



[TRANSLATION]

Citation: *AL v Canada Employment Insurance Commission*, 2022 SST 1688

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

## Decision

**Appellant:** A. L.

**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** Canada Employment Insurance Commission reconsideration decision (462622) dated April 5, 2022 (issued by Service Canada)

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**Tribunal member:** Normand Morin

**Type of hearing:** Videoconference

**Hearing date:** October 6, 2022

**Hearing participant:** Appellant

**Decision date:** October 28, 2022

**File number:** GE-22-1573

## 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 Employment Insurance (EI) benefits.<sup>1</sup> So, the Commission could not retroactively determine that the Appellant wasn't entitled to EI benefits.

## Overview

[2] In September 2020, the Appellant started full-time training at X, a university institution. The training leads to a Master of Human Resources Management. The fall 2020 term ran from September 6, 2020, to December 21, 2020. Her winter 2021 term ran from January 7, 2021, to April 28, 2021.<sup>2</sup> She then studied part-time at the same institution in the summer of 2021, from May 3, 2021, to June 28, 2021. The Appellant continued her training in the fall of 2021.

[3] From September 23, 2016, to March 13, 2020, inclusive, and from June 19, 2020, to October 8, 2020, inclusive, the Appellant worked as an assistant manager for the employer X. She stopped working for that employer because of a shortage of work.<sup>3</sup>

[4] On October 8, 2020, she made an initial claim for EI benefits (regular benefits).<sup>4</sup> A benefit period was established effective October 4, 2020.<sup>5</sup>

[5] From March 26, 2021, to April 7, 2021, during her training, the Appellant worked at X again and stopped working for that employer because of a shortage of work.<sup>6</sup>

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

<sup>2</sup> See GD3-7, GD3-8, GD3-19, GD3-20, GD3-24, GD3-25, GD7-11, and GD11-2.

<sup>3</sup> See GD2-14 and GD2-15.

<sup>4</sup> See GD3-3 to GD3-13.

<sup>5</sup> See GD3-1 and GD4-1.

<sup>6</sup> See GD11-2.

[6] On February 7, 2022, the Commission told her that it was unable to pay her EI benefits from October 5, 2020, to December 21, 2020, and from January 7, 2021, to April 28, 2021, because she was taking training on her own initiative and hadn't proven her availability for work.<sup>7</sup>

[7] On April 5, 2022, after a request for reconsideration, the Commission told her that it was upholding the February 7, 2022, decision.<sup>8</sup>

[8] The Appellant says that she stopped working in October 2020 following the Government of Quebec's health restrictions related to the COVID-19 pandemic,<sup>9</sup> like the closure of businesses, including training rooms. She says that she applied for benefits, that her application was approved, and that benefits were paid to her. The Appellant says that she always truthfully reported all her training periods. She argues that her training never stopped her from working.

[9] The Appellant says that she finds the Commission's handling of her file inconsistent. She says that, with the information that the Commission had had since October 2020 that allowed her to receive benefits, the Commission changed its decision in February 2022 and told her that she could not receive benefits and that she had to pay back all of the overpaid benefits. The Appellant points out that, when the Commission made its decision in February 2022, it had the same information that it had been given in October 2020. She says that she doesn't want to be the victim of the Commission's (Service Canada) lack of consistency or expertise in handling her case. The Appellant argues that, if she wasn't entitled to EI benefits after she applied for benefits in October 2020, she still could have received the Canada Recovery Benefit (CRB). She says that the Commission didn't tell her until February 2022 that she could not receive benefits. The Appellant says that, when she contacted her employer and the Canada Revenue Agency (CRA), she was told that, since she could not receive EI benefits, she could have received the CRB because she met the eligibility criteria for

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<sup>7</sup> See GD2-9 and GD3-26.

<sup>8</sup> See GD2-13, GD3-37, and GD3-38.

<sup>9</sup> Coronavirus disease 2019.

this type of benefit. She says that she was unable to apply for the CRB until she knew that she could not receive EI benefits. The Appellant says that, according to information she obtained from the CRA, retroactive claims for the CRB ended in December 2021. She says that, if she had received the CRB, she would not have any debt from the EI benefits paid to her and that the Commission is asking her to pay back. The Appellant argues that she is entitled to benefits and that it was the Commission's duty to refer her to the right forum (for example, the CRA) if she wasn't. She argues that the Commission has to assume its error or that it has to deduct the amount she would have received from the CRB from her debt.

