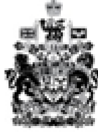

Citation: *GP v Canada Employment Insurance Commission*, 2023 SST 192

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	G. P.
Representative:	K. L.
Respondent:	Canada Employment Insurance Commission
Representative:	Tiffany Glover

Decision under appeal:	General Division decision dated July 25, 2022 (GE-22-14)

Tribunal member:	Charlotte McQuade
Type of hearing:	Videoconference
Hearing date:	November 14, 2022
Hearing participants:	Appellant Appellant’s representative Respondent’s representative
Decision date:	February 22, 2023
File number:	AD-22-589

Decision

[1] The appeal is dismissed.

[2] Although I have decided that the General Division made an error of law, the result does not change. I have substituted my decision for the General Division to find the Commission exercised its discretion judicially in verifying the Claimant's entitlement and reconsidering the claim.

[3] This means the Claimant's overpayment remains.

Overview

[4] G. P. is the Claimant. He was a full-time student on a study permit that restricted him to 20 hours a week of work while in school. The Claimant applied for Employment Insurance (EI) regular benefits and was paid benefits. On March 17, 2021, the Canada Employment Insurance Commission (Commission) disentitled the Claimant from benefits from October 5, 2020, to February 26, 2021, because it decided he wasn't available for work.

[5] The Claimant appealed that decision to the General Division who decided the Claimant wasn't available for work until March 1, 2021, except for the period from December 25, 2020, to January 3, 2021. The Claimant disagreed with the General Division's decision and appealed to the Tribunal's Appeal Division.

[6] The Appeal Division returned the Claimant's appeal to the General Division for reconsideration because the General Division had not addressed whether the Commission had the power to retroactively disentitle the Claimant and if so, whether the Commission had acted judicially when deciding to do so.

[7] After a new proceeding, the General Division decided the Commission had the power to disentitle the Claimant even after benefits were paid and that the Commission exercised its discretion judicially in doing so. The Claimant now appeals that decision to the Appeal Division. He maintains the General Division's admission of two affidavits

provided by the Commission into evidence gives rise to a reasonable apprehension of bias. He also argues the General Division made errors of law when it decided the Commission could postpone its entitlement decision and then retroactively review his claim without any new evidence about his claim or his availability for work.

[8] I am dismissing the appeal. The General Division misinterpreted section 153.161 of the *Employment Insurance Act* (EI Act) to mean it allowed for a delayed entitlement decision. However, section 153.161 and section 52 of the EI Act together allow the Commission to retroactively verify a claimant's entitlement, reconsider a claim and assess an overpayment if appropriate.

[9] I have substituted my decision for that of the General Division to find that the Commission exercised its discretion judicially in verifying the Claimant's entitlement and reconsidering the claim. This means that the overpayment remains.

Issues

[10] The issues in this appeal are:

a) Did the General Division's admission of the Commission's two affidavits in evidence give rise to a reasonable apprehension of bias?

b) Did the General Division misinterpret section 153.161 of the EI Act?

c) Did the General Division make an error of law when it decided the Commission exercised its discretion judicially in retroactively disentitling the Claimant from benefits?

d) If the General Division made any of the above errors, what is the remedy?

Analysis

[11] The Claimant argues that the General Division acted in a procedurally unfair way and made errors of law.

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

Admitting the Commission's affidavits did not raise a reasonable apprehension of bias

[13] The General Division's acceptance of the Commission's affidavits into evidence does not give rise to a reasonable apprehension of bias.

[14] At issue before the General Division was the interpretation of section 153.161 of the EI Act. The Commission and the Claimant disagreed on the interpretation of that provision. The General Division had to decide on the correct interpretation.

[15] The Commission wanted to rely on affidavits from two department officials from Employment and Social Development Canada in support of its position.[2]

[16] The Commission asked the General Division to accept the affidavits into evidence because they provided relevant, factual evidence about how the EI Act was administered.

[17] The Claimant objected to the affidavits being accepted into evidence. He argued they contained legal argument, which the General Division should not consider. He cautioned the General Division from deferring to the interpretation of section 153.161 of the EI Act set out in the affidavits.

