Citation: *Canada Employment Insurance Commission v BG*, 2023 SST 106

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	Canada Employment Insurance Commission
Representative:	Melanie Allen
Respondent:	B. G.

Decision under appeal:	General Division decision dated September 18, 2022 (GE-22-1815)

Tribunal member:	Charlotte McQuade
Type of hearing:	Teleconference
Hearing date:	January 4, 2023
Hearing participants:	Appellant's representative Respondent
Decision date:	February 1, 2023
File number:	AD-22-732

Decision

[1] The appeal is allowed. The General Division made an error of law.

[2] The Claimant has not proven his availability for work. The Commission exercised its discretion judicially in verifying the Claimant's entitlement and reconsidering the claim.

Overview

[3] B. G. is the Claimant. He worked full-time as a personal support worker at a long-term care home. At the same time, he was attending college to become a nurse. As part of his program, the Claimant had to attend a six-week clinical placement at another long-term care home. Due to a government emergency order, long-term care workers were only allowed to work in one facility. So, the Claimant took a leave of absence to attend the placement. He applied for Employment Insurance (EI) regular benefits. The Commission paid him benefits but later disentitled the Claimant for the period of his leave for reason he hadn't proven his availability for work.

[4] The Claimant appealed the Commission's decision to the General Division. The General Division allowed the Claimant's appeal. The General Division decided the Claimant had proven his availability for work.

[5] The Commission appealed the General Division's decision. The Commission submits that the General Division made an error of law, based its decision on important errors of fact and didn't decide an issue it should have.

[6] I am allowing the appeal. The General Division made an error of law. I have substituted my decision for the General Division. The Claimant hasn't proven his availability for work. The Commission exercised its discretion judicially when it decided to verify the Claimant's entitlement and reconsider the claim. Unfortunately, this means the Claimant is left with the overpayment.

Issues

[7] The issues in this appeal are:

a) Did the General Division make an error of law by not considering relevant case law from the Federal Court of appeal that says claimants who are only available for employment around their school schedule, are not available for work?

b) Did the General Division base its decision on an important error of fact that the Claimant had an intention to return to the labour market as soon as a suitable job was available, given he took a leave of absence from full-time employment to attend an unpaid six-week clinical placement?

c) Did the General Division make an error of law by justifying the Claimant's lack of efforts to find a job on the pandemic?

d) Did the General Division base its decision on an important error of fact that the Claimant's availability was not unduly restricted as a result of his personal choice to attend the clinical placement which meant he could not work at other long-term care homes?

e) Did the General Division make an error of jurisdiction by not deciding whether the Commission had exercised its discretion properly in deciding to retroactively review the Claimant's entitlement and assess an overpayment?

Analysis

[8] The Commission argues that the General Division made an error of law, errors of fact and an error of jurisdiction.

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

---

[1] See section 58(1) of the *Department of Employment and Social Development Act* (DESD Act).

The General Division made an error of law

[10] The Commission disentitled the Claimant from regular benefits for the period from March 15, 2021, to April 30, 2021, because he hadn't proven his availability for work.

[11] The Claimant appealed that decision to the Tribunal's General Division.

[12] The General Division had to decide whether the Claimant had proven his availability for work for the period March 15, 2021, to April 30, 2021.

[13] To be entitled to regular EI benefits, claimants must prove they are capable of and available for work and unable to obtain suitable employment for every working day in their benefit period.[2] This requirement also applies to students attending training they have not been referred to by the Commission or a designated authority.

[14] "Working day" is defined in the *Employment Insurance Regulations* (EI Regulations) to mean any day of the week except Saturday and Sunday.[3] So, this means the obligation is to prove availability is for every weekday.

[15] The law says that full-time students are presumed to be unavailable for work.[4]

[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.[5] The other way is by showing they have exceptional circumstances.[6]

[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.

---

[2] See section 18(1)(a) of the *Employment Insurance Act* (EI Act). See also section 153.161(1) of the EI Act in force between September 27, 2020, and September 25, 2021.
[3] See section 32 of the *Employment Insurance Regulations* (EI Regulations).
[4] See *Canada (Attorney General) v Cyrenne*, 2010 FCA 349.
[5] See *Canada (Attorney General) v Rideout*, 2004 FCA 304.
[6] See *Canada (Attorney General) v Cyrenne*, 2010 FCA 349.

