



[TRANSLATION]

Citation: *ZN v Canada Employment Insurance Commission*, 2022 SST 1681

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant: Z. N.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (456188) dated February 8, 2022 (issued by Service Canada)

Tribunal member: Normand Morin

Type of hearing: Videoconference

Hearing date: August 23, 2022

Hearing participant: Appellant

Decision date: September 16, 2022

File number: GE-22-833

Decision

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

Overview

[2] In January 2020, the Appellant began full-time training at X. In the fall of 2020, he continued his training full-time at that institution in a program that leads to a college diploma (DEC) in nursing. His fall 2020 term ran from August 31, 2020, to December 15, 2020, and his winter 2021 term ran from January 25, 2021, to May 26, 2021.² He continued his training at the same place with a summer 2021 term from June 2, 2021, to July 7, 2021,³ and a fall 2021 term from August 30, 2021, to December 6, 2021.⁴

[3] On April 17, 2020, after a period of employment with the employer X from September 5, 2018, to January 11, 2020, inclusive,⁵ the Appellant made an initial claim for EI benefits (regular benefits).⁶

[4] A benefit period for the EI Emergency Response Benefit (EI ERB) was established effective March 15, 2020. When this type of benefit was no longer available, a benefit period for EI regular benefits was established effective September 27, 2020.⁷

¹ See sections 52 and 153.161 of the *Employment Insurance Act (Act)*.

² See GD3-21, GD3-22, GD3-28 to GD3-30, and GD3-35.

³ See GD3-42.

⁴ See GD3-47 and GD3-48.

⁵ See GD3-16 and GD3-17.

⁶ See GD3-3 to GD3-15.

⁷ See GD4-1.

[5] The Commission says that the Appellant received sickness benefits (special benefits) for the period from September 27, 2020, to February 13, 2021, because he had reported being unavailable for work during that period for health reasons.⁸ It says that he then claimed regular benefits from February 15, 2021.⁹

[6] On January 4, 2022, the Commission told the Appellant that it was unable to pay him EI benefits from September 28, 2020, because he was taking a training course on his own initiative and hadn't proven that he would have been available for work if he hadn't been sick.¹⁰

[7] On January 4, 2022, the Commission also told the Appellant that it was unable to pay him EI benefits from February 15, 2021, because he was taking a training course on his own initiative and hadn't proven his availability for work.¹¹

[8] Additionally, in both decisions, the Commission said that he would receive a notice of debt if he owed money.¹²

[9] On February 8, 2022, after a request for reconsideration, the Commission told him that new decisions had replaced the January 4, 2022, decisions. Specifically, he wasn't entitled to EI sickness benefits from September 28, 2020, to December 15, 2020, and from January 25, 2021, to February 12, 2021, because he was taking a training course on his own initiative and hadn't proven that he would have been available for work if he hadn't been sick. Also, he could not get benefits (regular benefits) for the periods from February 15, 2021, to May 18, 2021, from June 2, 2021, to July 7, 2021, and from August 30, 2021, because he was taking a training course on his own initiative and hadn't proven his availability for work.¹³

⁸ See GD4-1.

⁹ See GD4-9.

¹⁰ See GD3-54.

¹¹ See GD2-9 and GD3-53.

¹² See GD2-9, GD3-53, and GD3-54.

¹³ See GD2-10, GD3-68, and GD3-69.

[10] In its arguments, the Commission says that it is conceding the appeal on the issue of the Appellant's disentitlement to sickness benefits (special benefits).¹⁴ Its concession is for the periods from September 28, 2020, to December 15, 2020, and from January 25, 2021, to February 12, 2021.

[11] The Appellant says that he stopped working because of the COVID-19 pandemic.¹⁵ He says that, throughout his benefit period, he always reported being in school, and he received benefits. He says that he completed his claimant reports online or over the phone, and the Commission never said anything to him about his entitlement to benefits. He points out that he was honest in providing all the information needed to process his EI file. He explains that he spoke with the Commission several times after completing his September 28, 2021, claimant report. He says that the Commission representatives he spoke with never told him that he could not get benefits because he was in school, and they never asked him to prove he was available for work. He questions why the Commission paid him benefits if he wasn't entitled to them. In his view, his EI file wasn't handled with due diligence. He says he doesn't have the money to pay back what the Commission says he owes in overpaid benefits (overpayment). He argues that paying back the money he owes is causing him significant emotional distress and financial hardship. He points out that, if necessary, he could pay it back through compensatory work. On March 7, 2022, the Appellant challenged the Commission's reconsideration decisions. Those decisions are now being appealed to the Tribunal.