[18] The General Division found the Affidavits to be relevant and accepted them in evidence.

[19] The General Division reasoned that the affidavits provided information about qualifying for and entitlement to EI benefits generally. They spoke about requirements under the EI Act for claims that involve non-referred training and what officers do when they adjudicate such claims. Both affidavits referred to section 153.161 of the EI Act.

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[1] See section 58(1) of the *Department of Employment and Social Development Act* (DESD Act).
[2] See RGD22-112 to RGD22-116; See also RGD22-121 to RGD22-125.

[20] The General Division decided the information could be helpful to determine the intent of section 153.161 of the EI Act.

[21] The General Division pointed out that the strict rules of evidence did not apply to administrative tribunals, unless expressly prescribed.[3] The General Division explained that its role was to listen to both parties and give them a fair opportunity to address any relevant statements contrary to their view. The General Division explained that accepting the affidavits in evidence did not prevent the Claimant from arguing what weight the General Division should assign to them.

[22] The Claimant now argues that the General Division's acceptance of those affidavits gives rise to a reasonable apprehension of bias. He says this could also be considered an error of law.

[23] The Claimant maintains the affidavits go well beyond setting out facts. He says the affiants are putting forward their personal opinions on the meaning of the legislation and the intention behind various measures even though they are not members of Parliament or cabinet ministers. He says the opinions in the affidavits are totally irrelevant to the General Division's task of interpreting the statute.

[24] The Claimant submits that the Commission can advance legal arguments through its counsel. However, he argues, admitting the affidavits as a supposed assertion of fact creates the impression that the General Division is allowing the Commission as the more powerful party to simply swear as a factual matter that its preferred interpretation of the EI Act is the correct one.

[25] The Claimant acknowledges that the strict rules of evidence may not apply in administrative proceedings. But he says there must be limits to maintain the fairness and integrity of General Division appeal.

[26] The Commission argues that the General Division did not make an error of law in admitting the affidavits as the General Division is the trier of fact and is entitled to

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[3] The General Division referred to *SB v Minister of Employment and Social Development*, 2017 SSTADIS 110.

determine relevance and assess and weigh the evidence as it sees fit. The Commission submits that the General Division did that. It determined the affidavits were both relevant and admissible as they assisted with the interpretation of section 153.161 of the EI Act. The Commission explained that the Tribunal and even the Federal Court of Appeal have accepted affidavit evidence from department officials in the past to assist with statutory interpretation.[4]

[27] The Commission also submits that the Claimant has not met the high bar to show bias. He has not shown that an informed person, viewing the matter realistically and practically, would conclude the General Division did not decide this issue fairly. Also, the Claimant had counsel and never raised this argument at the General Division.

[28] I find the General Division did not make an error of law in admitting the affidavits. The General Division has broad authority to admit evidence it considers to be relevant and assign what weight it finds to be appropriate. The General Division considered the affidavits to be relevant to its interpretation of section 153.161. It was entitled to reach this conclusion. As the General Division pointed out, the Claimant was free to argue what weight should be assigned to the affidavits.

[29] The General Division's acceptance of the affidavits also does not give rise to a reasonable apprehension of bias.

[30] The General Division is an independent decision-making body and adjudicators are presumed to be impartial.

[31] An allegation of bias is a serious allegation. The law says such an allegation cannot rest on mere suspicion, pure conjecture, insinuations, or mere impressions.[5]

[32] Bias is concerned with a decision maker who does not approach the decision-making with an open mind but is already predisposed to a particular conclusion. The

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[4] The Commission refers to *Canada v Burke*, 2022 FCA 44; See ADN10-2 at footnote 9 for cases from the Tribunal the Commission refers to.
[5] See *Arthur v Canada (A.G.),* 2001 FCA 223.

threshold for a finding of bias is high, and the burden of proof lies with the party alleging that it exists.