[10] The Appellant says that the Commission's decision deprives her of income from October 5, 2020, to December 21, 2020, and from January 7, 2021, to April 28, 2021. It also causes her financial problems, which she finds unfair. She points out that, since EI benefits were paid to her in 2021, the Quebec Ministry of Higher Education (Aide financière aux études) told her that she had a bursary overpayment. The Appellant argues that the Commission's decision also causes her serious harm, given the significant physical and psychological stress she is experiencing. She says that she can't survive without income for such a long time and pay back the money the Commission says she owes in overpaid benefits.

[11] On May 3, 2022, the Appellant challenged the Commission's reconsideration decision. This decision is now being appealed to the Tribunal.

## **Preliminary matters**

[12] In this case, the Appellant disputes having to pay back the benefits she was overpaid. She says that, following the Commission's new decision, it told her that she wasn't entitled to benefits because she was taking training and that, as a result, she had to pay back the benefits she had been overpaid.<sup>10</sup> The Appellant asks whether the Commission has the right to retroactively withdraw the EI benefits it paid her when doing so would cause her significant hardship and cause her to lose earnings, when she

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<sup>10</sup> See GD2-19 and GD3-33.

was available for work and capable of working.<sup>11</sup> She points out that if the Commission had made its decision within a reasonable period of time, and hadn't misled her into believing that her application had been approved, she could have applied for the CRB.<sup>12</sup>

[13] The Commission argues that it verified the Appellant's entitlement to benefits from the start of her benefit period, and applied the decision retroactively in accordance with section 153.161(2) of the Act.<sup>13</sup> It says that, after verifying her entitlement, it determined that the Appellant had received benefits she wasn't entitled to.<sup>14</sup> The Commission says that the Appellant has to pay back the benefits she was overpaid, under sections 43 and 44 of the Act.<sup>15</sup>

[14] The Commission argues that it used its discretion judicially under section 153.161(2) of the Act when it reconsidered the benefits paid to the Appellant while she was taking training, and when it made a retroactive decision about her.<sup>16</sup>

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

## Issues

[16] I have to determine whether the Commission had the power to retroactively decide whether the Appellant was entitled to benefits and, if so, whether it used its discretion judicially in deciding to verify and reconsider the Appellant's claim for benefits.<sup>17</sup>

[17] If so, I must also determine whether the Appellant has shown that she was available for work from October 5, 2020, to December 21, 2020, and from January 7, 2021, to April 28, 2021, during her training.<sup>18</sup>

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<sup>11</sup> See GD5-6.

<sup>12</sup> See GD5-7.

<sup>13</sup> See GD4-6.

<sup>14</sup> See GD4-6.

<sup>15</sup> See GD4-6.

<sup>16</sup> See GD9-2.

<sup>17</sup> See sections 52 and 153.161 of the Act.

<sup>18</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* (Regulations).

[18] I also have to decide whether the Appellant has to pay back the benefits she was overpaid and that the Commission says she owes.<sup>19</sup>

## **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?**

[19] 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>20</sup>

[20] If the Commission decides that a person has received money in benefits they didn’t qualify for or they weren’t entitled to, it calculates the amount paid and notifies the claimant of its decision.<sup>21</sup>

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

[22] 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.

[23] 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>22</sup>

[24] In one of its decisions, the Tribunal’s Appeal Division (Appeal Division) found that the Tribunal’s General Division (General Division) could not refuse to exercise its

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<sup>19</sup> See sections 43, 44 and 52 of the Act.

<sup>20</sup> See section 52 of the Act.

<sup>21</sup> See section 52(2) of the Act.