Preliminary matters

[12] In this case, the Appellant disputes having to pay back the benefits he was overpaid, despite the fact that he reported being in school and that he received those benefits without the Commission asking him to prove he was available for work.¹⁶ In his

¹⁴ See GD4-12 and GD4-13.

¹⁵ Coronavirus disease 2019.

¹⁶ See GD2-5, GD10-2, and GD10-3.

view, having to pay back the money the Commission says he owes in overpaid benefits is causing him hardship and jeopardizing his plans.¹⁷

[13] The Commission, meanwhile, explains that it relied on sections 18 and 153.161 of the *Employment Insurance Act* (Act) in deciding that the Appellant wasn't entitled to regular benefits after paying him such benefits for the periods from February 15, 2021, to May 18, 2021, from June 2, 2021, to July 7, 2021, and from August 30, 2021.¹⁸ It argues that section 153.161(2) of the Act allows it to decide entitlement to benefits after benefits are paid.¹⁹

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

Issues

[15] I have to determine whether the Commission had the power to retroactively decide whether the Appellant was entitled to EI sickness benefits (special benefits) and regular benefits and, if so, determine whether it used its discretion judicially in deciding to verify and reconsider the Appellant's claim for benefits.²⁰

[16] If that is the case, I have to determine whether the Appellant has shown:

- that he would have been available for work while taking training during the periods from September 28, 2020, to December 15, 2020, and from January 25, 2021, to February 12, 2021, if he hadn't been sick, and that, as a result, he would have been entitled to sickness benefits (special benefits) for those periods²¹

¹⁷ See GD2-5, GD10-2, and GD10-3.

¹⁸ See GD4-11.

¹⁹ See GD8-2 and GD8-3.

²⁰ See sections 52 and 153.161 of the Act.

²¹ See section 18(1)(b) of the Act.

- that he was available for work while taking training during the periods from February 15, 2021, to May 18, 2021, from June 2, 2021, to July 7, 2021, and from August 30, 2021²²

[17] I also have to determine whether the Appellant has to pay back the benefits that he received and that the Commission says he owes.²³

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?

[18] 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.²⁴

[19] If the Commission decides that a person has received an amount of money in benefits that they weren’t qualified for or entitled to, it must calculate the amount of the money and notify the claimant of its decision.²⁵

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

[21] 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.

²² See sections 18(1)(a) and 153.161 of the Act and sections 9.001 and 9.002(1) of the *Employment Insurance Regulations* (Regulations).

²³ See sections 43, 44, and 52 of the Act and section 153.161 of Part VIII.5 of the Act.

²⁴ See section 52 of the Act.

²⁵ See section 52(2) of the Act.

[22] 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.²⁶

[23] The Tribunal's Appeal Division (Appeal Division) found that the Tribunal's General Division (General Division) could not refuse to exercise its jurisdiction to determine whether the Commission had the power to retroactively disentitle the claimant to benefits.²⁷

[24] In this case, the Appellant applied for benefits on April 17, 2020, and a benefit period for the EI ERB was established effective March 15, 2020.²⁸ When this type of benefit was no longer available, a benefit period for regular benefits was established effective September 27, 2020.²⁹

[25] The Commission says that the Appellant reported being unavailable for work for health reasons for the period from September 27, 2020, to February 13, 2021, and that he received sickness benefits for that period.³⁰ It says that he then claimed regular benefits from February 15, 2021.³¹

[26] The Commission explains that, after paying him regular benefits, it decided that the Appellant wasn't entitled to such benefits for the periods from February 15, 2021, to May 18, 2021, from June 2, 2021, to July 7, 2021, and from August 30, 2021.³²

[27] On January 4, 2022, the Commission informed him of the decisions (initial decisions) about his availability for work.³³

²⁶ See section 153.161(2) of Part VIII.5 of the Act.

²⁷ See the Appeal Division decision in *GP v Canada Employment Insurance Commission*, 2021 SST 791.

²⁸ See GD3-3 to GD3-15 and GD4-1.

²⁹ See GD3-1 and GD4-1.

³⁰ See GD4-1.

³¹ See GD4-9.

³² See GD4-11.

³³ See GD2-9, GD3-53, and GD3-54.

