



Citation: *LM v Canada Employment Insurance Commission*, 2023 SST 139

Social Security Tribunal of Canada Appeal Division

Decision

Appellant: L. M.
Representative: K. L.

Respondent: Canada Employment Insurance Commission
Representative: Melanie Allen

Decision under appeal: General Division decision dated May 30, 2022
(GE-21-926)

Tribunal member: Charlotte McQuade

Type of hearing: Videoconference
Hearing date: January 9, 2023
Hearing participants: Appellant
Appellant's representative

Decision date: February 10, 2023
File number: AD-22-685

Decision

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

[2] I have substituted my decision for the General Division. The Commission didn't exercise its discretion properly when it decided to reconsider the claim for benefits.

[3] However, I have also decided that the claim is to be reconsidered. This means the overpayment remains.

Overview

[4] L. M. is the Claimant. She collected the maximum 15 weeks of Employment Insurance (EI) sickness benefits. After that, she claimed EI regular benefits.

[5] The Canada Employment Insurance Commission (Commission) paid regular benefits but later decided to reconsider the claim. The Commission assessed an overpayment after deciding that the Claimant was not capable of and available for work.¹ The Claimant appealed that decision to the Tribunal's General Division. She agreed she was not capable of work. But she said she told the Commission she couldn't work. Even so, the Commission decided to pay her regular benefits and told her to declare she was available for work on her biweekly reports. The Claimant argued that the Commission shouldn't have reconsidered her claim when it was the Commission's errors that resulted in the overpayment.

[6] The General Division dismissed the Claimant's appeal. The General Division decided the Claimant wasn't available for work. The General Division also decided that the Commission had exercised its discretion properly when it decided to reconsider the claim because it had acted within the statutory time limit to do so.

[7] The Claimant appealed the General Division's decision to the Appeal Division. Both parties agree and I accept that the General Division made an error of law when it

¹ This is a requirement for regular benefits under section 18(1)(a) of the *Employment Insurance Act* (EI Act).

decided that the Commission only had to show that it reconsidered the claim within the statutory time limit to prove it exercised its discretion properly.

[8] I have substituted my decision for the General Division to find that the Commission did not exercise its discretion judicially. But I also have decided the claim is to be reconsidered. This means the overpayment remains in place.

Post-hearing submissions

[9] At the hearing, I asked the Claimant's counsel for post-hearing submissions about a decision from the Federal Court of Appeal.² As the Commission's representative was unable to attend the hearing, in the interest of fairness, I also gave the Commission the opportunity to provide submissions about that case. I received post-hearing submissions from the Claimant which I have considered.³ However, I did not receive any additional submissions from the Commission.

Issues

[10] The issues in this appeal are:

- a) Did the General Division make an error of law or an error of jurisdiction when it decided the Commission need only show that it reconsidered the claim within the statutory time limit to prove it exercised its discretion judicially?
- b) Did the General Division make an error of law or an error of jurisdiction by failing to carry out its statutory mandate to review the Commission's exercise of discretion?
- c) Did the General Division make an error of law or an error of jurisdiction when it decided the Commission could retroactively reconsider a decision about the Claimant's availability in the absence of new information?

² See *Canada (Attorney General) v Buors*, 2002 FCA 372 (CanLII).

³ AD7.

Analysis

[11] The Claimant argues that the General Division made errors of law or jurisdiction.

[12] If established, any of these types of errors would allow me to intervene in the General Division decision.⁴

The parties agree that the General Division made an error of law

[13] The parties agree that the General Division made an error of law by deciding the Commission only had to show that it acted within the statutory time limit to prove it exercised its discretion judicially.

[14] Section 52 of the *Employment Insurance Act* (EI Act) says that the Commission may reconsider a claim for benefits within 36 months after the benefits have been paid or would be payable. This period can be extended to 72 months if the Commission is of the opinion that a false or misleading statement or representation has been made in connection with a claim.