[33] To establish bias, the party alleging bias must show that an informed person, viewing the matter realistically and practically and having thought the matter through, would conclude that it was more likely than not that the decision maker, whether consciously or unconsciously, would not decide the case in a fair manner.[6]

[34] I appreciate that there is a difference between actual bias and a reasonable apprehension of bias. But admitting the affidavits in evidence does not create the impression that the interpretation in the affidavits is the correct one. The Commission is a party and is entitled to submit evidence in support of its position. The Claimant was equally able to provide his own interpretation of the legislation.

[35] I don't see any evidence that the General Division thought it was bound in any way by the opinion expressed as to the interpretation of section 153.161 of the EI Act in the affidavits or that the General Division did not understand that its role was to make its own decision about the interpretation of the legislation.

[36] I have listened to the audio recording from the General Division hearing. It reveals the Claimant had a full and fair hearing. The Claimant was represented by counsel and did not raise the issue of bias at the General Division. The General Division specifically addressed the arguments the Claimant made about the affidavits in its decision.[7] The General Division's decision reflects a considered approach to arguments made by both parties concerning the interpretation of the legislation.

[37] An informed person, viewing the matter realistically and practically and having thought the matter through, would not conclude that it was more likely than not that the General Division, whether consciously or unconsciously, would not decide the case in a fair manner. Neither would they conclude there was a reasonable apprehension of bias.

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[6] See *Committee for Justice and Liberty v National Energy Board*, 1976 CanLII 2 (SCC).
[7] See paragraphs 50 to 52 of the General Division decision.

The General Division misinterpreted section 153.161 of the EI Act

[38] General Division misinterpreted section 153.161 of the EI Act.

[39] The Claimant had reported his full-time schooling and study permit to the Commission when he applied for benefits. He was paid regular EI benefits. On March 17, 2021, the Commission disentitled the Claimant from benefits from October 5, 2020, to February 26, 2021, because it decided he wasn't available for work.

[40] The Claimant appealed that decision to the Tribunal's General Division who decided that the Claimant wasn't available for work until March 1, 2021, except for the period from December 25, 2020, to January 3, 2021, when he was on a school break.

[41] The Claimant appealed that decision to the Appeal Division who returned the matter to the General Division because the General Division did not address whether the Commission had the power to retroactively disentitle the Claimant and if so, whether the Commission had acted judicially when deciding to reconsider the claim. To answer that question, the General Division had to consider what section 153.161 of the EI Act meant.

[42] In response to the Covid-19 global pandemic, the government of Canada amended the EI Act using a series of interim orders. Under Interim Order No. 10, the EI Act was amended by adding section 153.161. This provision applied to students taking non-referred training. Section 153.161 was in effect from September 27, 2020, to September 25, 2021.[8]

[43] Section 153.161 of the EI Act provides as follows:

> 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

[8] See section 153.196 (1) of the *Employment Insurance Act* (EI Act).

> any working day in a benefit period for which the claimant is unable to prove that on that day they were capable of and available for work.
>
> (2) 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.

[44] The Commission argued that section 153.161 of the EI Act allowed it to pay benefits based on qualification for benefits, but make a delayed entitlement decision. The Commission said that's what it did in the Claimant's case. It made a delayed entitlement decision on March 17, 2021, disentitling the Claimant under sections 18(1) and 153.161 of the EI Act.

[45] The Claimant submits that section 153.161 did not allow for a delayed entitlement decision. Rather, he submits, an entitlement decision was made at the time benefits were paid and the decision of March 17, 2021, was a reconsideration decision under section 52 of the EI Act.

[46] Section 52 of the EI Act says the Commission may reconsider a claim for benefits within 36 months of when benefits have been paid or would have been payable. This can be extended to 72 months if the Commission believes there has been a false or misleading statement made in relation to a claim.

[47] The Claimant argues that section 52 of the EI Act engages the Commission's policy on reconsideration, which guides its exercise of discretion under section 52 of the EI Act.[9] That policy says the Commission can't reconsider a claim on the same facts. The Claimant says that his claim shouldn't have been reconsidered by the Commission, given there were no new facts as he reported his schooling from the beginning.

[48] The General Division agreed with the Commission's position. It interpreted section 153.161 of the EI Act to mean the Commission had the power to verify

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

entitlement for claimants attending non-referred training under section 153.161 of the EI Act and to disentitle claimants even after benefits have been paid.

