Citation: *Canada Employment Insurance Commission v ET*, 2023 SST 196

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	Canada Employment Insurance Commission
Representative:	Rebekah Ferriss
Respondent:	E. T.
Representative:	K. L.

Decision under appeal:	General Division decision dated July 5, 2022 (GE-22-1330)

Tribunal member:	Charlotte McQuade
Type of hearing:	Teleconference
Hearing date:	November 7, 2022
Hearing participants:	Appellant's representative Respondent Respondent's representative
Decision date:	February 24, 2023
File number:	AD-22-474

Decision

[1] The appeal is allowed in part.

[2] The General Division made an error of law.

[3] The Commission did not exercise its discretion judicially in reconsidering the claim for the period from September 28, 2020, to December 15, 2020. The claim for this period should not be reconsidered. So, the initial decision communicated to the Claimant on October 27, 2020, remains in place.[1]

[4] The Commission exercised its discretion judicially in reconsidering the claim for the period from December 16, 2020, to September 4, 2021.

[5] I am returning the appeal to the General Division to decide whether the Claimant was available for work from December 16, 2020, to September 4, 2021.

Overview

[6] E. T. is the Claimant. She reported to the Canada Employment Insurance Commission (Commission) that she was attending school full-time. On October 27, 2020, the Commission confirmed to the Claimant that she was entitled to Employment Insurance (EI) regular benefits from September 9, 2020, to December 15, 2020. She continued to receive benefits from after December 16, 2020, to the end of her benefit period.

[7] On January 19, 2022, the Commission decided that the Claimant was not entitled to benefits from September 28, 2020, because she had not proven her availability for work while attending non-referred training.[2]

[8] The Claimant appealed that decision to the Tribunal's General Division. The General Division decided that the Commission had not exercised its discretion properly

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[1] GD3-30.
[2] GD3-263.

in retroactively reviewing the claim. The General Division decided that since nothing relevant had changed since the Commission initially approved the Claimant's entitlement, her entitlement shouldn't be reviewed. This meant she was not disentitled to benefits from September 28, 2020, to September 4, 2021.

[9] The Commission is now appealing the General Division decision. The Commission says that the General Division made errors of law and important errors of fact when it made its decision.

[10] I have decided that the General Division made an error of law by not considering the relevance of section 153.161 of the EI Act to the Commission's exercise of discretion. I have also decided that the Commission did not exercise its discretion judicially to reconsider the claim for the period from September 28, 2020, to December 15, 2020, so the claim is not to be reconsidered for that period.

[11] However, I have decided the Commission did exercise its discretion judicially to reconsider the claim for the period from December 16, 2020, to September 4, 2021, so I can't interfere in that decision. I am returning the question of the Claimant's availability from December 16, 2020, to September 4, 2021, to the General Division for reconsideration.

I will not accept the Commission's affidavit

[12] The Commission asked to submit new evidence. The new evidence is an affidavit from the Director of the Employment Insurance Policy Directorate (Director) within the Skills and Employment Branch of Employment and Social Development Canada.[3]

[13] The affidavit attaches a copy of Interim Order No. 10. [4]Interim Order No. 10 added sections 153.161(1) and (2) to the *Employment Insurance Act* (EI Act). An Explanatory Note follows the Order, although it is not part of the Order itself.[5]

[3] AD6-6 to AD6-10.
[4] AD6-12.
[5] AD6-20.

[14] The Appeal Division generally does not consider new evidence because the Appeal Division isn't rehearing the case. Instead, the Appeal Division is deciding whether the General Division made certain errors, and if so, how to fix those errors. In doing so, the Appeal Division looks at the evidence that the General Division had when it made its decision.

[15] There are a few limited exceptions to this rule. Generally, new evidence will only be accepted if it provides general background information, highlights findings that the Tribunal made without supporting evidence, or reveals ways in which the Tribunal acted unfairly.[6]

[16] The Commission submits that, although the affidavit is new evidence, it meets an exception to allow the Appeal Division to accept new evidence. The Commission argues the affidavit contains no specifics of the Claimant's situation or the appeal. Rather, it provides important background information pertaining to the context of the legislative amendments under appeal, specifically section 153.161.

[17] The Commission points out that the Tribunal has accepted this affidavit as background information in other cases.[7]

[18] The Claimant objects to the introduction of this new evidence. She says the Commission could have provided this information to the General Division and it is not background information only, as it contains the personal opinion of the Director as to the meaning of the legislation and the intention behind various measures. She says admitting the affidavit would create a reasonable apprehension of bias.