<sup>22</sup> See section 153.161(2) of Part VIII.5 of the Act.

jurisdiction to determine whether the Commission had the power to retroactively disentitle the claimant to benefits.<sup>23</sup>

[25] In another decision, the Appeal Division found that a file should be returned to the General Division to decide whether the Commission had the power to disentitle a claimant retroactively.<sup>24</sup> In that decision, the Appeal Division clarified that if the General Division found that the Commission had that power, then it also had to determine whether the Commission exercised it judicially when it decided to reconsider the Claimant's claim.<sup>25</sup>

[26] In this case, the Appellant applied for benefits on October 8, 2020, and a benefit period was established effective October 4, 2020.<sup>26</sup>

[27] The Appellant received benefits during the week of October 4, 2020, to the week of April 25, 2021.<sup>27</sup>

[28] On February 7, 2022, the Commission told her of the decision it had made about her availability for work.<sup>28</sup>

[29] The Commission argues as follows:

- a) It used its discretion judicially when it reconsidered the benefits paid to the Appellant while she was taking training.<sup>29</sup>
- b) Section 153.161(2) of the Act allows the Commission to verify, at any time after benefits have been paid, that the claimant is entitled to benefits.<sup>30</sup>

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<sup>23</sup> See the Appeal Division decision in *GP v Canada Employment Insurance Commission*, 2021 SST 791.

<sup>24</sup> See the Appeal Division decision in *Canada Employment Insurance Commission v ER*, 2022 SST 761, AD-21-393.

<sup>25</sup> See the Appeal Division decision in *Canada Employment Insurance Commission v ER*, 2022 SST 761, AD-21-393.

<sup>26</sup> See GD3-1, GD3-3 to GD3-18, and GD4-1.

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

<sup>28</sup> See GD2-9 and GD3-26.

<sup>29</sup> See GD9-2.

<sup>30</sup> See GD4-6.

- c) On February 7, 2022, after benefits were paid to the Appellant, the Commission verified whether she was entitled to them from the start of her benefit period (from October 4, 2020, to May 15, 2021). After verifying her entitlement, it determined that the Appellant had received benefits she wasn't entitled to. The Commission applied the decision retroactively in accordance with section 153.161(2) of the Act.<sup>31</sup>
- d) The Commission could not tell the Appellant that she wasn't entitled to benefits until her entitlement was verified.<sup>32</sup>
- e) Even though entitlement to benefits wasn't verified before benefits were paid, the Appellant still had to meet the requirements set out in section 153.161(1) of the Act to be entitled to the benefits she received.<sup>33</sup>
- f) The Appellant must pay back the benefits she was overpaid under sections 43 and 44 of the Act.<sup>34</sup>

[30] On the other hand, in her October 8, 2020, claim for benefits, and in her January 18, 2021, training questionnaire,<sup>35</sup> the Appellant indicated that she was taking training full-time, dedicating 25 or more hours per week to it.<sup>36</sup>

[31] For the fall 2020 and winter 2021 terms (from early September 2020 to late December 2020, and from early January 2021 to late April 2021), she says that all her course obligations occurred outside her normal working hours.<sup>37</sup>

[32] For both terms, the Appellant indicates having to attend her classes according to a specific schedule or attend sessions (in person, online, or by phone).<sup>38</sup>

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<sup>31</sup> See GD4-6, GD6-1, and GD9-2.

<sup>32</sup> See GD4-7.

<sup>33</sup> See GD4-9-1 [*sic*] and GD9-2.

<sup>34</sup> See GD4-6.

<sup>35</sup> Questionnaire entitled "Course or Training Program."

<sup>36</sup> See GD3-7, GD3-8, and GD3-19.

<sup>37</sup> See GD3-9, GD3-20, and GD3-21.

<sup>38</sup> See GD3-9 and GD3-20.