[15] The Commission was prompted to reconsider the Claimant's claim after learning she was still unwell and unable to work.⁵

[16] As a result of its reconsideration, the Commission retroactively disentitled the Claimant from regular benefits from June 22, 2020, for reason she had not proven she was capable of and available for work. This decision resulted in an overpayment of \$14,325.00. The Claimant appealed that decision to the Tribunal's General Division.

[17] The Claimant agreed before the General Division that she was incapable of work. However, she argued the Commission did not exercise its discretion properly when it decided to reconsider her claim.

⁴ See section 58(1) of the *Department of Employment and Social Development Act* (DESD Act).

⁵ See GD14-1 and GD25-1, where the Commission says section 52 of the EI Act is the section it relied on to reconsider the Claimant's entitlement and establish an overpayment. See GD4-1 to GD4-2 for the Commission's explanation of what prompted reconsideration of the claim.

[18] The Claimant told the General Division she collected 15 weeks of EI sickness benefits. In June 2020, she contacted the Commission for advice. She testified that she had told the Commission agents that she still hadn't recovered, and she still couldn't return to work. She said that the Commission agents she spoke to told her to claim regular benefits. She was told to report that she was available for work on her biweekly claimant reports. She believed she was following their advice when she reported being available for work and claimed EI regular benefits starting June 20, 2020.⁶

[19] The Claimant argued that the Commission had not followed its own reconsideration policy. That policy said that the Commission would not retroactively review decisions about availability if the Commission made an error.

[20] The General Division believed the Claimant had been misadvised by the Commission. The General Division found as a fact that the Commission agents gave the Claimant incorrect advice about how to claim benefits after her EI sickness benefits ended and that she was following these Commission agents' advice when she started claiming EI regular benefits.⁷

[21] The General Division also found as a fact that the overpayment was a direct result of this incorrect advice, and that the Claimant was always honest and cooperative with the Commission.⁸

[22] The General Division decided the Claimant had not proven she was capable for work so was not entitled to EI regular benefits.⁹

[23] The General Division explained that the Commission's reconsideration power under section 52 of the EI Act was a discretionary decision and that power had to be exercised judicially.¹⁰

⁶ See paragraph 11 of the General Division decision.

⁷ See paragraph 13 of the General Division decision.

⁸ See paragraph 24 of the General Division decision.

⁹ See section 18(1) of the EI Act.

¹⁰ See paragraph 19 of the General Division decision. The General Division refers to the Federal Court decision of *Portelance v Canada Employment Insurance Commission*, T-1765-89 as authority for the principle that the reconsideration power is a discretionary power.

[24] The General Division decided that, for the Commission to show it exercised its discretion judicially, it was only necessary that the Commission prove that it followed the statutory time limits to reconsider the claim.¹¹

[25] In support of that conclusion, the General Division referred to several cases from the Federal Court of Appeal concerning the Commission's broad power to reconsider decisions.¹²

[26] The General Division explained that the Commission had 36 months to reconsider a claim for benefits, make a decision, calculate the overpayment, if any, and notify a claimant of the overpayment.¹³

[27] The General Division concluded the Commission had exercised its discretion judicially as it had acted within the 36 months to reconsider the claim. It had paid the Claimant EI regular benefits starting June 20, 2020. The Commission started its review of those payments on March 4, 2021, as during a phone conversation on that date the Commission told the Claimant it was reviewing her availability. The Commission decided the Claimant wasn't available for work and notified her of the decision by letter dated March 11, 2021, and sent her a notice of debt on March 13, 2021.

[28] The General Division asked the Commission to consider, however, whether this was an appropriate use of its discretionary power, given the overpayment was a result of its incorrect advice.¹⁴

[29] The Claimant argues that the General Division made an error of law when it decided that the Commission only needed to show it had acted within the statutory time limit to show it exercised its discretion judicially to reconsider the claim. The Claimant says the time limit is not relevant to whether the Commission should have reconsidered a claim.

¹¹ See paragraph 20 of the General Division decision.

¹² The General Division refers to *Briere v Canada Employment and Immigration Commission*, A-637-86 and *Canada (Attorney General) v Laforest*, A-607-87.