[19] I will not accept the affidavit. I find the affidavit does not meet the exceptions that would allow me to accept it. I recognize that the affidavit does not refer to the specific facts under appeal, but it does contain the personal opinion of the Director as to the intent of the legislature in enacting section 153.161 of the EI Act. For example, the Director explains, "The intent of Section 153.161 was to maintain the policy intent of

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[6] See *Sharma v Canada (Attorney General),* 2018 FCA 48; See also *Sibbald v Canada (Attorney General)*, 2022 FCA 157.
[7] See, for example, *Canada Employment Insurance Commission v R.J.,* 2022 SST 212 (CanLII).

subsection 18(1)(a) of the EI Act as it pertains to availability while attending a program of instruction or non-referred training, while simultaneously providing a legal basis for the Commission to shift its operationalization of that policy to an after-the-fact determination of availability and entitlement to benefits."[8]

[20] The interpretation of section 153.161 of the EI Act is at issue in this appeal.[9] The affidavit is evidence supporting the Commission's position as to the interpretation of section 153.161. So, it is not background information only.

[21] However, I will consider Interim Order No. 10 and the Explanatory Note in this appeal. Interim Order No. 10 is not new evidence but legislation. The Explanatory Note is not part of the Interim Order itself but provides background information only concerning the provisions in the Interim Order.

Issues

[22] The issues in this appeal are:

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

b) Did the General Division fail to have regard to the evidence or fail to consider it in a meaningful way when it determined the biweekly claimant reports were decisions on entitlement?

c) Did the General Division make an error of law or base its decision on an important error fact when it decided the Commission had not exercised its discretion properly under section 153.161 of the EI Act?

d) Did the General Division make an error of law when it decided the Claimant was available for work from September 28, 2020, to September 4, 2021?

e) If the General Division made any of these errors, what is the remedy?

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[8] See paragraph 14 of the affidavit at AD6-9.
[9] See paragraph 14 of the affidavit at AD6-9.

Analysis

[23] The Commission argues that the General Division made errors of law and based its decision on important errors of fact.

[24] If established, any of these types of errors would allow me to intervene in the General Division decision.[10]

The General Division did not misinterpret section 153.161 of the EI Act

[25] The Commission submits that the General Division misinterpreted section 153.161 of the EI Act.

– The General Division decision

[26] The Claimant was attending university on a full-time basis. On January 19, 2022, the Commission had retroactively disentitled the Claimant from benefits from September 28, 2020, to September 4, 2021, for reason she hadn't proven her availability for work.

[27] The Claimant appealed that decision to the Tribunal's General Division.

[28] The Claimant argued before the General Division that on October 27, 2020, the Commission approved her availability for the period from September 9, 2020, to December 15, 2020. She said nothing had changed. She was not any less available. So, she said it was wrong of the Commission to go back and change its mind with no new facts.

[29] The Commission argued that the Claimant hadn't proven her availability for work as her schooling was a personal restriction that unduly limited her chances of going back to work. The Commission submitted that it had made only one initial decision on October 27, 2020, for the period from September 9, 2020, to December 15, 2020, which it reconsidered on January 19, 2022.

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

[30] The Commission said it delayed making an initial entitlement decision about the Claimant's entitlement from December 16, 2020, to September 4, 2021, until January 19, 2022, relying on section 153.161 of the EI Act. That decision was the Claimant hadn't proven her availability for work.

[31] The General Division did not accept that the Commission had made a delayed entitlement decision for the period from December 16, 2020, to September 4, 2021. The General Division decided that the Commission had made initial decisions approving the Claimant's entitlement from September 28, 2020, to September 4, 2021. The General Division said these initial decisions included the decision of October 27, 2020, and the automatic approvals that continued after December 15, 2020.[11]

[32] The General Division decided that the Commission had later reviewed the Claimant's entitlement under section 153.161 of the EI Act, which the General Division said the Commission could do, even after benefits were paid. However, the General Division said the Commission had to exercise its discretion judicially when it made a decision to review entitlement.[12]

[33] The General Division decided that the Commission had not exercised its discretion properly. The General Division said this was because the Commission had considered an irrelevant fact and not considered relevant facts.

[34] The General Division said the Commission's focus on the Claimant's statement that she was spending 30 hours of week on her schooling was irrelevant as it did not pertain to the period under review. The General Division noted that the Commission had failed to consider the periods the Claimant was not in school as well as the fact that from May 30, 2021, she had reported only part-time schooling. Further, the General Division pointed out that the Commission also failed to consider the Commission had already made a decision that the Claimant was entitled to benefits from September 9, 2020, to December 15, 2020.

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[11] See paragraph 33 of the General Division decision.
[12] The General Division refers to the case of *Attorney General of Canada v Purcell*, A-694-94 for these factors.

[35] Since the General Division decided the Commission had not exercised its discretion judicially, it substituted its discretion for the Commission to decide the claim should not be retroactively reviewed. The General Division said this was because nothing had changed in the Claimant's situation to trigger a review of the initial decisions finding her available and allowing benefits.

