



[TRANSLATION]

Citation: *Canada Employment Insurance Commission v AL*, 2023 SST 253

Social Security Tribunal of Canada Appeal Division

Decision

Appellant: Canada Employment Insurance Commission
Representative: Julie Meilleur

Respondent: A. L.
Representative: J. D.

Decision under appeal: General Division decision dated
October 28, 2022 (GE-22-1573)

Tribunal member: Pierre Lafontaine

Type of hearing: Teleconference
Hearing date: February 28, 2023
Hearing participants: Appellant Representative
Respondent
Respondent's representative

Decision date: March 7, 2023
File number: AD-22-854

Decision

[1] The appeal is allowed on the issue of whether the Appellant (Canada Employment Insurance Commission) exercised its discretion judicially.

[2] However, the file returns to the General Division to determine whether the Respondent (Claimant) was entitled to benefits from October 5, 2020, to December 21, 2020, and from January 7, 2021, to April 28, 2021, when she was taking training.

Overview

[3] The Appellant, the Commission, decided that the Respondent (Claimant) was not entitled to Employment Insurance (EI) regular benefits from October 5, 2020, to December 21, 2020, and from January 7, 2021, to April 28, 2021, 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 gave the Commission permission 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] However, the file returns to the General Division to determine whether the Claimant was entitled to benefits from October 5, 2020, to December 21, 2020, and from January 7, 2021, to April 28, 2021, when she was taking training.

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.

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 on 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 General Division should not have considered the Commission's policy about judicially exercising its discretion under section 52 of the EI Act when looking at the discretion under section 153.161. However, the Claimant says that the General Division's decision is not based only on policy related to section 52.

[19] The Claimant argues that the Commission acknowledges in its grounds of appeal that the General Division found that it did not exercise its discretion judicially because it did not apply the provisions of section 153.161 (2) of the EI Act by requiring the Claimant to prove her entitlement to receive benefits.

[20] The Claimant argues that the General Division did not err in finding that the Commission, based on its conduct in the matter, failed to exercise its discretion

judicially under section 153.61 of the EI Act by ignoring a relevant factor, and by acting in bad faith.

[21] 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.

[22] 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

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

[24] 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

[25] 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. This provision applies to the Claimant who established an initial claim for EI benefits effective October 4, 2020.

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.

[26] Section 153.161 of the EI Act says:

Availability

Course or program of instruction or non-referred training

153.161 (1) For the purposes of applying paragraph 18(1)(a), a claimant who attends a course, program of instruction or training to which the claimant is not referred under paragraphs 25(1)(a) or (b) is not entitled to be paid benefits for any working day in a benefit period for which the claimant is unable to prove that on that day they were capable of and available for work.

Verification

(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.

[27] This temporary provision says that, for the purposes of section 18(1)(a) of the EI Act, 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 may not happen when benefits are paid.

[28] 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.

[29] The Commission argues that the Claimant's entitlement was not verified until February 7, 2022. But, I find no evidence before the General Division that the entitlement decision was delayed.⁴ Instead, the Claimant's evidence shows that her claim was verified and approved on October 21, 2020.⁵

[30] I find that the Claimant reported her full-time training on her application for benefits.⁶ The Claimant's Service Canada file shows that the application was initially

⁴ The Commission's representations to the General Division are not evidence of the facts they summarize: see *MM v Canada Employment Insurance Commission*, 2015 SSTAD 1045.

⁵ See GD5-6.

⁶ See GD3-7 to GD3-11.

under reconsideration because of her training and that the Commission issued a decision on October 21, 2020. This led to benefits being paid that had not been paid to the Claimant before that decision.⁷

[31] I find that the evidence before the General Division shows, on a balance of probabilities, that the Commission already verified the Claimant's entitlement before paying her benefits.

[32] That being said, 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 that claimants should not have received.

[33] In addition, the decision to seek verification under section 153.161 or to reconsider a claim under section 52 is discretionary. This means that, although the Commission has the power to seek verification of entitlement or to reconsider a claim, it does not have to do so.

[34] 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.⁸

[35] 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

⁷ See GD5-17 and 18.

⁸ See *Canada (Attorney General) v Purcell*, 1995 CanLII 3558 (FCA).

- 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 received⁹

[36] 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.¹⁰ 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.

[37] I have no doubt that the Claimant acted in good faith and repeatedly reported her training to the Commission. The Commission reconsidered the claim based on the facts that were before it when the initial entitlement decision was made and when benefits were paid.

[38] In the absence of section 153.161 of the EI Act, I agree that the Commission would have had to consider the above factors and its own policy when making the discretionary decision to reconsider the Claimant's claim.

[39] However, I find that during the temporary pandemic measures, the Commission's discretionary decision whether to reconsider a claim had to be made with the legislative intent of section 153.161 of the EI Act in mind.

[40] 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 benefits have been paid.

⁹ See Digest of Benefit Entitlement Principles, Chapter 17 – Section 17.3.3.

¹⁰ See Digest of Benefit Entitlement Principles, Chapter 17 – Section 17.3.2.

This means that the Commission exercised its discretion within the parameters set by Parliament during the pandemic.

[41] One of the principles of statutory interpretation is that Parliament does not speak in vain. In implementing section 153.161 of the EI Act, Parliament clearly decided that reconsidering an initial decision about a student's availability made during the pandemic outweighed the importance of the initial decision being final.

[42] 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, as a result, could not retroactively determine that the Claimant was not entitled to EI benefits.

[43] This means that I am justified in intervening.

Remedy

[44] For the above reasons, I find that the Commission used its discretion judicially under sections 52 and 153.161 of the EI Act.

[45] The Commission considered all the relevant information in reconsidering the Claimant's claim. 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 reconsidering the Claimant's entitlement to benefits.

[46] However, given the General Division's erroneous findings, the file returns to the General Division to determine whether the Claimant was entitled to benefits from October 5, 2020, to December 21, 2020, and from January 7, 2021, to April 28, 2021, when she took training.

Conclusion

[47] The appeal is allowed on the issue of whether the Commission used its discretion judicially.

[48] However, given the General Division's erroneous findings, the file returns to the General Division to determine whether the Claimant was entitled to benefits from October 5, 2020, to December 21, 2020, and from January 7, 2021, to April 28, 2021, when she took training.

Pierre Lafontaine
Member, Appeal Division