[18] The law says that availability is assessed considering three factors.[7] These are whether the person:

- 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.

[19] The Claimant told the General Division that he had been working full-time as a personal support worker at a long-term care home. He worked during the evening and during the day he attended online schooling to become a nurse.[8]

[20] The Claimant was required, as part of his nursing program, to attend a six-week placement at a long-term care home.[9] He couldn't remain working at his job due to a government emergency order that restricted workers to one long-term care home. So, he took a leave of absence during the period of the placement. The Claimant attended his placement for 12-hour shifts on Thursdays and Fridays. He also had to attend a four-hour online course each week.[10]

[21] The Claimant reported on his application for benefits that his schooling was a part-time program. He reported being less available for work prior to the placement due to the emergency order restricting him to working in one long-term care home. The Claimant confirmed that if he found full-time work that conflicted with his program, he would finish his program.[11]

---

[7] See *Faucher v Canada (AG)*, A-56-96.
[8] I heard this from the audio recording of the General Division hearing at approximately 0:19:40.
[9] GD2-12.
[10] GD3-49.
[11] GD3-7 to GD3-9.

[22] The Claimant reported on each of his biweekly claimant reports that he was not ready, willing, and capable of working each day, Monday through Friday during each week.[12] He declared this for two of the five days per week.[13]

[23] The General Division does not say this explicitly but appears to have concluded the Claimant's program was not a full-time program as it did not apply the presumption of non-availability to the Claimant. Rather, the General Division considered the three availability factors noted above.

[24] The General Division decided that the Claimant wanted to go back to work as soon as a suitable job was available because he would have kept working while doing his training if the law had allowed him to do so, and he returned to the nursing home he worked at previously once his training was done.

[25] The General Division found as a fact that the Claimant's efforts to find a job included asking the employer where he did his clinical training if he could work in any other capacity. He also asked his regular employer if he could keep working during his 6-week training in any capacity but that this was refused due to the emergency order. The General Division noted that the Claimant did not look for work elsewhere as he did not want to endanger the elderly, vulnerable clientele he was working with.[14]

[26] The General Division decided that these efforts were enough to meet the requirements of this second factor because it was all the Claimant could really do to find another employment during this critical period of the pandemic.

[27] The General Division also decided the Claimant had not set any personal conditions that unduly limited his chances of returning to the workforce. The General Division decided it was the emergency order and the pandemic that restricted his ability to work, not his own choices.

---

[12] GD3-22, GD3-28, GD3-34, and GD3-40.
[13] GD3-23, GD3-29, GD3-34, GD3-35, and GD3-41.
[14] see paragraphs 23 to 25 of the General Division decision

[28] The Commission submits that the General Division made an error of law by failing to consider and apply relevant case law from the Federal Court of Appeal that says claimants who are only available for employment outside of their school schedule or who restrict their availability to certain times and days to accommodate their school schedule are not available for the purpose of the *Employment Insurance Act* (EI Act). [15]

[29] The Claimant had no specific submissions on this point but says he believes the General Division applied the law properly.

[30] Respectfully, I find the General Division made an error of law.

[31] The Federal Court of Appeal has said on multiple occasions that students who unduly restrict their availability around their schooling have not proven their availability for work.[16] For example, in a case similar to the Claimant's, the Federal Court of Appeal found that a claimant who was available for work only two days per week and weekends was not available for work.[17]

[32] The General Division was required to consider the case law from the Federal Court of Appeal, having regard to the Claimant's particular situation, and decide whether the Claimant had unduly restricted his chances of returning to the labour market by only being available for work around his school schedule.

[33] However, the General Division did not consider this case law or consider whether, having regard to the Claimant's inability to work two out of the five weekdays due to his placement schedule, he had unduly restricted his chances of returning to the labour market.

---

[15] The Commission refers to *Canada (AG) v Primard*, 2003 FCA 349 and *Duquet v Canada (AG),* 2008 FCA 313.
[16] See, for example, *Canada (Attorney General) v Gagnon*, 2005 FCA 321; See also *Duquet v Canada Employment Insurance Commission*, 2008 FCA 313; See also *Canada (Attorney General) v Primard*, 2003 FCA 349 and *Canada (Attorney General) v Rideout*, 2004 FCA 304.
[17] See *Canada (Attorney General) v Rideout*, 2004 FCA 304.