¹³ See footnote 4 of the General Division decision.

¹⁴ See paragraphs 24 and 25 of the General Division decision.

[30] The Claimant points out that the Federal Court of Appeal has said that discretionary decisions made based on irrelevant considerations, or without regard for all the relevant considerations, must be set aside.¹⁵ So, the General Division should have considered whether the Commission exercised its discretion, having regard to those factors.

[31] The Commission agrees that the General Division made an error of law when it decided the Commission only needed to show it had acted within the statutory time limit to show it had properly exercised its discretion.

[32] I accept that the General Division made an error of law when it decided that the Commission only had to show it acted within the statutory time limits to show it exercised its discretion properly.

[33] The statutory timeframe for reconsideration sets a limit on **when** the Commission can reconsider a claim. The exercise of discretion as to **whether** the Commission will reconsider a claim requires consideration of different factors.

[34] The two cases from the Federal Court of Appeal relied on by the General Division, *Briere* and *Laforest*, say only that the Commission must make its decision, calculate the overpayment, and notify the claimant of the overpayment within the statutory time limits.¹⁶ In other words, they outline what steps must be taken within the statutory time limit. These cases do not say anything about how the Commission should exercise its discretion.

[35] The Federal Court of Appeal has said that to exercise discretion in a judicial manner, the Commission must not have acted in bad faith, or for an improper purpose or motive or taken into account an irrelevant factor or ignored a relevant factor or acted in a discriminatory manner.¹⁷

¹⁵ The Claimant refers to *Canada (Attorney General) v Dunham*, A-708-95.

¹⁶ See *Briere v Canada Employment and Immigration Commission*, A-637-86; See also *Canada (Attorney General) v Laforest*, A-607-87.

¹⁷ See *Canada (Attorney General) v Purcell*, 1995 CanLII 3558 (FCA).

[36] So, the General Division had to consider these factors when reviewing whether the Commission's exercise of discretion. By focusing instead on the statutory time limit, respectfully, the General Division made an error of law.

[37] Since the General Division made an error of law, I can intervene in the decision.¹⁸

Remedy

[38] To fix the General Division's error, I can refer the matter back to the General Division for reconsideration, or I can give the decision the General Division should have given.¹⁹

[39] Both parties ask that I give the decision the General Division should have given. As this issue of the Commission's exercise of discretion to reconsider the claim was raised before the General Division and both parties had a full and fair opportunity to provide evidence and submissions on this issue, I find this is an appropriate case for me to substitute my decision for the General Division.

[40] The Commission says it exercised its discretion judicially when it decided to reconsider the claim. The Commission asks that I dismiss the appeal.

[41] The Claimant says the Commission did not exercise its discretion judicially as it had no new facts when it reconsidered the claim and it overlooked relevant factors. The Claimant asks that I substitute my discretion to decide that the claim should not be reconsidered.

[42] First, I will consider what factors are relevant to the exercise of discretion to reconsider a claim.

– Factors relevant to the exercise of discretion

¹⁸ See section 58(1) of the DESD Act.

¹⁹ See section 59(1) of the DESD Act.

[43] The EI Act does not say specifically what factors are relevant to the exercise of discretion under section 52 of the EI Act.

[44] The Appeal Division had previously considered this issue in detail in *MS v Canada Employment Insurance Commission*.²⁰

[45] There, the Appeal Division decided that the exercise of discretion reflects the tension between claimants being able to rely on the finality of decisions and the Commission's interest in accuracy, meaning mistakes and misrepresentations should be corrected. The Appeal Division decided that factors that helped resolve the tension between the finality and accuracy of a decision were relevant factors in the exercise of the Commission's discretion.

[46] The Appeal Division decided the factors contained in the Commission's reconsideration policy found in its *Digest of Benefit Entitlement Principles* (Digest) were relevant to the Commission's exercise of discretion.²¹

[47] The reconsideration policy provides that the policy was developed 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:

- 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 state.
- the claimant ought to have known there was no entitlement to the benefits received.