[33] For both terms in question, the Appellant also says that she was available for work and capable of working in the same type of job and under the same or better conditions (for example, hours, type of work) as she was before she started her course or program.<sup>39</sup>

[34] For each of the two terms (fall 2020 and winter 2021), she also indicates not having made efforts to find a job since her training started or since becoming unemployed.<sup>40</sup>

[35] In her January 18, 2021, claim for benefits and questionnaire, the Appellant said that she hadn't made efforts to find a job because she already had one.<sup>41</sup> In her January 18, 2021, questionnaire, she indicated that the establishment where she worked was temporarily closed because of the COVID-19 pandemic.<sup>42</sup>

[36] For her fall 2020 term, the Appellant indicates in her claim for benefits that, if she got a full-time job that conflicted with her training, she would accept the job if she could delay the start date to allow her to finish her training.<sup>43</sup> For her winter 2021 term, she indicated in the training questionnaire that, if she got a full-time job but that job conflicted with her course or program, she would change her course schedule to accept the job.<sup>44</sup>

[37] The Appellant says that, when she completed her claimant reports, she always indicated that she was in school, and the hours she worked. She points out that this is how the Commission received information about her work period from March and April 2021 (from March 26, 2021, to April 7, 2021).<sup>45</sup> She says that when she completed her claimant reports, they were approved.

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<sup>39</sup> See GD3-9 and GD3-21.

<sup>40</sup> See GD3-9 and GD3-21.

<sup>41</sup> See GD3-9 and GD3-21.

<sup>42</sup> See GD3-21.

<sup>43</sup> See GD3-9.

<sup>44</sup> See GD3-21.

<sup>45</sup> See GD11-2.

[38] The Appellant says that there were no communications from the Commission between when she applied for benefits on October 8, 2020, and when it contacted her on February 7, 2022.<sup>46</sup>

[39] She says that she contacted the Commission in October 2020 because she wasn't receiving benefits and wanted information about that.

[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 8, 2020, claim for benefits.

[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 says that it relied on section 153.161(2) of the Act in making its decision,<sup>47</sup> I find that the provisions of section 52 of the Act 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] The Commission also acknowledges that it used its discretion to reconsider the Appellant's file.<sup>48</sup>

[45] 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.

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<sup>46</sup> See GD3-24 and 25.

<sup>47</sup> See GD4-3, GD4-6, GD6-1, GD9-1, and GD9-2.

<sup>48</sup> See GD9-2.

[46] 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>49</sup> This section also shows that the Commission has the discretion to decide to verify a claim for benefits.

[47] 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>50</sup>

[48] 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.

[49] 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 decisions, 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.

[50] 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>51</sup>

[51] 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.

[52] I find that, before making its February 7, 2022, decision<sup>52</sup> more than a year after the Appellant applied for benefits, the Commission didn't tell her the job search required

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<sup>49</sup> See section 153.161(2) of the Act.

<sup>50</sup> See sections 52(1) and 52(5) of the Act.

<sup>51</sup> See section 153.161(2) of the Act.

<sup>52</sup> See GD2-9 and GD3-26.

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.

**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>53</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>54</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>55</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>56</sup>

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<sup>53</sup> The Federal Court of Appeal (Court) established this principle in *Uppal*, 2008 FCA 388.

<sup>54</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>55</sup> See the Court's decisions in *Chartier*, A-42-90 and *Uppal*, 2008 FCA 388.

<sup>56</sup> This principle was established or reiterated in *Hudon*, 2004 FCA 22 and *Gagnon*, 2004 FCA 351.

[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
- 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>57</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, as a result of the review of her file, the Appellant was overpaid \$13,374.00 (overpayment).<sup>58</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>59</sup>

[63] In the case of an overpayment, the Commission may reconsider a claim for benefits, as set out in the Act.<sup>60</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.

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<sup>57</sup> See section 17.3.3 of the Digest of Benefit Entitlement Principles.

<sup>58</sup> See GD2-11, GD2-12, and GD3-27 to GD3-30.

<sup>59</sup> See section 17.3.3 of the Digest.

<sup>60</sup> See section 52 of the Act.

[65] The provisions in 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 meets one of the other conditions set out under the policy that deals with this (Commission's Reconsideration Policy).<sup>61</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>62</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>63</sup>

[71] The Commission says that benefits were paid to the Appellant because she applied for them and because she said that she was available for work.<sup>64</sup> It points out

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<sup>61</sup> See section 17.3.3.2 of the Digest.

<sup>62</sup> See section 52(1) of the Act.

<sup>63</sup> See section 52(5) of the Act. See also the Court's decisions in *Dussault*, 2003 FCA 372, *Pilote*, A-868-97.