[34] I do not need to decide whether the General Division made any other errors. As I have found an error of law, I can intervene in the General Division decision.[18]

Remedy

[35] 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.[19]

[36] Both parties want me to make the decision the General Division should have given. Neither party says they have any further evidence to provide.

[37] Since the General Division found the Claimant to be available for work, the General Division did not decide whether the Commission had exercised its discretion judicially in retroactively assessing an overpayment.

[38] However, the Commission provided submissions to the General Division about this issue.[20] I have listened to the audio recording of the General Division hearing. I heard the Claimant explain why he thought the Commission's assessment of an overpayment was unfair.

[39] I am satisfied the parties had a full and fair opportunity to present their case on both issues. Since neither party has any further evidence to present and both have made their arguments, I find this to be an appropriate case to substitute my decision for that of the General Division.

The Claimant has not proven his availability for work

[40] The Claimant has not proven his availability for work.

---

[18] Section 58(1)(c) of the *Department of Employment and Social development Act* (DESD Act) says an error of law is one of the grounds of appeal.
[19] See section 59(1) of the DESD Act.
[20] GD4-2 to GD4-3.

– The presumption of non-availability does not apply to the Claimant

[41] The Claimant was only attending school two days a week along with an online course. Although he was spending approximately 28 hours a week on his schooling, the college through which he was attending this course considered his program to be a part-time program.[21] So, I accept this was part-time schooling.

[42] Since the Claimant wasn't attending school full-time, the presumption of non-availability does not apply to him.

[43] I will focus, therefore, on whether the Claimant has proven his availability for work having regard to the three availability criteria set out above.

– Wanting to go back to work

[44] The Claimant has not shown that he wanted to go back to work as soon as a suitable job was available.

[45] The Claimant had previously been working full-time before attending his placement. He was not willing to drop his placement if offered full-time work.[22]

[46] The Claimant asked his employer if he could continue working during his placement, but he was not able to, due to the emergency order. The Claimant also asked his placement provider if he could work there, but that was not permitted.[23]

[47] The Claimant did not seek out any other work, outside of the long-term care sector as he did not want to endanger the elderly, vulnerable clientele he was working with.[24]

---

[21] GD3-7.
[22] GD3-9.
[23] See paragraph 23 of the General Division decision.
[24] See paragraph 23 of the General Division decision.

[48] The Claimant submits that he had an intention to work. He would have continued working with his existing employer but for the emergency order preventing him from doing so.

[49] The Commission says that the Claimant's choice to take a leave of absence from his regular job to attend his six-week placement demonstrates the Claimant did not want to go back to work, but instead wanted to complete his training program.

[50] I accept that the Claimant wanted to continue to work with his existing employer or his placement employer if he had been allowed to.

[51] However, I find his intention was not to return to the labour market as soon as a suitable job was available. The Claimant took a leave from a full-time job to attend his placement and he was unwilling to abandon his placement for a full-time job. The Claimant's intention was to prioritize attending his placement over finding work.

[52] Further, the Claimant was aware attending the placement would mean he could not work in any other long-term care homes, and he did not seek out any other work, outside of long-term care homes. So, his conduct does not suggest an intention to return to the labour market as soon as a suitable job was available.

[53] The Claimant has not shown a desire, therefore, to return to the workforce as soon as a suitable job was available.

– Efforts to find a suitable job

[54] The Claimant's efforts to find work do not demonstrate he had a sincere desire to return to the workforce as soon as a suitable job was available.

[55] The Claimant's efforts to find work were limited to asking his employer if he could continue to work there while attending placement and asking the placement employer if he could work there. The Claimant did not engage in any other job search efforts.

[56] The General Division found these efforts sufficient to show the Claimant's desire to return to the workforce as soon as a suitable job was available. The General Division

said that was because this was all the Claimant could really do to find another employment during this critical period of the pandemic.[25]

[57] The Commission says the evidence shows that the Claimant's efforts were insufficient to show that he was making reasonable and customary efforts to find suitable employment. The Commission submits that the General Division made an error of law by analyzing the Claimant's efforts with regard to the pandemic. The Commission says the Appeal Division has confirmed in several decisions that it would be an error of law to consider the pandemic to justify why the claimant did not apply for jobs.[26]

[58] The Claimant maintains that his efforts to find work were limited due to the emergency order and the pandemic, as decided by the General Division.