[48] The Appeal Division decided in the *MS* case that the Commission should consider these relevant factors in the policy, but it wasn't necessarily bound to apply

²⁰ See *MS v Canada Employment Insurance Commission*, 2022 SST 933.

²¹ See section 17.3.3. of the *Digest of Benefit Entitlement Principles* (Digest).

them. As well, there may be additional relevant factors beyond those set out in the reconsideration policy that should also be considered.

[49] I agree with the reasoning in the *MS* case and adopt it in this case. The factors in the Commission's reconsideration policy are relevant but not binding. There may be additional relevant factors. Factors that are relevant are those that relate to the issues of finality and accuracy.

The Commission did not exercise its discretion judicially

[50] The Commission did not exercise its discretion judicially as it overlooked relevant factors.

[51] There is no dispute that the Commission acted within the statutory time limit to reconsider the claim. As the General Division found, the Commission exercised its discretion to reconsider the claim, made a decision, calculated the overpayment, and notified the Claimant within 36 months of the benefits being paid.

[52] The Claimant hasn't pointed to any bad faith or discriminatory behaviour or improper purpose on the part of the Commission in reconsidering the claim.

[53] Rather, the Claimant is focusing on two main points. The Claimant says that Commission did not act judicially because:

- The Commission cannot reconsider a decision of a discretionary nature such as a decision about availability in the absence of new facts or a mistake as to material facts.
- The Commission did not consider all the relevant factors.

[54] There was also no dispute before the General Division that the Claimant was not capable of or available for work between June 2020 and March 2021 and so wasn't entitled to the regular benefits she had been paid.

[55] The General Division accepted the Claimant's testimony as credible and found as a fact that the Commission agents gave the Claimant incorrect advice about how to claim benefits after her EI sickness benefits ended. The General Division found as a fact that the Claimant believed that she was following these Commission agents' advice when she started claiming EI regular benefits. The General Division found as a fact that the overpayment was a direct result of the Commission's incorrect advice.²²

[56] The General Division also found that by following the Commission agents' instructions about claiming EI regular benefits, the Claimant couldn't take appropriate steps to find other benefits that would have been better for her situation. The General Division pointed out that the Claimant might be past the time limits for applying for these kinds of benefits.²³

[57] The Commission has not challenged any of these factual findings and I see no reason to disturb them. So, I accept these findings of fact.

– The lack of new information does not necessarily preclude reconsideration

[58] It is not necessary that the Commission have new information or make a mistake as to a material fact to exercise its discretion to reconsider a claim.

[59] The Claimant argues that the Commission cannot reconsider a "judgment call" decision like availability with retroactive effect absent new information. She relies on several Umpire decisions which state that principle.²⁴

[60] She also submits that this principle has been codified in the Commission's reconsideration policy which says that decisions on availability are outside the structure of the EI Act. So, they cannot be retroactively reconsidered in the absence of false or misleading information.²⁵

²² See paragraphs 13 and 24 of the General Division decision.

²³ See paragraph 15 of the General Division decision.

²⁴ The Claimant refers to CUB 5664, CUB 37680A, CUB 8839 and CUB 4262.

²⁵ See section 17.3.3.2 of the Digest.

[61] The Digest defines “structure of the EI Act” to mean the basic elements required to set up a claim and pay benefits. It says this does not include a period of non-availability.²⁶

[62] The Claimant submits that the Commission can always retroactively disentitle a worker who has not been forthright. The Commission can also look at the facts and make a new decision disentitling a worker from benefits going forward. But what it cannot do, the Claimant maintains, is take a fresh look at the exact same facts and amend or rescind a previous decision, with retroactive effect, changing a claimant’s rights.

[63] The Claimant argues that in her case, there are no new facts that had been given to the Commission when it changed its mind and reconsidered the claim. She provided all the relevant facts right from the very beginning.