[28] On February 8, 2022, during a conversation with the Appellant to verbally notify him of the reconsideration decisions in his case, the Commission told him that it could reconsider its decisions under section 52 of the Act.³⁴

[29] The Commission argues as follows:

- a) Under section 153.161(2) of the Act,³⁵ it 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.³⁶
- b) The Appellant's entitlement to benefits was assessed later under section 153.161(2) of the Act, not section 52 of the Act.³⁷
- c) The Commission exercised its authority under section 153.161 of the Act in deciding that EI benefits could not be paid from February 15, 2021.³⁸
- d) The Commission explains that, as a result of the review of the Appellant's appeal, it has decided to concede the issue before the Tribunal concerning the disentanglement it imposed on him for the periods from September 28, 2020, to December 15, 2020, and from January 25, 2021, to February 12, 2021, when it decided that he would not have been available for work during those periods if he hadn't been sick.³⁹
- e) The Commission says that it is conceding the appeal on this issue for the periods in question because the Appellant can't be denied sickness benefits retroactively under section 153.161 of the Act. The Commission argues that

³⁴ See GD3-67 and GD4-6.

³⁵ See Part VIII.5 of the Act: Temporary Measures to Facilitate Access to Benefits.

³⁶ See GD4-8, GD4-11, and GD8-2.

³⁷ See GD8-1 and GD8-2.

³⁸ See GD8-2.

³⁹ See GD4-12.

section 153.161 of the Act applies only to section 18(1)(a) of the Act—that is, to regular benefits.⁴⁰

[30] As for the Appellant, he says that he applied for benefits after working full-time throughout 2019.⁴¹ He says that he was encouraged to apply after visiting the Commission (Service Canada) website.⁴² He points out that the website in fact says: “We encourage you to apply for Employment Insurance (EI) benefits as soon as possible and let us determine if you’re eligible.”⁴³

[31] In the training questionnaires he completed on September 14, 2020, and February 1, 2021, for his fall 2020 and winter 2021 terms, the Appellant indicated that he was taking training full-time and that he spent 25 or more hours per week on it.⁴⁴ In both questionnaires, and in the one he completed on May 22, 2021 (winter 2021 term), he indicated that he hadn’t made efforts to find work since the start of his training course or program or since becoming unemployed.⁴⁵

[32] In these three questionnaires, he said that he hadn’t made efforts to look for work because his employer had offered him hours that would fit around his school schedule (fall 2020 term),⁴⁶ because he had had surgery and wasn’t able to work as many hours as he used to (winter 2021 term),⁴⁷ or because he was unable to commit to an employer given that his school schedule was too irregular (winter 2021 term).⁴⁸ In the questionnaires he completed on June 6, 2021 (summer 2021 term), and September 14, 2021 (fall 2021 term), he indicated that he had made efforts to find work.⁴⁹

[33] In the questionnaire he completed on May 22, 2021, for his winter 2021 term and the ones he completed for later terms, the Appellant indicated that he spent 15 to

⁴⁰ See GD4-12.

⁴¹ See GD10-2.

⁴² See GD10-2.

⁴³ See GD10-2.

⁴⁴ See GD3-19 to GD3-22, GD3-27, and GD3-28.

⁴⁵ See GD3-24, GD3-25, GD3-31, and GD3-39.

⁴⁶ See GD3-25.

⁴⁷ See GD3-32.

⁴⁸ See GD3-39.

⁴⁹ See GD3-44 and GD3-50.

24 hours per week on his training.⁵⁰ In the questionnaire dated May 22, 2021, he said that he had dropped courses during his winter 2021 term, which meant that he wasn't considered a full-time student anymore.

[34] In the questionnaires he completed for his fall 2020, winter 2021, and summer 2021 terms, the Appellant indicated that he wasn't 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 he was before he started his course or program.⁵¹ In the questionnaires, he attributed this situation to the demands of his training and the time he had to spend on it⁵² or to medical reasons for his winter 2021 term given his surgery.⁵³ In the questionnaire he completed on September 14, 2021, for his fall 2021 term, he indicated that he 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 he was before he started his course or program.⁵⁴

[35] For all the terms in question, the Appellant also indicated in his questionnaires that none of his course obligations occurred outside his normal work hours and that he was obligated to attend scheduled classes or scheduled sessions (in person, online, or by telephone).⁵⁵

[36] The Appellant says that he always reported being in school on his claimant reports and that the Commission paid him benefits.⁵⁶ He says that he sometimes completed reports over the phone with the help of a Commission representative.⁵⁷ He points out that the reports he completed help decide whether he is entitled to benefits.⁵⁸

⁵⁰ See GD3-34, GD3-40, and GD3-46.

