commission says in its submissions.<sup>76</sup>
- j) The Appellant also questions why her evidence that the NB-EI Connect program would have approved her application isn't enough for her to be able to get a retroactive approval from the Commission saying that her training was "referred" or that it had authorized the training.<sup>77</sup>
- k) The Appellant says that she is confused by the inconsistent information she got from the Commission after it told her about the decision in her case and asked her to pay back the benefits she had received.<sup>78</sup>
- l) If the Commission had looked into whether there might be a problem with her claim when her benefit period started, she could have sought confirmation sooner from NB-EI Connect that her application for an authorization had been approved. 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.<sup>79</sup>
- m) The Appellant says that the Commission's decision penalized her even though its purpose is to facilitate the processing of claims under different government programs offered during the COVID-19 pandemic.<sup>80</sup>

[82] In my view, the Commission hasn't shown that the Appellant could assume that there was no entitlement to the benefits received.

---

<sup>75</sup> See GD3-32 to GD3-35.

<sup>76</sup> See GD14-1 and GD16-1.

<sup>77</sup> See GD16-1.

<sup>78</sup> See GD2-9 to GD2-17.

<sup>79</sup> See GD2-9 to GD2-17 and GD3-32 to GD3-35.

<sup>80</sup> See GD2-9 to GD2-17.

[83] I find that the Commission didn't exercise its discretion judicially when it decided to verify the Appellant's claim for benefits and when it reconsidered the claim.

[84] In my view, the Commission hasn't shown that the Appellant ought to have known (had "knowledge") that there was no entitlement to the benefits received—one of the rules set out in the Digest to show that it has exercised its discretion judicially.

[85] I find that the Commission didn't follow the "Reconsideration Policy" it developed to ensure a consistent and fair application of section 52 of the Act and to prevent creating debt when a claimant was overpaid through no fault of their own, as the policy states.<sup>81</sup>

[86] In my view, all the elements were there for the Commission to set up the Appellant's claim and pay her benefits.

[87] I note that the Commission had ample opportunity to verify what the Appellant had indicated on her application for benefits, which included specific information about the training she had started in September 2020.<sup>82</sup> The Commission knew from then on that she spent 25 or more hours per week on her training.<sup>83</sup>

[88] I also note that, when she completed her claimant reports, the Appellant continued to report that she was taking training. She indicated that she was available for work and reported the number of hours worked.<sup>84</sup>

[89] The Appellant's EI file ("My Service Canada Account"), which the Commission had access to, also indicates the Appellant's training periods and the updates she made.

[90] I find the Appellant's testimony credible and place the most weight on it. The Appellant was consistent in her statements about her availability for work, her training,

---

<sup>81</sup> See section 17.3.3 of the Digest.

<sup>82</sup> See GD3-3 to GD3-20.

<sup>83</sup> See GD3-12.

<sup>84</sup> See GD2-39 to GD2-46, GD2-49 to GD2-54, GD2-57 to GD2-68, GD2-71, GD2-72, GD2-75, GD2-76, GD2-79 to GD2-82, GD2-87 to GD2-102, and GD14A-1 to GD14A-131.

and her efforts to get her training authorized by the Commission or by an authority that it designates, that is, through the NB-EI Connect program.

[91] I am of the view that the Appellant could reasonably believe that, when her claim for benefits was approved and she started getting benefits, this meant she was entitled to those benefits.

[92] I find that, despite its finding that the information on file doesn't support the Appellant's statements that she was available for work,<sup>85</sup> the Commission hasn't shown that the Appellant ought to have known that she wasn't entitled to benefits. Moreover, in my view, the Commission's arguments don't show that the Appellant wasn't entitled to benefits during her training.

[93] I find that the Commission also hasn't shown that the Appellant ought to have known that she could not get benefits because, under the provisions of section 25 of the Act, she was taking training she hadn't been referred to.<sup>86</sup>

[94] On this point, I note that the Commission says that it is [translation] "understandable" that the Appellant thought she had been approved under the NB-EI Connect program, given that her claim for benefits was active and she was getting benefits.<sup>87</sup>

[95] The Appellant argues that the information and documents she provided to the Commission show that the NB-EI Connect program would have approved her training if her program application had been sent without issue.

[96] On this point, I am of the view that the Commission's statement that it was [translation] "truly unfortunate" that this information could not affect its reconsideration decision<sup>88</sup> doesn't show that it considered all relevant factors in its analysis. I find that the Commission didn't explain why the information and documents in question could not

---

<sup>85</sup> See GD14-1.

<sup>86</sup> See GD4-5.

<sup>87</sup> See GD14-1.

<sup>88</sup> See GD14-1.

affect its analysis. I note that, in one of its emails to the Appellant, dated May 11, 2022, NB-EI Connect (PETL/EPFT) says that it could not approve her training retroactively and that Service Canada (the Commission) could reconsider its decision.<sup>89</sup>

[97] I find that the Commission's statement about the information and documents that the Appellant had sent it doesn't show that it exercised its discretion judicially in verifying and reconsidering the Appellant's claim for benefits.

[98] In summary, given the evidence and the particular circumstances of this case, I find that the Commission didn't use its discretion judicially when it decided to verify the Appellant's claim for benefits and when it reconsidered the claim.

[99] I find that the Commission didn't consider all relevant factors in doing so. These factors refer, first of all, to all the information the Appellant gave about her training on her application for benefits, her claimant reports, and the updates she made in her EI file. The relevant factors the Commission didn't consider also refer to the information and documents the Appellant gave it to show that the NB-EI Connect program would have approved her application for an authorization if it had been sent without issue.

[100] In my view, the Commission failed to follow its own rules in exercising its discretion. I find that it misused its discretion.

[101] I find that a reconsideration of the Appellant's claim for benefits is unwarranted, even if done within the time set out in the Act.

[102] Because of this, I won't review the initial decision to grant the Appellant benefits.

---

<sup>89</sup> See GD9-2 and GD9-3.

### **Availability for work and repayment of benefits that were overpaid**

[103] Since I have found that the Commission didn't exercise its discretion judicially when it decided to verify the Appellant's claim for benefits and when it reconsidered the claim, there is no need to review the initial decision in her case.<sup>90</sup>

[104] This means that there is no need to determine whether the Appellant was available for work from September 28, 2020, during her training.

[105] There is also no need to determine whether the Appellant has to pay back the benefits that she was overpaid and that the Commission says she owes.<sup>91</sup>

### **Conclusion**

[106] I find that the Commission didn't use its discretion judicially in deciding to verify and reconsider the Appellant's claim for benefits. This means that the Commission could not retroactively determine that the Appellant wasn't entitled to EI benefits.

[107] So, there is no need to determine whether she was available for work from September 28, 2020, and whether she was entitled to benefits.

[108] There is also no need to decide whether the Appellant has to pay back the money that the Commission says she owes in overpaid benefits.

[109] This means that the appeal is allowed.

Normand Morin  
Member, General Division – Employment Insurance Section

---

<sup>90</sup> See sections 52 and 153.161 of the Act.

<sup>91</sup> See sections 43, 44, and 52 of the Act.