[59] I agree with the Commission that the General Division misplaced its focus on the pandemic and emergency order, rather than focusing on the Claimant's actual efforts to find work when it decided this factor.

[60] The *Employment Insurance Regulations* (EI Regulations) provide criteria for determining whether a claimant's efforts to obtain suitable employment are reasonable and customary efforts.[27] I have considered these criteria for guidance only in deciding whether the Claimant's efforts demonstrate that he had a sincere desire to return to the workforce as soon as a suitable job was available.

[61] The criteria in the EI Regulations explain that reasonable and customary efforts are sustained efforts.

[62] Reasonable and customary efforts also include activities such as assessing employment opportunities, preparing a resume or cover letter, registering for job search tools or with electronic job bank and employment agencies, attending job search

---

[25] See paragraph 24 of the General Division decision.
[26] The Commission refers to *Canada Employment Insurance Commission v ET*, 2022 SST 662 and *Canada Employment Insurance Commission v SL*, 2022 SST 556.
[27] See section 9.001 of the EI Regulations.

workshops or job fairs, networking, contacting prospective employers, submitting job applications, and attending interviews.

[63] The Claimant's efforts to find work do not show a sustained effort. He only made enquiries with his existing employer and placement employer but beyond that took no steps to find work. He also did not engage in any of the job search efforts that are considered to be reasonable and customary efforts.

[64] I recognize that the Claimant was prevented by the emergency order from working in any other long-term care homes. I also recognize that he had a very good reason for not wanting to work anywhere else. He did not want to put the individuals he was working with at risk.

[65] However, the focus of the second availability factor is on a claimant's efforts to find work. This is evident from the criteria which describe reasonable and customary efforts. What is relevant is the types of job search activities being undertaken and whether the job search is sustained.

[66] The second availability factor is not concerned with factors such as the pandemic or a claimant's reasons for not job searching, no matter how commendable those reasons might be.

[67] As the Federal Court of Appeal has said, no matter how little chance of success a claimant may feel a job search would have, they still must be actively seeking work to prove their availability.[28] This tells me that the focus of this factor is specifically on job search efforts.

– Conditions unduly limiting chances of going back to work

[68] Due to personal conditions the Claimant set, and the impact of the emergency order, the Claimant's chances of returning to work was unduly limited.

---

[28] See *The Attorney General of Canada v Cornelissen-O'Neill*, A-652-93.

[69] The Claimant argues that he did not impose any personal conditions that unduly restricted him from getting a job. He wanted to continue working with his employer while attending his placement but was prevented from doing so by the emergency order.

[70] The General Division found as a fact that the Claimant had not imposed any personal conditions that limited his chances of finding another job. Rather, the General Division said it was the combined effect of the emergency order and the pandemic that created the limitations.

[71] The Commission submits that the Claimant imposed a personal condition of restricting his availability to three days a week, around his placement. Since the Claimant could only work in one long-term care facility, he was also restricted for the rest of the days of the week. The Commission argues that these conditions unduly limited the Claimant's chances of returning to the labour market.

[72] The Commission maintains that it doesn't matter if the restriction is self-imposed or not because the question of availability is an objective one. The Commission relies on case law from the Federal Court of Appeal in that regard.[29] The Commission says that since the Claimant was restricted from working every weekday, he hasn't proven his availability for work.

[73] Respectfully, I cannot accept the General Division's finding of fact that the Claimant set no personal conditions. This finding of fact, in my view, is not consistent with the evidence.

[74] I find the Claimant imposed two personal conditions. He imposed a personal condition of only being willing to work three out of five weekdays so he could attend his placement. He reported this on his claimant reports.

---

[29] The Commission relies on *Vezina v Canada (Attorney General), 2003 FCA 198 (CanLII)* for this reasoning.

[75] The Claimant also set a personal condition of restricting his job search. He chose not to seek any work outside long-term care homes due to his concern of putting the residents he was working with at risk.

[76] In addition to these personal conditions, the Claimant was subject to a condition he had not imposed. The emergency order prevented him from working at any other long-term care homes.