⁵¹ See GD3-24, GD3-31, GD3-38, and GD3-43.

⁵² See GD3-24, GD3-31, GD3-38, and GD3-43.

⁵³ See GD3-31 and GD3-32.

⁵⁴ See GD3-49 and GD3-50.

⁵⁵ See GD3-22, GD3-30, GD3-36, GD3-37, GD3-42, GD3-48, and GD3-49.

⁵⁶ See GD2-5 and GD10-2.

⁵⁷ See GD2-5 and GD10-2.

⁵⁸ See GD10-2.

[37] The Appellant explains that he also spoke with the Commission several times after completing his September 28, 2021, claimant report.⁵⁹ He says that the Commission never told him that he wasn't entitled to benefits, and it never asked him to prove his availability for work.⁶⁰

[38] 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 his benefit period established effective September 27, 2020.

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

[40] Even though the Commission says that it relied on section 153.161(2) of the Act in making its decision,⁶¹ I find that the provisions of section 52 of the Act continue to apply despite those of section 153.161(2) of the Act.

[41] I note that, when it verbally notified him of the reconsideration decisions in his case on February 8, 2022, the Commission explained to him that it could reconsider its decisions under section 52 of the Act.⁶²

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

[43] 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.

[44] 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.⁶³

⁵⁹ See GD2-5.

⁶⁰ See GD2-5.

⁶¹ See GD4-8, GD4-11, GD8-1, and GD8-2.

⁶² See GD3-67.

⁶³ See section 153.161(2) of the Act.

This section also shows that the Commission has the discretion to decide to verify a claim for benefits.

[45] 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.⁶⁴

[46] 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.

[47] In making its decisions, 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 new decisions in accordance with the procedure set out in section 52(2) of the Act.

[48] 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.⁶⁵

[49] 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 his entitlement to benefits under section 153.161(2) of the Act.

[50] I find that, before making its decisions on January 4, 2022,⁶⁶ more than a year after the Appellant's benefit period was established, the Commission didn't tell him about the job search required to show his availability for work or about the proof he had to provide, before retroactively disentitling him from receiving benefits.

⁶⁴ See sections 52(1) and 52(5) of the Act.

⁶⁵ See section 153.161(2) of the Act.

⁶⁶ See GD2-9, GD3-53, and GD3-54.

[51] 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 decisions.

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 decisions?

[52] 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."⁶⁷

[53] 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.⁶⁸

[54] Since the Commission's power to reconsider is discretionary, its decisions can be interfered with only if it didn't exercise this power judicially.⁶⁹

[55] 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.⁷⁰

[56] 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.

⁶⁷ The Federal Court of Appeal (Court) established this principle in *Uppal*, 2008 FCA 388.

⁶⁸ 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.

⁶⁹ See the Court's decisions in *Chartier*, A-42-90; and *Uppal*, 2008 FCA 388.

⁷⁰ This principle was established or reiterated in the following decisions: *Hudon*, 2004 FCA 22; and *Gagnon*, 2004 FCA 351.

[57] 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 received⁷¹

– **Benefits underpaid**

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

[59] Based on the documents the Commission submitted and its calculations, as a result of the review of his file, the Appellant was overpaid \$16,044 in regular benefits and \$8,595 in sickness benefits (special benefits) (\$6,876 + \$1,719 = \$8,595), for a total of \$24,639 (overpayment).⁷² In this case, it isn’t that “benefits have been underpaid.”

[60] The Digest says that the Commission always reconsiders if the claimant has been denied benefits that may become payable as the result of reconsideration.⁷³

[61] In the case of an overpayment, the Commission may reconsider a claim for benefits, as set out in the Act.⁷⁴

[62] 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.

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

⁷¹ See section 17.3.3 of the Digest of Benefit Entitlement Principles (Digest).

⁷² See GD2-11, GD2-12, GD3-55 to GD3-57, and GD4-5.

⁷³ See section 17.3.3 of the Digest.

⁷⁴ See section 52 of the Act.

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

[64] I find that, when the Appellant’s claim was set up and he 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.

[65] 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).⁷⁵

[66] 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**

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

[68] 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.⁷⁶ 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.⁷⁷

[69] The Commission hasn’t accused the Appellant of false or misleading statements.

[70] The Commission says it recognizes that the Appellant may have always reported being in school during his benefit period and may have spoken with a number of its

⁷⁵ See section 17.3.3.2 of the Digest.

⁷⁶ See section 52(1) of the Act.