<sup>64</sup> See GD4-6 and GD9-1.

that this wasn't the case, despite the Appellant's claims that benefits were paid to her in error.<sup>65</sup>

[72] The Commission says that, although the Appellant completed her application for benefits and her claimant reports in good faith, it found that the Appellant wasn't available for work within the meaning of sections 18 and 153.161 of the Act.

[73] The Appellant argues that she always truthfully reported all her training periods.<sup>66</sup>

[74] In her October 8, 2020, application for benefits and her January 18, 2021, training questionnaire, the Appellant said that she was available for work and capable of working under the same or better conditions as she was before she started her training. She specified that it was full-time training and the number of hours she was dedicating to it.<sup>67</sup>

[75] The Appellant says that, when she completed her claimant reports, she said that she was taking training and working hours for the weeks when this applied, for example, during her period of employment from March 26, 2021, to April 7, 2021.<sup>68</sup>

[76] I find that the Commission wasn't faced with false or misleading statements about the Appellant's claim.

[77] I find that 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 in her statements to the Commission, whether in her application for benefits, her January 18, 2021, training questionnaire, or her claimant reports.

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

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<sup>65</sup> See GD4-6.

<sup>66</sup> See GD2-20, GD3-34, and GD5-6.

<sup>67</sup> See GD3-7 to GD3-9, GD3-19, and GD3-21.

<sup>68</sup> See GD11-2.

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

[79] 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.

[80] The Commission argues as follows:

- a) Section 153.161(1) of the Act says that a claimant who attends a training course on their own initiative isn’t entitled to benefits for any working day in a benefit period where they can’t prove that they were capable of and available for work.<sup>69</sup>
- b) Benefits were paid to the Appellant because she applied for them and reported that she was available for work.<sup>70</sup>
- c) It was up to the Appellant to ensure that she met the eligibility criteria for the benefits she was applying for.<sup>71</sup>

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<sup>69</sup> See GD4-3.

<sup>70</sup> See GD4-6 and GD9-1.

<sup>71</sup> See GD4-7.



- d) The decision about the Appellant's entitlement to benefits was made after benefits had been paid to her under section 153.161(2) of the Act.<sup>72</sup> Section 153.161 was added to the Act through Interim Order No. 10 (Employment Insurance Emergency Response Benefit).<sup>73</sup> This new provision of the Act "enables a modified operational approach to the assessment of availability to work for claimants who are in training."<sup>74</sup> This modified approach during the COVID-19 pandemic facilitated the payment of EI benefits to claimants who were taking "non-referred" training.<sup>75</sup> However, assessing availability remained the same, and claimants who were taking a "non-referred" training course had to prove their availability.<sup>76</sup> Section 153.161(2) of the Act allows the Commission to verify entitlement to benefits later on.<sup>77</sup>
- e) With Interim Order No. 10 amending the Act, entitlement decisions under section 153.161(1) of the Act were made after benefits began to be paid so that EI payments could be made promptly to claimants. Before, decisions about training were made before benefits were paid.<sup>78</sup>
- f) The Commission could not tell the Appellant that she wasn't entitled to benefits until her entitlement was verified. Her entitlement to benefits was verified on February 7, 2022, and the decision was communicated to her.<sup>79</sup>
- g) The Commission used its discretion judicially under section 153.161(2) of the Act when it reconsidered the benefits paid to the Appellant while she was taking training and when it made a retroactive decision about her.<sup>80</sup>

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<sup>72</sup> See GD4-6.

<sup>73</sup> See GD9-1.

<sup>74</sup> See GD9-8.

<sup>75</sup> See GD4-6.

<sup>76</sup> See GD4-6.

<sup>77</sup> See GD4-6.

<sup>78</sup> See GD9-1.

<sup>79</sup> See GD4-7.

<sup>80</sup> See GD9-2.