[77] The Claimant had been working full-time before attending his placement. Given he was unable to work on Thursdays and Fridays, the Claimant was eliminating a potential group of employers who might have required him to work shifts on those days.

[78] The potential group of employers was limited even more by the emergency order. Although the emergency order was not a condition the Claimant set, it meant he was preventing from working in any other long-term care home.

[79] So, the combination of the Claimant's school schedule and the emergency order meant the Claimant could only have worked on three weekdays for an employer, other than a long-term care home.

[80] However, since the Claimant imposed the personal condition of not looking for any work outside long-term care homes, that meant any potential employers outside of long-term care homes were also eliminated.

[81] I accept that the third availability factor relates to personal conditions a claimant has set and not external conditions.[30]

[82] However, that does not mean I can ignore external conditions that might significantly compromise a claimant's availability for work.

[83] The Federal Court of Appeal has said that the question of availability is an objective one and does not depend on the particular reasons for restricting availability.[31]

---

[30] See *Faucher v Canada (AG)*, A-56-96.
[31] See *Canada (Attorney General) v Bertrand*, 1982 CanLII 3003 (FCA).

[84] Where a claimant is facing restrictions that effectively mean that the claimant has no realistic chance of obtaining suitable employment, even if those restrictions are outside that claimant's control, they must be considered.[32]

[85] For example, in *Maughan*, the Federal Court of Appeal took this approach where the claimant was unable to work due to the need to care for a family member.[33] The claimant there had not set a personal condition but was, nevertheless, found unavailable for work.

[86] In *Leblanc* the claimant was unable to work due to a fire that destroyed his ability to get to work and equipment he needed to do his work. The Court decided that even though the claimant wanted to work, he was still not available for work.[34]

[87] In this case, the conditions the Claimant was facing were partly self-imposed and partly due to the emergency order. However, the combined effect of those conditions meant the Claimant had no chance of returning to the labour market during the period of his school placement.

[88] The Claimant has not, therefore, proven his availability for work from March 15, 2021, to April 30, 2021. His intention was not to return to the workforce as soon as a suitable job was available, nor did his efforts demonstrate such an intention. Further, due to a combination of personal conditions and an external condition, the Claimant had no chance of returning to the labour market during the period of his training.

[89] Next, I will consider whether the Commission exercised its discretion judicially in reconsidering the claim and assessing an overpayment.

---

[32] See, for example, *Canada (Attorney General) v Leblanc,* 2010 FCA 60 and *Canada (Attorney General) v Maughan*, 2012 FCA 35; See also *Canada (Attorney General) v Bertrand*, 1982 CanLII 3003 (FCA) and *Vezina v Canada (Attorney General)*, 2003 FCA 198 (CanLII).
[33] See *Canada (Attorney General) v Maughan*, 2012 FCA 35.
[34] See *Canada (Attorney General) v Leblanc*, 2010 FCA 60.

The Commission exercised its discretion judicially

[90] The Commission exercised its discretion judicially in retroactively assessing an overpayment.

[91] The Claimant told the General Division that he had called Service Canada before he quit his job and applied for EI benefits. He said he told the agent that he was attending a placement and could not work at any other long-term care homes. He said he was told he was eligible for benefits.[35]

[92] The Claimant submits that the overpayment is the Commission's mistake. He maintains that he wouldn't have applied for EI benefits if he had been told he was ineligible for those benefits while attending his placement. He says he was honest in declaring his schooling in all his reporting and was paid benefits.

[93] The Commission says it relied on section 153.161 of the EI Act which allowed it to postpone the entitlement decision after making a determination on qualification, to allow for efficient processing of claims.

[94] The Commission says this provision allowed it to later verify whether the Claimant was entitled to benefits even after those benefits were paid to him. Since when that verification was sought, the Claimant was not able to prove his availability, the Commission says it made an initial decision to disentitle the Claimant from benefits from March 15, 2021, to April 30, 2021.

[95] During the pandemic, the government temporarily changed the EI Act to add section 153.161. This provision applied only to students attending non-referred training. It was in force from September 27, 2020, until September 25, 2021, but continued to apply to benefit periods beginning between September 27, 2020, and September 25, 2021.[36] Since the Claimant's benefit period began during this period, this provision is relevant to the Claimant's situation.