⁷⁷ See section 52(5) of the Act. See also the Court’s decisions in *Dussault*, 2003 FCA 372; and *Pilote*, A-868-97.

representatives without them telling him he wasn't entitled to benefits because of his studies.⁷⁸

[71] The Commission explains that section 153.161(2) of the Act nonetheless says that it 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.⁷⁹

[72] The Appellant argues that, throughout his benefit period, he always reported being in school.⁸⁰

[73] The Appellant says that he was always [translation] "completely honest" in providing all the information the Commission representatives needed to process his file and decide whether he could get benefits.⁸¹

[74] In my view, the factor for benefits being paid as a result of a false or misleading statement doesn't apply to the Appellant. I find that he was always honest, whether in the training questionnaires, on his claimant reports, or in his conversations with Commission representatives.

[75] I find that the Commission could nonetheless reconsider or verify the Appellant's claim for benefits.

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

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

⁷⁸ See GD4-11.

⁷⁹ See GD4-11.

⁸⁰ See GD2-5.

⁸¹ See GD10-2 and GD10-3.

[77] The Commission argues as follows:

- a) It paid the Appellant EI benefits on the basis that he qualified for them under section 7 of the Act, since he had enough insurable hours. But he also had to meet the requirements of the Act to be entitled to benefits throughout his benefit period.⁸²
- b) When he applied for benefits, the Appellant was informed of his responsibilities in terms of availability, namely, to always be available for work, look for a job, and accept offers of suitable employment. He accepted those responsibilities.⁸³
- c) The Appellant hasn't proven that he was available for work while taking training.⁸⁴
- d) Section 153.161(2) of the Act allows the Commission to decide entitlement to benefits after benefits are paid. Qualification and entitlement to benefits have different legal requirements and are legally distinct concepts in the Act.⁸⁵
- e) The facts of the case have shown that the Appellant hasn't proven his entitlement to benefits, since he was taking a "non-referred" training course full-time. He prioritized his training over a job, even when his courses were part-time.⁸⁶
- f) The Commission explains that, as a result of the review of the Appellant's appeal, it has decided to concede the issue before the Tribunal concerning the disentanglement it imposed on him for the periods from September 28, 2020, to December 15, 2020, and from January 25, 2021, to February 12,

⁸² See GD4-10 and GD8-2.

⁸³ See GD4-11.

⁸⁴ See GD4-13.

⁸⁵ See GD4-8, GD4-11, and GD8-2.

⁸⁶ See GD4-11 and GD8-2.

2021, when it decided that he would not have been available for work during those periods if he hadn't been sick.⁸⁷

- g) It says that it is conceding the appeal on this issue for the periods in question because the Appellant can't be denied sickness benefits retroactively under section 153.161 of the Act. The Commission argues that section 153.161 of the Act applies only to section 18(1)(a) of the Act—that is, to regular benefits.⁸⁸
- h) However, the Appellant isn't entitled to regular benefits for the periods from February 15, 2021, to May 18, 2021, from June 2, 2021, to July 7, 2021, and from August 30, 2021, after the Commission paid him such benefits.⁸⁹
- i) The Commission considered the information and statements the Appellant had provided as well as the relevant statutory requirements and case law in deciding the Appellant's entitlement to benefits in connection with his availability for work. It also says that it considered all the new information obtained from him concerning the issue when it reviewed his file.⁹⁰

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

- a) The Appellant applied for benefits after losing his job because of the COVID-19 pandemic and given that he had enough insurable hours.⁹¹
- b) He thought he was entitled to claim benefits. If he had had the slightest doubt about being entitled to benefits, he would not have applied.⁹²

⁸⁷ See GD4-12 and GD4-13.

⁸⁸ See GD4-12.

⁸⁹ See sections 18 and 153.161 of the Act—GD4-11 and GD8-2.

⁹⁰ See GD8-2.

⁹¹ See GD2-5.

⁹² See GD10-3.

- c) He always told the Commission that he was taking training (training questionnaires, claimant reports, dealings with Commission representatives).⁹³
- d) None of the Commission representatives he spoke with told him that he could not get benefits while in school or asked him to prove his availability for work.⁹⁴
- e) The Appellant says that his EI file wasn't handled with due diligence and that there were a number of processing inconsistencies. He points out that the Commission approved his claims for benefits only to tell him that he wasn't entitled at the end of his benefit period. He also points out that he received benefits on February 11, 2022, after the Commission's reconsideration decisions telling him he wasn't entitled.⁹⁵
- f) If he wasn't entitled to benefits, the Commission could have denied him benefits when his benefit period started. If it had, he could have avoided now having the Commission ask him to pay back the benefits he was overpaid, especially since he can't pay back the full amount he owes.⁹⁶

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

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

[81] 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.