[36] So, the General Division concluded that the initial decisions remained in effect and the Claimant was not disentitled to benefits from September 28, 2020, to September 4, 2021.[13]

[37] The General Division did not consider, therefore, whether the Claimant met the legal test for availability in the law.[14]

– The Commission's position

[38] The Commission submits that the General Division erred in law when it interpreted section 153.161 of the EI Act to operate like a reconsideration power similar to that found in section 52 of the EI Act. The Commission submits the decisions made under section 153.161 of the EI Act are initial entitlement decisions.

[39] The Commission disagrees that, before it exercised its authority under section 153.161, it made any initial entitlement decisions other than the October 27, 2020, decision relating to the period from September 9, 2020, to December 15, 2020.

[40] The Commission says it reconsidered the October 27, 2020, initial decision on January 19, 2022, under section 52 of the EI Act when the Claimant provided new information that brought her availability into question.[15]

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[13] See paragraphs 68 to 71 of the General Division decision.
[14] That test is set out in *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96.
[15] See section 52 of the *Employment Insurance Act* (EI Act), which says that the Commission may reconsider a claim for benefits within 36 months after the benefits have been paid, or payable. See GD3-263 for the January 19, 2022, decision.

[41] The Commission says that the decision it made on January 19, 2022, about the Claimant's entitlement for the period from December 16, 2020, to September 4, 2021, was an initial entitlement decision made under section 153.161 of the EI Act.[16]

[42] The Commission says the correct interpretation of section 153.161 is that decisions made under this provision are initial entitlement decisions.

[43] The Commission argues that the General Division's interpretation ignores the plain meaning of section 153.161 of the EI Act. The plain meaning of section 153.161, the Commission submits, is that it operates similarly to section 18 of the EI Act as both provisions pertain to availability under the EI Act. However, under section 18, an entitlement decision is usually made before benefits are paid. Under section 153.161, the decision on entitlement is made after benefits have been paid.

[44] The Commission says section 153.161(2) makes clear this is how the provision is to operate. It says the Commission can verify entitlement even after benefits are paid.

[45] In other words, the Commission says, section 153.161 operates to allow the Commission to issue benefits to qualified individuals and then later verify that those who received benefits can prove entitlement. Payment is based initially on a claimant meeting the qualification requirements.

[46] The Commission argues that this interpretation is consistent with the context of the EI Act amendments that were made in response to the economic need of Canadians who had temporarily lost work. The amendments allowed a modified operational approach to the assessment of availability for claimants who declared non-referred training.[17]

[47] The Commission submits further that section 153.161 interacts as part of a whole with the EI statute. Section 153.161 did not eliminate the requirement that claimants must qualify for benefits or that claimants must prove their entitlement for benefits. The

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[16] GD3-263.
[17] The Commission says this modified operational approach was enacted under Interim Order No. 10, which amended Part VIII.5 of the EI Act and was part of the *COVID-19 Emergency Response Act.*

Commission submits that the General Division failed to have regard for the context of these amendments that specifically allowed an entitlement decision to be rendered after benefit payments commenced.

[48] The Commission says, as well, the General Division's decision is inconsistent with prior decisions made by both the Tribunal's Appeal Division and Tribunal's General Division where section 153.161 of the EI Act was interpreted to mean the Commission could review the Claimant's availability for work, even after benefits have been paid.[18]

– The Claimant's position

[49] The Claimant argues that General Division correctly interpreted section 153.161 of the EI Act. The Claimant submits that this provision does not permit the Commission to delay an entitlement decision.

[50] The Claimant argues that the Commission is trying to insert words into section. 153.161 that are simply not there. She says that section 153.161 of the EI Act contains no language that allows the Commission to forego or delay assessing benefit entitlement to some unspecified point in the future.

[51] The Claimant points out that the term used in section 153.161 is "verify" which she argues means a power to confirm the veracity of the information underpinning the previous decision to pay benefits. The term "verify" does not describe making a new, initial decision.

[52] Further, the Claimant maintains, the interpretation of section 153.161(2) advanced by the Commission would mean that in some cases the Commission would never make any decision respecting benefit entitlement since the power to verify in section 153.161(2) is discretionary. In other words, if the Commission does not decide

[18] The Commission refers to *Canada Employment Insurance Commission v EN*, 2022 SST 662 and *GVP v Canada Employment Insurance Commission*, GE-22-14, dated July 25, 2022 (unreported) at AD1-61, as well as *Canada Employment Insurance Commission v SL*, 2022 SST 556; See also *Canada Employment Insurance Commission v KT* dated October 7, 2022 (unreported) at AD 6-25.

to verify the claim under section 153.161(2), then no decision on entitlement would ever be made.

[53] The Claimant argues that there is nothing in the context surrounding section 153.161 that supports the Commission's interpretation.