---

[35] I heard this from the audio recording of the General Division hearing at approximately 0:09:38 and at approximately 0:23:15.
[36] See section 333 of the *Budget Implementation Act, 2021*, No. 1 (S.C. 2021, c. 23).

[96] Section 153.161(1) of the EI Act provides that a claimant attending non-referred 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.

[97] Section 153.161(2) of the EI Act provides that the Commission may, at any point after benefits are paid to a claimant verify that a claimant who is attending non-referred 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.

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

[99] The Commission says it didn't reconsider the claim under section 52 of the EI Act. The Commission says it paid benefits based on qualification and postponed its initial entitlement decision until after it had verified whether the Claimant was entitled to benefits.

[100] I do not accept that section 153.161 allows the Commission to make a delayed entitlement decision. I don't find it necessary in this case to get into a detailed explanation as to why that is, as the central issue in this case is not about the Commission's authority to retroactively assess an overpayment or under what provision of the EI Act it is relying on to do so, but whether the Commission exercised its discretion properly in assessing an overpayment in the Claimant's circumstances.

[101] I will note that the Appeal Division has previously held that section 153.161 does not permit a delayed entitlement decision.[37] Rather, this provision allowed the Commission to make an initial entitlement decision based on the limited information provided in the application form. It is the verification of entitlement that can be delayed. I agree with the reasoning in those cases and adopt it in this case.

---

[37] See *SF v Canada Employment Insurance Commission*, 2022 SST 1095; See also *Canada Employment Insurance Commission v OB*, 2022 SST 1371.

[102] However, section 52 and section 153.161 of the EI Act must be read together. Section 52 and section 153.161 of the EI Act together give the Commission the power to retroactively verify a claimant's entitlement after benefits have been paid and to reconsider the claim and assess an overpayment, if appropriate.

[103] Both section 52 and section 153.161(2) of the EI Act are discretionary decisions. This means that while the Commission can seek to verify a claimant's entitlement and reconsider their claim, it doesn't have to.

[104] 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:[38]

- 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.

[105] I will review the circumstances in which the Commission sought verification of the Claimant's entitlement and reconsidered his claim.

[106] The Claimant declared his schooling on his application form completed on March 17, 2021.[39] He declared attending more than 25 hours a week on his schooling. He explained he was attending a field placement from March 18, 2021, to April 30, 2021. He also declared two other courses he was taking from January 18, 2021, to April 30, 2021.

---

[38] See *Canada (Attorney General) v Purcell*, 1995 CanLII 3558 (FCA).
[39] GD3-6 to GD3-16.

[107] The Claimant noted he was not available for work and capable of working under the same or better conditions as he was before he started his course. He said this was due to the government order that he could not work and train in different nursing homes. The Claimant noted being able to work Monday mornings and all-day Thursday and Friday. He noted if he found full-time work to conflict with his training, he would finish the training. The Claimant also said he had made efforts to find work since the start of his course or since he became unemployed.

[108] The application form noted the Claimant's responsibilities which included being capable of and available for work and unable to obtain suitable employment. The responsibilities included actively searching for suitable employment and keeping a detailed job search record. Various job search activities were also explained. The application said that the information would be used to determine eligibility for EI benefits and the information provided was subject to verification.[40]

[109] Based on the information provided in the application form, the Commission decided to pay the Claimant benefits.

[110] The Claimant completed biweekly claimant reports throughout his claim. He reported attending training on each report. He also declared that he was not ready, willing, and capable of work for two days per week.[41]

[111] The Commission tried to contact the Claimant on December 22 and December 23, 2021, without success, to try to verify his entitlement. The notes provide the reason for that attempted contact was "Training – declared not available."

