



Citation: *LM v Canada Employment Insurance Commission*, 2022 SST 1625

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

## Decision

**Appellant:** L. M.

**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** Canada Employment Insurance Commission reconsideration decision (421001) dated May 6, 2021 (issued by Service Canada)

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**Tribunal member:** Amanda Pezzutto

**Type of hearing:** Videoconference

**Hearing date:** May 16, 2022

**Hearing participant:** Appellant

**Decision date:** May 30, 2022

**File number:** GE-21-926

## Decision

[1] L. M. is the Claimant. The Canada Employment Insurance Commission (Commission) has made decisions about her entitlement to Employment Insurance (EI) benefits. Because of these decisions, the Commission is asking the Claimant to repay benefits. The Claimant disagrees with how the Commission made its decisions, so she is appealing to the Social Security Tribunal (Tribunal).

[2] I must dismiss the Claimant's appeal. The law gives the Commission very broad powers to review entitlement to EI benefits, even after it has already paid benefits. The Commission used its review power in a way that respects the time limits described in the law. Plus, the Claimant wasn't capable of working, so she isn't entitled to EI regular benefits.

[3] But I strongly suggest that the Commission review the circumstances and consider whether it can write off the Claimant's debt.

## Overview

[4] The Claimant stopped working because of an injury in February 2020. She collected 15 weeks of EI sickness benefits. Then, in June 2020, she contacted the Commission to ask for advice. She hadn't recovered and she couldn't return to work. The Claimant believed that she was following the advice of Commission agents when she started claiming EI regular benefits and reporting that she was capable of and available for work. She collected many weeks of EI regular benefits.

[5] Then, in March 2021, the Commission reviewed her entitlement to EI regular benefits. The Commission decided that she had never been capable of or available for work. So, the Commission asked the Claimant to repay all the EI regular benefits she had received.

[6] The Claimant agrees that she wasn't capable of working. But she says the Commission didn't act judiciously when it decided to retroactively review her entitlement to EI regular benefits. She says this is because the Commission didn't follow its own

reconsideration policy. She says she was following Commission agents' advice when she reported being capable of and available for work.

[7] The Commission says it had to retroactively review the Claimant's entitlement to EI regular benefits because the information on her biweekly claimant reports was false. It says she isn't entitled to any EI regular benefits because she wasn't capable of working. So, the Commission says she must repay benefits.

## **Issues**

[8] First, I must decide if the Commission had the authority to retroactively review the Claimant's entitlement to EI benefits, even after it had already paid benefits.

[9] If I decide that the law gives the Commission this authority, then I must decide if the Claimant has proven that she was capable of working and entitled to EI regular benefits.

## **Analysis**

### **The Claimant is credible**

[10] Before I make any decisions about the issues under appeal, I want to explain why I think the Claimant is credible.

[11] The Claimant has always given the same explanation. She started a benefit period shortly before the Commission introduced new temporary income support measures during the early days of the COVID pandemic. She collected 15 weeks of EI sickness benefits. Then, in June 2020, she contacted the Commission for advice. The Claimant has always said that she clearly told the Commission agents that she still hadn't recovered and she still couldn't return to work. She says that the Commission agents she spoke to told her to claim regular benefits and 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.

[12] I think it is completely plausible that Commission agents gave the Claimant misleading advice. In June 2020, the government had just recently introduced many different temporary measures to support people who were out of work. The terms and conditions of these programs were all different, and I think it is likely that it was difficult to fully train all agents on the nuances of the different income support programs. I have heard from several other appellants in different kinds of appeals who have also said they received contradictory, confusing, or incorrect advice from Commission agents during the spring and summer of 2020.

[13] So, I believe the Claimant. I find her credible. I believe that Commission agents gave her incorrect advice about how to claim benefits after her EI sickness benefits ended. I believe that she was following these Commission agents' advice when she started claiming EI regular benefits.