[49] Under this interpretation, the General Division decided that the Commission could pay benefits first, based on qualification, and then later decide whether a claimant was entitled to those benefits.

[50] The General Division decided, however, that the Commission's power to verify entitlement under section 153.161 was discretionary and that discretion had to be exercised judicially. This meant acting in good faith, having regard to all the relevant factors, and ignoring any irrelevant factors.

[51] The General Division said the discretionary decision that the Commission had to make under section 153.161 was whether the Claimant had proven his availability for work. So, only factors relating to a decision about availability for work were relevant to the exercise of that discretion.

[52] The General Division considered that the six-month delay in making a decision, the Claimant's truthfulness throughout and the fact he understood after a conversation with a Commission's agent before applying for benefits, that he was entitled to benefits were not relevant factors.

[53] The General Division decided that the Commission had considered all relevant factors relating to the Claimant's availability such as details of the Claimant's studies, efforts made to find work and any limitations to working. So, the General Division decided the Commission had exercised its discretion judicially.

– Claimant's position

[54] The Claimant argues that the General Division misinterpreted section 153.161 of the EI Act.

[55] The Claimant argues that there is nothing in the text of section 153.161 that mentions delaying an initial decision on benefit entitlement to some unspecified point in the future.

[56] The Claimant submits that the term used in section 153.161 is “verify.” The term “verify” confers a power to confirm the veracity of the information underpinning the previous decision to pay benefits. The term “verify” does not describe making a new, initial decision.

[57] The Claimant also submits the Commission can take appropriate action if the verification process reveals that the claimant has not been honest and forthcoming. There is no need to construe the section as somehow delaying the initial decision.

[58] Further, the Claimant says, the General Division’s interpretation of section 153.161(2) of the EI Act runs completely contrary to the legislative scheme. It would mean that in some cases the Commission would never make any decision respecting benefit entitlement, given the power to verify in section 153.161(2) is discretionary. In other words, if the Commission did not verify the claim under section 153.161(2), then no decision on entitlement would ever be made. This would be contrary to the EI Act, the Claimant submits.

[59] The Claimant also points out that section 153.161(2) imposes no time limit for the Commission to act. The General Division’s interpretation would leave claimants with a lifetime of uncertainty about when the Commission might make a decision about availability and demand that benefits be repaid even if the claimant provided complete and accurate information from the very start.

[60] The Claimant argues that the proper interpretation is that the Commission made an initial decision when it decided to pay benefits and its decision of March 17, 2021, is a reconsideration decision under section 52 of the EI Act.

– Commission’s position

[61] The Commission maintains the General Division did not misinterpret section 153.161 of the EI Act.

[62] The Commission submits that there is a legal difference between qualifying for (EI) benefits and being entitled to EI benefits.[10]

[63] The Commission maintains that the language of section 153.161(2) allowed the Commission to "verify" entitlement to those EI benefits "at any point after benefits are paid." So, the entitlement assessment was conducted after benefits have been paid.

[64] This is different, the Commission says, from the language of section 18(1)(a) of the EI Act where failure to prove entitlement can be fatal to being paid benefits. The Commission says that this difference in language reflects the modified operation approach the Commission used in processing EI applications during the Covid-19 pandemic. [11]This modified approach facilitated payment of EI benefits to claimants taking non-referred training on the basis they qualified.[12]

[65] The Commission submits that the General Division considered the text, context, and purpose of the section of the EI Act. It determined that pursuant to s.153.161, the Commission first makes a decision on qualification, which is different from a decision on whether a claimant is entitled to EI benefits.

[66] The Commission submits that the General Division found that a plain language reading of the text of s.153.161 meant that the Commission can "ask a claimant to prove that it is true, certain, or correct that they are entitled to EI benefits...even after [the Commission] has paid benefits" as this is what the law allows.

[67] As well, the Commission says, the General Division found 153.161 of the EI Act was consistent with the modified operational approach to entitlement decisions regarding student claimants in the pandemic context.