- h) In making its decision, the Commission considered all relevant factors and didn't consider irrelevant ones.<sup>81</sup> It considered the Appellant's information about her training.<sup>82</sup> It also gave the Appellant the opportunity to confirm and clarify the information on file. The Commission considered this in making its decision.<sup>83</sup>
- i) The Commission didn't act in bad faith, for an improper purpose or motive, or in a discriminatory manner. It verified the Appellant's entitlement after benefits had been paid to comply with the legislative intent of Interim Order No. 10 amending the Act.<sup>84</sup>

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

- a) The Appellant applied for benefits after losing her job because of the COVID-19 pandemic.<sup>85</sup>
- b) She said in her October 8, 2020, application for benefits and in her January 18, 2021, training questionnaire that she was taking training and the conditions she could work under.<sup>86</sup>
- c) According to information from her online EI account ("My Service Canada Account"), her claim for benefits was initially "under review" from October 8 to October 21, 2020. On October 21, 2020, a decision was made granting her benefits. The Appellant concludes that her claim for benefits was verified and processed by the Commission and that she was entitled to benefits.<sup>87</sup>

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<sup>81</sup> See GD9-2.

<sup>82</sup> See GD3-7 to GD3-11, GD3-19 to GD3-23, and GD9-2.

<sup>83</sup> See GD3-24 and GD9-2.

<sup>84</sup> See GD9-2 to GD9-8.

<sup>85</sup> See GD2-19 to GD2-22 and GD3-33 to GD3-35.

<sup>86</sup> See GD2-19 to GD2-22.

<sup>87</sup> See GD2-19 to GD2-22, GD3-33 to GD3-35, GD5-6, and GD5-17 to GD5-19.

- d) The Appellant always told the Commission that she was taking training in her claimant reports.<sup>88</sup>
- e) She thought she was entitled to benefits, given her involuntary inability to work due to pandemic-related health restrictions.<sup>89</sup>
- f) If she wasn't entitled to benefits, it was the duty of the Commission (Service Canada) to refer her to the right forum (for example, the CRA) so that she could receive another type of benefit (for example, the CRB).<sup>90</sup>

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

[83] I find that the Commission didn't exercise its discretion judicially in deciding 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 the claimant was overpaid through no fault of their own, as the policy states.<sup>91</sup>

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

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<sup>88</sup> See GD2-19 to GD2-22 and GD3-36.

<sup>89</sup> See GD2-19 to GD2-22 and GD3-33 to GD3-35.

<sup>90</sup> See GD2-19 to GD2-22, GD3-33 to GD3-36, GD5-7, and GD5-21 to GD5-23.

<sup>91</sup> See section 17.3.3 of the Digest.

[87] I note that the Commission had the opportunity to verify the Appellant's statements several times, namely when she applied for benefits on October 8, 2020, when she completed a training questionnaire on January 18, 2021, and when she completed her claimant reports. From the moment the Appellant applied for benefits, the Commission knew that she was taking training full-time, dedicating 25 or more hours per week to it, and the conditions she could work under.

[88] I find that the Appellant was transparent about her training and her availability for work. Her statements to the Commission were consistent.

[89] I am of the view that the Appellant could reasonably believe that, when her application for benefits was approved and she started receiving benefits, that meant that she was entitled to those benefits.

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

[91] I find that the Commission didn't consider all relevant factors in doing so. These factors refer to all the information the Appellant gave about her training in her application for benefits, a training questionnaire, and her claimant reports.

[92] I am of the view that the Commission failed to apply its own rules in exercising its discretion. I find that it misused its discretion.

[93] 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.

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

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

[95] Since I have found that the Commission didn't exercise its discretion judicially in deciding 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>92</sup>

[96] This means that there is no need to determine whether she has shown that she was available for work from October 5, 2020, to December 21, 2020, and from January 7, 2021, to April 28, 2021, during her training.<sup>93</sup>

[97] 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>94</sup>

## **Conclusion**

[98] 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.

[99] So, there is no need to determine whether she was available for work from October 5, 2020, to December 21, 2020, and from January 7, 2021, to April 28, 2021, during her training, and whether she was entitled to benefits.

[100] So, 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.

[101] This means that the appeal is allowed.

Normand Morin

Member, General Division – Employment Insurance Section

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<sup>92</sup> See sections 52 and 153.161 of the Act.

<sup>93</sup> See sections 18(1)(a) and 153.161 of the Act, and sections 9.001 and 9.002(1) of the Regulations.

<sup>94</sup> See sections 43, 44 and 52 of the Act.