[64] The Claimant submits that although she reported that she was available on her biweekly reports, that was because that is what the Commission’s agents told her to report. She maintains it is not a false statement or a misrepresentation to report exactly what a Commission agent tells you to report after giving them all the necessary information. Rather, it would be a misrepresentation to not report what you are told to report by the Commission.

[65] The Claimant says the Commission has not suggested that it was mistaken as to some material fact. Instead, it is trying to revisit the conclusion it originally drew from the same facts that were accurately reported from the very beginning. The Claimant submits, therefore, the Commission has not acted judicially in reconsidering the claim.

[66] The Commission maintains that it has the authority to reconsider a claim under section 52, whether or not there are any new facts or whether there exists a mistake regarding some material fact.

²⁶ See section 17.3.3.2 of the Digest.

[67] I agree. I find that a claim, even one based on a “judgment call” type of decision can be reconsidered without new facts.

[68] I note that section 111 of the EI Act provides that a Commission may rescind or amend a decision given in any particular claim for benefits if new facts are presented or if it is satisfied that the decision was given without knowledge of, or was based on a mistake as to, some material fact.

[69] Since the reconsideration power in section 52 of the EI Act is in addition to the Commission’s authority under section 111, this tells me that section 52 is not limited to situations of new facts or mistakes of material facts. It is a much broader authority.

[70] I acknowledge the Umpire decisions but they are not binding on me. I find a blanket rule that a decision of a discretionary nature can never be reconsidered on the same facts to be inconsistent with the notion that the Commission must consider all relevant facts when deciding whether to exercise its discretion to reconsider a claim.

[71] I am not aware of any Federal Court or Federal Court of Appeal decisions that say that the absence of new facts or a mistake as to a material fact precludes reconsideration in a decision that does not relate to the structure of the EI Act.

[72] One of the cases the Claimant refers to, CUB 5664, was affirmed by the Federal Court of Appeal but not on that specific point.

[73] In that case the decision in issue was one about insurable hours, which is a type of decision that relates to the structure of the EI Act. The Umpire decided that the Commission could revisit that kind of decision, even if it had made a mistake, because benefits could not be paid contrary to the structure of the EI Act. However, the Umpire noted that the Commission did not have the power to act retroactively to the detriment of the claimant on a decision based on a judgment of a discretionary nature made by a competent officer, except when a new fact is presented, which the officer could not be faulted for not having known at the time the decision was made.²⁷

²⁷ See CUB 5664.

[74] The Federal Court of Appeal affirmed the Umpire's decision but said nothing about the Umpire's comment about discretionary decisions. Its finding was explicit to the decision being reconsidered, which was a decision about insurable hours.²⁸ So, this case is not binding insofar as it relates to the Umpire's comments about discretionary decisions.

[75] I do agree that the absence of new facts on a decision of a discretionary nature is certainly a relevant factor the Commission must consider. It goes to the issue of a claimant being able to rely on the finality of a decision. But there may be other facts that suggest a claim should be reconsidered, despite the absence of new facts. In other words, the details matter.

[76] Although not binding, I note that the Commission's reconsideration policy allows for reconsideration of decisions falling outside the structure of the EI Act as long as one of the factors for reconsideration in the policy is met. One of those factors is false statements.²⁹

[77] Even if I am incorrect about whether a claim involving a decision of a discretionary nature can be reconsidered without new facts, in this case the overpayment did not arise from the Commission changing its decision on the same facts. Rather, it arose from different information being provided in the claimant reports than what had been reported verbally to the Commission.

[78] The General Division accepted that the Claimant was told on several occasions, despite reporting she was incapable of work, that she would be converted to regular benefits. On June 19, 2020, the Commission decided to convert the claim to regular benefits.³⁰ So, the Commission mistakenly decided the Claimant was entitled to regular benefits even though the Commission had all the facts necessary to conclude she wasn't entitled to benefits.

²⁸ See *Brisebois v CEIC*, A-582-79.

²⁹ See section 17.3.3.2 of the Digest.

³⁰ GD16-4.

[79] However, the overpayment did not arise from that decision. The Claimant's ongoing entitlement was assessed having regard to her biweekly claimant reports which contained different information.