[68] The Commission submits further that the General Division rejected the Claimant's arguments that sections 52 or 111 and the case law interpreting those

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[10] The Commission refers to section 6(1) and section 7 of the EI Act versus sections 153.161 and 18(1)(a) of the EI Act.
[11] Affidavit at paragraph 14 of RGD12A-25
[12] The Commission refers to the Canada Gazette Part II, Volume 154, Number 21, Explanatory Note, Appendix C.

sections were applicable. It found the pandemic context in which section 153.161 was created, being the Government of Canada's desire to get benefits to claimants who needed them, was relevant to interpreting 153.161. The General Division concluded that under 153.161 the Commission makes two decisions; that a claimant first qualifies for benefits and then whether a claimant is entitled to benefits.

[69] The Commission argues that the Appeal Division had previously affirmed that section 153.161 of the EI Act allowed the Commission to make entitlement decisions at any time after benefits have been paid.[13]

– My finding

[70] I find that the General Division misinterpreted section 153.161 of the EI Act when it decided that it allowed for a delayed entitlement decision.

[71] Section 153.161 of the EI Act does not permit a delayed entitlement decision. What it permits is delayed verification of an initial entitlement decision that has already been made, based on statements made by a claimant in their application and the ongoing claimant reports.

[72] Section 153.161 was implemented on September 27, 2020, as part of Interim Order No. 10.[14] As explained in the Explanatory Note to Interim Order 10, Interim Order 10 was made for the purpose of mitigating the economic effects of Covid-19. The Explanatory Note also provided that section 153.161 allowed a modified operational approach to the assessment of availability for claimants who were not referred to a course of instruction per section 25 of the EI Act.[15]

[73] The text of section 153.161(2) says the Commission may, at any point after benefits are paid to a claimant, verify that the claimant is entitled to those benefits by

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[13] The Commission refers to *Canada Employment Insurance Commission v KT* (AD-22-275) at Appendix B, Tab 1, *Canada Employment Insurance Commission v SL, 2022 SST 556* and *Canada Employment Insurance Commission v ET*, 2022 SST 662.
[14] See Canada Gazette, Part II, volume 154, No. 21, Interim Order No. 10 at pages 2423–2424.
[15] See, Canada Gazette, Part II, volume 154, No. 21, Interim Order No. 10, Explanatory Note at pages 2427 to 2428.

requiring proof that they were capable of and available for work on any working day of their benefit period.

[74] The text is clear that verification of entitlement might not happen until after benefit payments have been paid. However, there is nothing in the text of section 153.161 which suggests it the Commission can delay or forego making an initial decision. It speaks to verifying "entitlement." This implies that a previous entitlement decision has already been made.

[75] The text also says the Commission "may" verify entitlement so the power to verify is discretionary. A discretionary authority is inconsistent with the Commission's position that this provision allows a delayed entitlement decision to be made. As the Claimant points out, if the Commission were to not exercise its discretion to verify the claim this would mean, in some cases, the Commission would never make any decision respecting benefit entitlement. That cannot be what was intended. The General Division did not address the discretionary nature of the provision.

[76] The General Division decided that payment was based on "qualification" for benefits and not "entitlement." The qualifying requirements to establish a claim are set out in section 7 of the EI Act. The basic requirements are having an interruption of earnings and the required number of insurable hours.

[77] However, the text of section 153.161(1) of the EI Act is inconsistent with the notion that payment is made based on qualifying requirements only. Section 153.161(1) says that a person is not entitled to be paid benefits for any working day in a benefit period for which they are unable to prove they are capable of and available for work. This provision suggests the Commission cannot pay benefits without any evidence a person was available for work. Payment must be based on some evidence of availability.

[78] I have also considered section 153.161 in the context of section 52 of the EI Act. As above, section 52(1) provides the Commission with a discretion to reconsider a claim for benefits within 36 months after benefits have been paid or payable. Section 52(2)

says that if the Commission decides that a person has received money by way of benefits for which the person was not qualified, or to which the person is not entitled, the Commission must calculate the amount of the money and notify the claimant of its decision.