[14] Even though I find the Claimant credible, it doesn't mean that I can use this to allow her appeal. This is because misinformation from a Commission agent doesn't override the law.<sup>1</sup> You can only get EI benefits if the law allows for it.

[15] But I think the Commission should carefully consider whether it can write off the Claimant's overpayment. By following 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. And now, she might be past the time limits for applying for these kinds of benefits. Misinformation from the Commission has put the Claimant in a difficult financial situation and created a large debt that will cause her hardship to repay.

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<sup>1</sup> In *Canada (Attorney General) v. Shaw*, 2002 FCA 325, the Federal Court of Appeal explains that misinformation from the Commission does not give a claimant relief from the provisions of the *Employment Insurance Act*. Similarly, in *Granger v. Canada Employment Insurance Commission*, A-684-85, the Federal Court of Appeal explains that Commission agents do not have the power to amend the law. An individual Commission agent cannot promise to pay benefits in a way that is contrary to the law.

## **Does the Commission have the power to retroactively review the Claimant's entitlement to EI benefits?**

[16] I find that the law gives the Commission the power to retroactively review the Claimant's entitlement. I also find that the Commission used its review power judiciously because it respected the time limits described in the law.

[17] Most of the Claimant's arguments are about this issue. She says that the law gives the Commission the discretion to retroactively review someone's entitlement to EI benefits. She says that this means that the Commission didn't have to review her entitlement to EI benefits. She says the Commission's reconsideration policy says it won't retroactively review decisions about availability if the Commission made an error. She says that Commission agents made mistakes because they gave her incorrect advice. So, she says this means that the Commission hasn't followed its own reconsideration policy because it didn't pay benefits.

[18] The Commission disagrees. The Commission says it used section 52 of the *Employment Insurance Act* (EI Act) to review the Claimant's entitlement to EI benefits. The Commission says it must review the Claimant's entitlement to EI benefits if there is a false statement, even if it was an honest mistake. The Commission says there are false statements because the Claimant reported being capable of work when she hadn't recovered yet.

[19] I disagree with the Commission on one point. Section 52 of the EI Act gives the Commission the discretionary authority to retroactively review entitlement. Nothing in the law says that the Commission must retroactively review anyone's entitlement to EI benefits. It is always a discretionary decision.<sup>2</sup>

[20] But, I find that the Commission used its discretion judiciously. This is because I can't force the Commission to follow its reconsideration policy, because it is a policy, not

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<sup>2</sup> Section 52 of the *Employment Insurance Act* says the Commission "may" reconsider a claim for benefits. In other parts of the law, the word "may" signals a discretionary power. For instance, section 38 of the *Employment Insurance Act* says the Commission "may" impose a penalty. Also see *Portelance v Canada Employment Insurance Commission*, T-1765-89 on the discretionary power to reconsider or review a claim for benefits.

the law. I can only look at whether the Commission followed the law. To use its discretion judiciously in this situation, I find that the Commission only has to show that it followed the time limits described in the law.

[21] Section 52 of the EI Act gives the Commission very broad powers to revisit any of its decisions about EI benefits.<sup>3</sup> To show that it used this power judiciously, the Commission has to follow the time limits described in the law when it retroactively reviews any of its decisions. The Commission generally has up to three years to use the power in section 52 of the EI Act to revisit its decisions.<sup>4</sup> Then, if the Commission paid you EI benefits you weren't really entitled to receive, the Commission can ask you to repay those EI benefits.<sup>5</sup>

[22] In this case, the Commission paid the Claimant EI regular benefits starting June 20, 2020. The Commission started its review of these payments on March 4, 2021. During a phone conversation on March 4, 2021, the Commission told the Claimant that it was reviewing her availability for work. The Commission decided that the Claimant wasn't available for work and notified her of its decision by letter dated March 11, 2021. The Commission also sent a notice of debt to the Claimant on March 13, 2021.