[80] Starting the week of June 21, 2020, and on an ongoing basis, the Claimant responded "yes" to the question, "are you ready, willing and capable of working each day, Monday through Friday, during each week of this report?"³¹

[81] This was different information than the Claimant had previously provided to the Commission that she was not capable of work.

[82] The Claimant argues these weren't false statements because they were made at the direction of the Commission. She also says that the answers require legal conclusions about availability and capability which the Commission had already decided.

[83] Respectfully, I cannot agree. Read as a whole the question is clear. It is not asking for legal conclusions. There is no evidence that the Claimant did not understand the question being asked. Her evidence was she reported in the manner she did, following the Commission's advice.

[84] There is no doubt the Claimant was following the Commission's advice when she reported as she did. But that doesn't mean the statements weren't false. The statements were not accurate and provided different information to the Commission than had previously been provided.

[85] A decision about capability and availability is not a one-time decision that is binding for the life of the benefit period. Claimants must prove they are capable and available for work for every working day in the benefit period.³²

[86] The Commission's initial decision to convert the Claimant to regular benefits only started the claim for regular benefits. But to receive benefits, the Claimant had to make

³¹ GD3-16.

³² See section 18(1)(a) of the EI Act.

biweekly claims. Ongoing entitlement is assessed based on the information provided in those claim reports. To make this point, at the end of each report is a confirmation statement that “I understand that this information will be used to determine my eligibility for benefits.”³³

[87] The ongoing payments were not tied to the initial mistaken decision to convert her claim to regular benefits. Rather, the payments continued because of the statements in the biweekly claim reports that the Claimant was ready, willing, and capable of working each day in the benefit period.

[88] This is not a situation, for example, where the Claimant accurately reported she was incapable of work on her biweekly claim reports, yet the Commission continued to pay regular benefits. That might be a circumstance where the claim should not be reconsidered given no new facts. But that is not the situation here. Here the biweekly reports contained different information than had been verbally communicated to the Commission.

[89] However, that is not to say that the initial incorrect decision is not relevant to whether the claim should be reconsidered. It is relevant, as are the false statements.

– The Commission overlooked relevant factors in the exercise of its discretion

[90] The Commission was specifically asked by the General Division to explain how it had exercised its discretion to reconsider the claim.

[91] The Commission provided submissions to the General Division explaining that it reconsidered the claim because, although the Claimant said that an agent at Service Canada informed her to declare available on her claimant’s reports, they still were false statements, as she was not available for work during the period in question.

[92] The Commission explained further that even if the Claimant felt that she was misinformed by the Commission that did not mean she could answer her reports untruthfully. She was still responsible to report accurately on her reports. The

³³ GD3-18.

Commission pointed out that if the Claimant knew that she was not capable of working then she should have reported that on her claimant reports. Due to the claimant's false statements, the Commission was required to correct the decision and establish the overpayment.³⁴

[93] The Claimant argues that submissions are not evidence, and the evidence shows that the only factor the Commission considered in reconsidering the claim was that she was not available for work.

[94] The Commission's notes of March 11, 2021, suggest that the decision to reconsider was based solely on the fact the Claimant was not capable and available for work.³⁵ However, the notes from the Commission's reconsideration agent also explain that that the Claimant's false statements, even though not made knowingly, were also a reason for reconsidering the claim.³⁶

[95] I think it more likely than not the factors that the Commission considered in exercising its discretion to reconsider the claim were that the Claimant was not available for work and that she had made false statements in her biweekly claimant reports.

[96] The Claimant maintains that the Commission overlooked relevant factors, including:

- The Claimant was given incorrect advice from the Commission when she was told to apply for regular EI benefits and to report she was available on her claimant reports.
- The Claimant had always been cooperative and honest with the Commission.
- The Commission's actions precluded the Claimant from taking appropriate steps to access other pandemic-related benefits.

³⁴ GD14-1.

³⁵ GD3-28.