[79] The General Division did not consider that if section 153.161 was interpreted to allow the Commission to make a delayed initial entitlement decision, and that decision was that a claimant was not entitled to benefits, there does not appear to be a corresponding statutory mechanism, to allow the Commission to calculate an overpayment and notify the claimant of the overpayment.

[80] This also suggests to me that section 153.161(2) does nothing more than allow the Commission to verify a claimant can prove their availability for work after an initial entitlement decision has already been made based on the limited information provided in the application for benefits and the ongoing claimant reports.

[81] Considering the text of section 153.161 of the EI Act and having regard to the context of section 52 of the EI Act, I find that section 153.161 allows the Commission to make an initial entitlement decision based on the statements made by a Claimant in the application for benefits and the ongoing claimant reports. However, the Commission can postpone its verification of a claimant's entitlement to a later date.

[82] This interpretation is also consistent with a modified operational approach. Due to the extraordinary circumstances of the pandemic, the legislature recognized it was not possible for the Commission to verify entitlement at the time of application and so permitted a delayed verification. But that does not mean that an initial decision was not made by the Commission.

[83] The Commission relies on the Tribunal decisions of *Canada Employment Insurance Commission v KT (KT)*[16]and *Canada Employment Insurance Commission v*

[16] See *Canada Employment Insurance Commission v KT* (AD22-275) at ADN8-4.

SL (*SL*)[17] and *Canada Employment Insurance Commission v ET* (*ET*) as confirming its interpretation.[18]

[84] In the *SL* case, the Appeal Division decided the Commission could consider and reconsider the Claimant's availability under either section 52 or section 153.161 of the EI Act. However, no specific finding was made as to what provision the reconsideration had occurred under. Similarly in the *KT* case, the Appeal Division did not decide on what basis the past decision was being reviewed. It focused on the fact the Commission had not acted in bad faith in retroactively reviewing the claim.

[85] In the *ET* case, the Appeal Division decided the Commission could verify entitlement even after benefits were paid pursuant to section 153.161 of the EI Act. But that case does not say that the Commission can delay its entitlement decision.

[86] On the other hand, the Appeal Division has specifically considered whether section 153.161 of the EI Act permits a delayed entitlement decision in *SF v Canada Employment Insurance Commission*. [19]There, the Appeal Division decided that section 153.161 should not be interpreted to mean that the Commission could split its decision-making responsibility into two parts and indefinitely postpone making a decision about the Claimant's entitlement to benefits.

[87] In *SF*, the Appeal Division decided the Commission made a decision based on statements made by the claimant and, under its modified operational approach, paid benefits based on those statements and postponed considering the issue in more detail. I prefer and adopt the reasoning in *SF* case. As above, I find such an interpretation to be consistent with the text of the provision, the context of section 52 of the EI Act and the modified operational approach allowed by the legislature.

[88] However, I do agree, as was found in the *SF* case, that section 153.161 is still relevant to the question of the overpayment. Together, section 52 and section 153.161

[17] See *Canada Employment Insurance Commission v SL*, 2022 SST 556.
[18] See *Canada Employment Insurance Commission v SL*, 2022 SST 556.
[19] See *SF v Canada Employment Insurance Commission*, 2022 SST 1095.

give the Commission the power to retroactively verify a claimant's entitlement and to assess an overpayment, if appropriate.

[89] Specifically, the Commission has the discretionary authority to seek verification of entitlement after benefits were paid under section 153.161(2) of the EI Act. If that verification is sought and the Commission decides a Claimant hasn't proven their availability for work, then the Commission has the discretion to decide under section 52 whether it is going to reconsider the claim. It must exercise its discretion judicially in making that decision.

[90] This approach to the interpretation of section 153.161 and how it interacts with section 52 of the EI Act has been followed by the Appeal Division in several recent cases.[20]

[91] The General Division, therefore, made an error of law in interpreting section 153.161 to allow a delayed entitlement decision to be made.

[92] I do not need to consider whether the General Division made any other errors. Since the General Division made an error of law, I can intervene in the decision. [21]

Remedy

[93] 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.[22]

[94] The Commission asks that I dismiss the Claimant's appeal. The Claimant asks that I substitute my decision for that of the General Division and rescind the Commission's decision of March 17, 2021.