[23] So, the evidence shows me that the Commission used its power to retroactively review the Claimant's entitlement to EI benefits in a way that respects the law. The law gives the Commission the authority to make a retroactive review, and the Commission

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<sup>3</sup> See *Briere v Canada Employment and Immigration Commission*, A-637-86 on the broad power given by section 52 of the Employment Insurance Act:

This provision authorizes it to amend a posteriori within a period of three or six years, as the case may be, a whole series of claims for benefit and to make a fresh decision on its own initiative as to entitlement to benefit, and in appropriate cases to withdraw its earlier approval and require claimants to repay what had been validly paid pursuant to such approval.

<sup>4</sup> Subsection 52(1) of the *Employment Insurance Act*. The law says the Commission has 36 months. See also *Canada (Attorney General) v Laforest*, A-607-87. In this decision, the Federal Court of Appeal held that the Commission has 36 months to reconsider a claim for benefits, make a decision, calculate the overpayment, if any, and notify the claimant of the overpayment. In some situations, the Commission has up to 72 months to review its decisions, but since the Commission completed its review within 36 months of its original decision, I don't have to decide if the circumstances allow the Commission to extend the review period to 72 months.

<sup>5</sup> Subsection 52(3) of the *Employment Insurance Act*.

followed the guidelines and time limits described in the law when it did its retroactive review.

[24] I have already explained why I think the Claimant is credible. I find that she got incorrect advice from Commission agents about claiming EI regular benefits. The overpayment is a direct result of this incorrect advice. I find that she has always been honest and cooperative with the Commission. I think this means that the Commission should carefully consider the impact of its decision to create a debt for the Claimant.

[25] The power to retroactively review entitlement to EI benefits is a discretionary power. This means that the Commission didn't have to create an overpayment in this case. Instead, the Commission had the discretion to choose whether or not to review the Claimant's entitlement and create an overpayment. So, I ask that the Commission consider whether this was an appropriate use of its discretionary power.

[26] Alternatively, the law gives the Commission broad powers to write-off an overpayment in certain situations, including when it would cause undue hardship.<sup>6</sup> This part of the law doesn't have time limits. So, I ask that the Commission consider whether it may write off the Claimant's debt. If the Commission refuses to write off the Claimant's debt, she can ask the Federal Court to review this decision.

### **Was the Claimant capable of work?**

[27] I find that the Claimant hasn't proven that she was capable of work, starting June 20, 2020. She didn't become capable of work until March 2021.

[28] To get EI regular benefits, you have to prove that you are capable of and available for work, but unable to find a suitable job.<sup>7</sup> To show that you are capable of working, you have to show that you can't work in your usual job, nor any other suitable jobs.<sup>8</sup>

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<sup>6</sup> Subsection 56(1) of the *Employment Insurance Regulations*, particularly paragraph (f).

<sup>7</sup> Paragraph 18(1)(a) of the *Employment Insurance Act*.

<sup>8</sup> *Canada (Attorney General) v Caughlin*, A-1168-84.

[29] The Claimant isn't making arguments on this point. She has always said she wasn't capable of working in June 2020. She told the Commission that she still wasn't capable of full-time work during a conversation on March 11, 2021. At the hearing, she agreed that she wasn't capable of working from June 2020 until her recovery. She said she recovered some time in February or March 2021.

[30] There isn't any dispute on this point. Both the Commission and the Claimant agree that the Claimant wasn't capable of working between June 2020 and March 2021. I don't have enough information to determine her exact recovery date, but I think it was likely after March 11, 2021, because of the conversation the Claimant had with the Commission on this date.

[31] So, I find that the Claimant wasn't capable of working. This is because she hasn't proven that she was capable of working in her usual job, nor any other kind of job. So, she hasn't proven that she was entitled to EI regular benefits starting June 20, 2020.

## **Conclusion**

[32] I must dismiss the Claimant's appeal. The Commission had the authority to review her entitlement to EI benefits, even after it had already paid benefits. She hasn't proven that she was entitled to EI regular benefits starting June 20, 2020 because she wasn't capable of working.

Amanda Pezzutto  
Member, General Division – Employment Insurance Section