⁹³ See GD2-5, GD3-19 to GD3-51, GD10-2, and GD10-3.

⁹⁴ See GD2-5.

⁹⁵ See GD2-5, GD2-14, GD10-2, and GD10-3.

⁹⁶ See GD10-2 and GD10-3.

[82] 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.⁹⁷

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

[84] I note that the Commission had ample opportunity to verify what the Appellant had indicated in the five questionnaires he completed (September 14, 2020; February 1, 2021; May 22, 2021; June 6, 2021; and September 14, 2021), on his claimant reports, and in its dealings with him, including their conversation on October 27, 2020.⁹⁸ From the moment he completed the first training questionnaire, the Commission knew that he was in school full-time and spent 25 or more hours per week on his studies.

[85] I note that the Commission also says that the Appellant reported being unavailable for work for health reasons for the period from September 27, 2020, to February 13, 2021.⁹⁹

[86] I am of the view that the Appellant could reasonably believe that, when his claim for benefits was approved and he received benefits, this meant he was entitled to those benefits.

[87] I find the Appellant's testimony credible. He was transparent and consistent in his statements about his training and his availability for work.

[88] I find that, despite its finding that the Appellant hadn't proven he was available for work while taking training, the Commission hasn't shown that he ought to have known that he wasn't entitled to benefits.

⁹⁷ See section 17.3.3 of the Digest.

⁹⁸ See GD3-26.

⁹⁹ See GD4-1.

[89] However, I agree with the Commission that it can't retroactively disentitle the Appellant from receiving the sickness benefits (special benefits) it paid him for the periods from September 28, 2020, to December 15, 2020, and from January 25, 2021, to February 12, 2021.¹⁰⁰

[90] I agree with the Commission that section 153.161 of the Act applies only to section 18(1)(a) of the Act—that is, to regular benefits.¹⁰¹

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

[92] I find that the Commission didn't consider all relevant factors in doing so. These factors refer to all the information the Appellant gave in the training questionnaires, on the claimant reports where he reported being in school, and when he spoke with the Commission.

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

[94] 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.

[95] Because of this, I won't review the initial decision to grant the Appellant benefits, specifically the sickness benefits (special benefits) and regular benefits he received.

Availability for work and repayment of benefits that were overpaid

[96] Since I have found that the Commission didn't exercise its discretion judicially when it decided to verify the Appellant's claim for benefits and when it reconsidered the claim, there is no need to review the initial decision in his case.¹⁰²

¹⁰⁰ See GD4-12.

¹⁰¹ See GD4-12.

¹⁰² See sections 52 and 153.161 of the Act.

[97] This means that there is no need to determine whether the Appellant has shown that he would have been available for work while taking training during the periods from September 28, 2020, to December 15, 2020, and from January 25, 2021, to February 12, 2021, if he hadn't been sick, and whether, as a result, he was entitled to sickness benefits (special benefits) for those periods.¹⁰³

[98] In addition, there is no need to determine whether the Appellant has shown that he was available for work while taking training during the periods from February 15, 2021, to May 18, 2021, from June 2, 2021, to July 7, 2021, and from August 30, 2021, and whether he was entitled to EI regular benefits.¹⁰⁴

[99] So, there is also no need to determine whether the Appellant has to pay back the benefits that he was overpaid and that the Commission says he owes.¹⁰⁵

Conclusion

[100] 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, specifically sickness benefits (special benefits) and regular benefits.

[101] So, there is no need to determine whether the Appellant has shown that he would have been available for work while taking training during the periods from September 28, 2020, to December 15, 2020, and from January 25, 2021, to February 12, 2021, if he hadn't been sick.

[102] In addition, there is no need to determine whether the Appellant has shown that he was available for work while taking training during the periods from February 15, 2021, to May 18, 2021, from June 2, 2021, to July 7, 2021, and from August 30, 2021.

¹⁰³ See section 18(1)(b) of the Act.

¹⁰⁴ See sections 18(1)(a) and 153.161 of the Act and sections 9.001 and 9.002(1) of the Regulations.

¹⁰⁵ See sections 43, 44, and 52 of the Act.

[103] So, there is also no need to decide whether the Appellant has to pay back the money that the Commission says he owes in overpaid benefits.

[104] This means that the appeal is allowed.

Normand Morin
Member, General Division – Employment Insurance Section