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[20] See for example, *WA v Canada Employment Insurance Commission,* 2023 SST 17 and *Canada Employment Insurance Commission v OB*, 2022 SST 1371; See also *Canada Employment Insurance Commission v OB*, 2022 SST 1371.
[21] Section 58(1)(c) of the DESD Act says an error of law is one of the grounds of appeal.
[22] See section 59(1) of the DESD Act.

[95] I am satisfied the parties had a full and fair opportunity to present their case before the General Division. So, I find this to be an appropriate case to substitute my decision for that of the General Division.

The Commission exercised its discretion judicially when it decided to verify the Claimant's entitlement and reconsider his claim

[96] I find the Commission made an initial entitlement decision after the Claimant applied for benefits on October 7, 2020, based on the statements made in his application.

[97] On March 16, 2021, and March 17, 2021, the Commission sought to verify the Claimant was entitled to the benefits he had been paid.[23] On that date the Claimant was asked about his work permit restrictions, the hours he spent on his schooling, his tuition, his schedule, whether he would accept a full-time job if offered, whether he would drop classes or left his schooling to accept an offer of suitable employment. He was also asked about his job search. In short, the Commission sought to verify that he could prove his availability for work. The Commission was not satisfied he had.

[98] Having decided that, the Commission then exercised its discretion to reconsider the Claimant's claim. The Claimant was advised on March 17, 2021, that he was not entitled to benefits from October 5, 2020, to February 26, 2021. [24]The overpayment was calculated, and a notice overpayment was subsequently issued.[25]

[99] The decisions to carry out a verification under section 153.161 and to reconsider a claim under section 52 are discretionary. This means that, although the Commission has the power to carry out a verification or to reconsider a claim, it does not have to do so.

[100] As above, 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

[23] GD3-22 to GD3-24.
[24] GD3-24.
[25] GD3-26.

bad faith or for an improper purpose or motive, consider an irrelevant factor or ignore a relevant factor, or act in a discriminatory manner.[26]

[101] Having regard to the Commission's notes, I find it more likely than not that the Commission exercised its discretion to verify the Claimant's entitlement based on the fact the Claimant was attending non-referred training."[27]

[102] 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. There is no evidence that the Commission had verified the claimant's availability previously. The Commission acted on relevant information that called into question the Claimant's availability, being his attendance at non-referred training.

[103] The Commission's agent's notes of March 16 and March 17, 2021, reflect that a decision was made to reconsider the claim, based on the fact the Commission was not satisfied the Claimant had proven his availability for work. [28]So, I find it more likely than not that the only factors the Commission considered relevant to its exercise of discretion to reconsider the claim were factors relating to its decision about the Claimant's availability for work.

[104] The Claimant argues the Commission did not exercise its discretion judicially in reconsidering the claim and retroactively assessing an overpayment.

[105] The Claimant submits that the Commission can look at the facts and make a new decision disentitling a claimant from benefits going forward but what it cannot do is retroactively reconsider a decision about availability, absent new facts, or information. This is consistent, the Claimant argues, with the Commission's reconsideration policy and various CUB decisions.[29]

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[26] See *Canada (Attorney General) v Purcell*, 1995 CanLII 3558 (FCA).
[27] GD3-22.
[28] GD3-22 to GD3-23
[29] The Claimant refers to CUB 5664, CUB 37680A, CUB 8839 and CUB 4262.

[106] The Claimant submits further that the Commission ignored other relevant factors. These were:

- The Claimant contacted Service Canada before applying and was told he was entitled to benefits.
- After applying for benefits, in another conversation, the Commission investigated the reasons for separation from the Claimant's former employer and told him he would continue receiving benefits. So, he reasonably would have assumed his entire claim had been investigated.[30]
- The delay of six months meant the Claimant now has $10,000.00 in debt through no fault of his own.
- The Claimant had been open and honest throughout.

[107] As above, the Commission has a policy to help guide its exercise of 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 EIA 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:[31]

- benefits have been underpaid
- benefits were paid contrary to the structure of the [EI Act]
- benefits were paid as a result of a false or misleading statement
- the claimant ought to have known there was no entitlement to the benefits received.