³⁶ GD3-40

- The Commission's delay in addressing the situation has put the Claimant in a difficult financial situation and created a large debt that will cause her hardship to repay.
- The Commission's own policy set out in item 17.3.3 of the Digest states that a claim should not be reconsidered to create a debt " ... when the claimant was overpaid through no fault of their own."

[97] I agree with the Claimant that the Commission did overlook some relevant factors.

[98] The Commission did not consider the impact of the Commission's mistaken initial decision of June 19, 2020, converting the Claimant to regular benefits, despite her information that she was not capable of working. The Commission's reconsideration policy identifies this as a relevant factor for consideration.³⁷

[99] The Commission also did not consider that the overpayment arose through no fault of the Claimant, given she was directed to make false statements. The Commission's reconsideration policy identifies this as a relevant factor for consideration.³⁸

[100] The Commission also did not consider that, in reliance on the Commission's initial decision, that she did not pursue other possible pandemic-related benefits. This factor relates to the Claimant being able to rely on the finality of the decision. So, it is a relevant factor to consider.

[101] The Commission did not consider the delay. However, the delay is not relevant. The Commission acted within the statutory time period.

[102] The Commission did not consider the Claimant's financial hardship but that is not relevant. The legislation provides for a write-off procedure by the Commission where

³⁷ See section 17.3.2.2 of the Digest.

³⁸ See section 17.3.3 of the Digest.

financial hardship is a consideration.³⁹ This suggests that financial hardship is meant to be considered in the context of a write-off and not in the context of the Commission's exercise of discretion to reconsider a claim. Financial hardship does not go directly to either of the factors of finality or accuracy.

[103] The Commission did not consider the Claimant's honesty in dealing with the Commission but that is not in dispute. The Commission has not said the Claimant knowingly made false statements or was dishonest.

[104] Since the Commission failed to consider all relevant factors, it did not exercise its discretion judicially.

– The claim is to be reconsidered

[105] Since I have found that the Commission did not exercise its discretion judicially, I will decide whether discretion should be exercised to reconsider the claim. I have the authority to do so as I am giving the decision the General Division should have and the General Division has the authority to give the discretionary decision the Commission should have given.⁴⁰

[106] The Commission made a mistake about the Claimant's initial entitlement. It had all the facts it needed to decide the Claimant was not entitled to regular benefits, yet it decided on June 19, 2021, to convert her claim to regular benefits.

[107] The Commission's policy says when the Commission makes that kind of mistake, as long as the decision is not one contrary to the structure of the EI Act, the claim will be corrected currently but not retroactively.⁴¹

³⁹ See section 56(1)(f) of the *Employment Insurance Regulations* (EI Regulations).

⁴⁰ Section 59(1) of the DESD Act for the Appeal Division's authority. This approach was taken by the Appeal Division in *MS v Canada Employment Insurance Commission*, 2022 SST 933.

⁴¹ See section 17.3.2.2 of the Digest.

[108] The Claimant was not entitled to benefits but the Commission's decision that the Claimant was capable of and available for work was outside the structure of the EI Act, as the Commission defines that.⁴²

[109] The Claimant's reliance on the Commission's decision to convert her benefits to regular benefits meant she did not apply for other pandemic-related benefits she might have been entitled to.

[110] The Claimant cannot have known there was no entitlement to benefits, having been told by the Commission that she was entitled to regular benefits.

[111] All of those factors argue against exercising discretion to reconsider the claim. However, the false statements are also relevant. Given the false statements, there was nothing to flag the Commission that the payment of regular benefit was in error. Had the Claimant accurately declared the fact she was not capable of work, the Commission's initial error in converting the claim to regular benefits wouldn't have mattered. The claim would have been stopped. The Claimant would then have had the opportunity to pursue other pandemic-related benefits. So, the false statements were pivotal.

[112] The Commission's reconsideration policy provides that false statements are a reason to reconsider the claim. There were false statements, even though they were made innocently.

[113] I have considered whether the reconsideration policy should not be applied in this situation, given the fact the Claimant was directed to make these false statements by the Commission. But for that advice, the overpayment would not have arisen.