[112] However, when the Commission could not reach the Claimant to prove his entitlement, the Commission exercised its discretion on January 4, 2021, to reconsider the claim. The Commission determined that the Claimant was not entitled to benefits

[40] GD3-12 to GD3-14.
[41] GD3-17 to GD3-43.

from March 15, 2021, to April 30, 2021, because he was taking a training course on his own initiative and had not proven his availability for work.[42]

[113] The Claimant filed a reconsideration request explaining that he had reached out to Service Canada in March 2021 and explained to the agent that he was attending a six-week training course in a long-term care home and a government order prevented him from working in another home. He said that he was approved as eligible for EI.[43]

[114] The reconsideration agent's notes provide that the Claimant confirmed that he was working at a nursing home when he went to a long-term care facility for a 6-week training. The Claimant confirmed that he could only work at that long-term care facility during this time as there was a restriction allowing work only at one long-term care home. The Claimant also stated that his training was 24 hours per week (2 shifts of 12 hours) on Thursday and Friday and he also had one 4-hour class which was online.[44]

[115] The notes provide further that the Claimant was told by the reconsideration agent that the reason for the overpayment was that the Commission had made partial payments to the Claimant for the weeks in which he had declared availability for 3 days per week but was not actually available.[45]

[116] So, the relevant factor considered by the Commission in reconsidering the claim appears to have been the fact the Claimant declared availability for three days per week on his claimant reports, but he was not able to prove he was available for work on those days.

[117] I see no evidence that the Commission acted in bad faith, considered irrelevant factors, ignored relevant factors, or acted in a discriminatory manner when it decided to verify the Claimant's entitlement to benefits. The reason for seeking verification of entitlement was noted as, "Training - declared not available."[46] So, the Commission was

---

[42] GD3-45.
[43] GD3-46 to GD3-47.
[44] GD3-49.
[45] GD3-49.
[46] GD3-44.

acting on relevant information declared by the Claimant that called into question his entitlement to benefits. So, this was a proper purpose for the Commission to seek to verify the Claimant's entitlement.

[118] I find the Commission also exercised its discretion in a judicial manner in reconsidering the claim on January 4, 2022, and assessing an overpayment.

[119] There were no new relevant facts presented at the General Division hearing that the Claimant had not provided to the Commission. There is no evidence that the Commission considered irrelevant information or acted in bad faith or in a discriminatory manner. Claimants are obligated to repay benefits paid to the Commission to which they are not entitled.[47] So, reconsidering a claim where it appears a claimant may not be entitled to benefits is a proper purpose.

[120] The Commission did not mention the fact the Claimant was told he would be eligible for benefits at the time he applied when it decided to reconsider the claim. So, the Commission appears to have decided that fact was irrelevant. I agree this was not a relevant factor.

[121] The Claimant was told he was eligible for benefits at the time he applied. This was not mistaken advice. The Claimant was eligible for benefits when he applied, having earned enough hours of insurable employment to qualify for benefits.

[122] However, the Claimant completed his application for benefits after that call. As the application makes clear, even if you are eligible for benefits, there are ongoing requirements to be entitled to EI benefits. Those requirements include job searching and being capable of and available to work.

[123] Although the Claimant told the Service Canada agent that he could not work in any other long-term care homes due to the emergency order, there was no evidence before the General Division that the Claimant had any detailed discussion with the

[47] See section 43 of the EI Act.

Service Canada agent about his availability for work or that he was misled in any way about the availability requirements.

[124] The Commission reconsidered the Claimant's claim, not because he was not eligible for benefits but because he could not prove his entitlement to benefits. So, what he was told about his eligibility for benefits was not a relevant factor the Commission had to consider.

[125] I understand the Claimant declared his schooling on his application form and declared that he could only work certain days of the week. He noted the same thing on his claimant reports. He was paid benefits, despite that information.

[126] However, the application form and claimant reports provide limited information to the Commission about a claimant's availability for work. For example, there are no detailed questions about a job search which is an important factor in verifying a claimant's availability for work.

[127] Section 153.161 was added to the EI Act in the extraordinary circumstances of the pandemic. The legislature specifically gave the Commission the power in section 153.161 to delay verification of entitlement even after benefits have been paid.

[128] 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.

[129] I find that the Commission exercised its discretion judicially under sections 52 and 153.161 of the EI Act.

[130] Since the Commission exercised its discretion judicially in verifying the Claimant's entitlement and reconsidering the claim, the result is the Claimant, unfortunately, the Claimant still has an overpayment.

Conclusion

[131] The appeal is allowed.

[132] The General Division made an error of law. I have substituted my decision to find the Claimant has not proven his availability for work. The Commission exercised its discretion judicially in verifying the Claimant's entitlement and reconsidering the claim.

Charlotte McQuade
Member, Appeal Division