[108] 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. The Claimant did not make any false or

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[30] Audio recording of the General Division hearing held on June 21, 2021, at 00:19:54.
[31] See Digest of Benefit Entitlement Principles, Chapter 17 – Section 17.3.3.

misleading statements and could not have known that he was not entitled to the benefits received. None of the factors mentioned in the Commission's policy justify reconsidering the Claimant's claim.

[109] There is no doubt the Claimant honestly reported his schooling throughout his claim and the debt was created through no fault of his own. Absent section 153.161 of the EI Act, I would agree that the Commission had exercised its discretion improperly by failing to have regard to the relevant factors set out in its own policy.

[110] The CUB decisions the Claimant relies on were decided before the implementation of section 153.161 of the EI Act. As well, the Commission's policy was developed prior to the addition of section 153.161 to the EI Act. The policy does not refer to section 153.161 of the EI Act or provide any guidance on how section 153.161 should inform the Commission's exercise of discretion under section 52 of the EI Act.

[111] Section 153.161 was added to the EI Act in the extraordinary circumstances of the pandemic. The legislature approved a modified operating procedure on the part of the Commission. The legislature specifically gave the Commission the power in section 153.161 to delay verification of entitlement even after benefits have been paid.

[112] It is important to note that 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, in the application or claimant reports, and even after benefits were paid.

[113] In other words, in the specific circumstances of the pandemic, with the implementation of section 153.161, the legislature signalled its intention that reconsidering a claim in circumstances where verification is sought and a claimant cannot prove their entitlement, outweighs the principle of finality. So, I find the Commission was not bound to apply the reconsideration policy, having regard to section 153.161 of the EI Act.

[114] The General Division found as a fact that the Claimant spoke to officers at Service Canada before applying and understood he could apply for EI benefits after which a decision would be made.[32] The General Division also accepted the Claimant understood that he was approved to receive benefits.[33]

[115] The Commission did not consider these calls when it exercised its discretion. However, they were not relevant.

[116] The first call was not relevant because the Claimant completed his application for benefits after the initial call and the application makes clear, even if a claimant is eligible for benefits, there are still ongoing requirements to be entitled to EI benefits. Those include being capable of and available to work.[34]

[117] With respect to the call from Service Canada after the Claimant applied, the call concerned the Claimant's separation from employment. There is no evidence that there was any discussion in that conversation about the Claimant's availability for work or that his availability had been verified in that conversation. So, this call was not relevant to the Commission's exercise of discretion.

[118] I find the delay is not relevant to the exercise of discretion either. The Commission acted within the statutory 36-month time limit to reconsider the claim.

[119] There was no evidence that the Commission acted in bad faith or for improper purpose. Claimants are obligated to repay benefits to which they are not entitled. [35]So, reconsidering a claim where it appears a claimant may not be entitled to benefits is a proper purpose.

[120] The Commission considered all the relevant information in deciding to reconsider the claim. There were no new facts relevant to the exercise of discretion provided by the Claimant at the General Division hearing. There is no indication that the Commission

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[32] See paragraph 63 of the General Division decision.
[33] See paragraph 66 of the General Division decision.
[34] GD3-10 to GD3-11.
[35] See section 43 of the EI Act.

considered irrelevant information or in a discriminatory manner. The Commission, therefore, exercised its discretion judicially in reconsidering the claim.

[121] Since the Commission exercised its discretion judicially, I cannot intervene in that decision.

[122] I understand the Claimant is going to be disappointed in this result. Unfortunately, the law has worked a real hardship in this case. The Claimant acted honestly throughout yet is now left with a substantial debt.

[123] I am sympathetic to the Claimant’s situation. However, I cannot remedy it.

Conclusion

[124] The appeal is dismissed. Although the General Division made an error of law, it doesn’t change the result. I have substituted my decision to find that the Commission exercised its discretion judicially in verifying the Claimant’s entitlement and reconsidering the claim. So, I cannot interfere in that decision.

Charlotte McQuade
Member, Appeal Division