[114] However, I find I am bound by the direction from the Federal Court of Appeal that this sort of misinformation from the Commission cannot be relied on to relieve a claimant of an overpayment.⁴³

⁴² See section 17.3.3.2 of the Digest.

⁴³ See *Canada (Attorney General) v Buors*, 2002 FCA 372.

[115] In *Buors* the claimant had been enrolled in an employment benefits program. He had returned to work while in the program. The claimant had contacted the Commission for direction on how to complete his claimant reports. Following the Commission's advice, he had not declared his earnings. When the earnings were discovered, an overpayment was assessed. He appealed this decision. The matter went first to the Board of Referees and then the Umpire.

[116] The Umpire commented, "It is apparent that the claimant was very detailed in the manner in which he wanted the reporting cards explained to him, and he apparently filled them out diligently on the understanding he had from the Commission."

[117] The Umpire found the Commission had acted improperly in claiming an overpayment in that situation. The Umpire thought that was an abuse of process. In that regard, the Umpire said, "This abuse of power, through the instructions and assistance given to the claimant, resulted in a considerable liability for a person in his position in life."⁴⁴

[118] However, the Federal Court of Appeal overturned the Umpire Decision, finding that the claimant could not rely on the Commission's misinformation to avoid the overpayment.⁴⁵

[119] The Claimant says the *Buors* case is distinguishable from her situation because that case concerned a decision about the benefit rate, which rate is set by law. She says that is a decision that goes to the structure of the EI Act which is different than the availability decision in her case which is outside the structure of the EI Act.

[120] The Claimant points out that the *Buors* case relies on the *Granger* case which also involved a claimant's benefit rate. In that case, the Federal Court of Appeal said that "the applicant did not argue that the Commission had exercised its discretion

⁴⁴ See CUB 51187.

⁴⁵ See *Canada (Attorney General) v Buors*, 2002 FCA 372.

improperly, because here the law gives the Commission no discretion: it simply imposes on it a duty to calculate and pay the benefits in accordance with the law.”⁴⁶

[121] Respectfully, I must disagree. The *Buors* case is not about the benefit rate but about the allocation of unreported earnings. Such a decision is not a decision contrary to the structure of the EI Act, as defined by the Commission.⁴⁷

[122] I cannot ignore the direction from the *Buors* case. The facts are essentially similar to the Claimant’s situation. In both cases the overpayment arose due to misinformation about how to complete the claimant reports. So, the Commission’s misdirection to the Claimant about how to complete the claimant reports is not a reason to not apply the Commission’s reconsideration policy.

[123] Having regard to all the relevant factors, I find, therefore, the claim is to be reconsidered. This means the overpayment remains.

[124] I recognize the Claimant is going to be disappointed in this result. The Claimant can still ask the Commission to write off her debt.⁴⁸ She can also ask the Canada Revenue Agency to write off some or all her debt or enter into a payment plan, due to financial hardship.⁴⁹

[125] Although I have no authority to direct the Commission or the Canada Revenue Agency in this regard, I would ask that these agencies give consideration to any such request made by the Claimant, given the circumstances in which the overpayment arose and, as noted by the General Division, the financial hardship that will result from having to repay the debt.

⁴⁶ See *Granger v Canada Employment and Immigration Commission*, [1986] 3 FC 70 (FCA), aff’d [1989] 1 SCR 141.

⁴⁷ See section 17.3.3.2 of the Digest.

⁴⁸ See section 56 of the EI Regulations.

⁴⁹ The Canada Revenue Agency’s Debt Management Call Centre can be reached at 1-866-864-5823.

Conclusion

[126] The appeal is dismissed.

[127] The General Division made an error of law. I have substituted my decision for the General Division.

[128] The Commission did not exercise its discretion properly when it decided to reconsider the Claimant's claim for benefits paid from June 22, 2020.

[129] However, I reach the same conclusion as that of the Commission. The claim is to be reconsidered. This means the overpayment remains.

Charlotte McQuade
Member, Appeal Division