[54] She says that the Commission may be relying on claimant self-reports to make payment, and that is why the legislature confirmed the Commission's power to "verify." In other words, the Commission can decide to pay benefits based solely and entirely on the information the claimant provides at the time. She argues that section 153.161(2) then allows the Commission to later verify the claimant's self-report and take appropriate action if the verification process reveals that the claimant has not been accurate and forthcoming. But that doesn't mean the section should be construed as somehow delaying the initial decision.

– Section 153.161 does not permit a delayed entitlement decision

[55] I find the General Division did not misinterpret section 153.161 of the EI Act. This section does not permit a delayed entitlement decision.

[56] Section 153.161(1) of the EI Act provides as follows:

> 153.161(1) For the purposes of applying paragraph 18(1)(a), a claimant who attends a course, program of instruction or training to which the claimant is not referred under paragraphs 25(1)(a) or (b) is not entitled to be paid benefits for any working day in a benefit period for which the claimant is unable to prove that on that day they were capable of and available for work.
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> 153.161(2) The Commission may, at any point after benefits are paid to a claimant, verify that the claimant referred to in subsection (1) is entitled to those benefits by requiring proof that they were capable of and available for work on any working day of their benefit period.

[57] Section 52 of the EI Act sets out the Commission's reconsideration powers. It says that the Commission may reconsider a claim for benefits within 36 months of when

benefits have been paid or would have been payable. This can be extended to 72 months if the Commission believes there has been a false or misleading statement made in relation to a claim.

[58] Section 153.161 was implemented on September 27, 2020, as part of Interim Order No. 10.[19] It was in force until September 25, 2021. As explained in the Explanatory Note to Interim Order No. 10, Interim Order No. 10 was made for the purpose of mitigating the economic effects of Covid-19. The Explanatory Note also provided that section 153.161 allowed a modified operational approach to the assessment of availability for claimants who were not referred to a course of instruction per section 25 of the EI Act.[20]

[59] The text of section 153.161(2) says the Commission may, at any point after benefits are paid to a claimant, verify that the claimant is entitled to those benefits by requiring proof that they were capable of and available for work on any working day of their benefit period.

[60] The text is clear that verification of entitlement can happen even after benefits have been paid. However, there is nothing in the text of section 153.161 which suggests that Commission can delay or forego making an initial decision. It speaks to verifying "entitlement." This implies that a previous entitlement decision has already been made.

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

[62] The Commission says that payment was based on "qualification" for benefits and not "entitlement." The qualifying requirements to establish a claim are set out in

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[19] See Interim Order No. 10 Amending the *Employment Insurance Act* at AD6-12.
[20] See Explanatory Note to Interim Order No. 10 at AD6-20.

section 7 of the EI Act. The basic requirements are having an interruption of earnings and the required number of insurable hours.

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

[64] I have also considered section 153.161 in the context of section 52 of the EI Act. As above, section 52(1) provides the Commission with a discretion to reconsider a claim for benefits within 36 months after benefits have been paid or payable. Section 52(2) says that if the Commission decides that a person has received money by way of benefits for which the person was not qualified, or to which the person is not entitled, the Commission must calculate the amount of the money and notify the claimant of its decision.

[65] If section 153.161 was interpreted to allow the Commission to make a delayed initial entitlement decision after seeking verification of a claimant's availability and that decision was the claimant was not entitled to benefits, there does not appear to be a corresponding statutory mechanism, to allow the Commission to calculate an overpayment and notify the claimant of the overpayment.

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

[67] Considering the text of section 153.161 of the EI Act and having regard to the context of section 52 of the EI Act, I find that section 153.161 allows the Commission to make an initial entitlement decision based on the statements made by a Claimant in the

application for benefits and their claimant reports. However, the Commission can postpone its verification of a claimant's entitlement to a later date.

[68] This interpretation is consistent with a modified operational approach. Due to the extraordinary circumstances of the pandemic, the legislature recognized it was not possible for the Commission to verify entitlement at the time of application and so permitted a delayed verification. But that does not mean that an initial decision was not made by the Commission, based on the limited information provided in the application for benefits and claimant reports.

[69] The Commission refers to C*anada Employment Insurance Commission v EN*, and *GVP v Canada Employment Insurance Commission*, as well *as Canada Employment Insurance Commission v SL*, and *Canada Employment Insurance Commission v KT* in support of its position.

[70] I would note that these issues were not argued in the *EN* case. That case involved a Commission appeal about a claimant's availability for work. In the *SL* case, the Appeal Division decided the Commission could consider and reconsider the Claimant's availability under either section 52 or section 153.161 of the EI Act. However, no specific finding was made as to what provision the reconsideration had occurred under. Similarly in the *KT* case no decision was made as to what provision was being relied on to retroactively review the claim.

[71] With respect to *GVP*, I am not bound by decisions made by the General Division. I do note that in *GVP*, the Commission's proposed interpretation was not considered in light of the discretionary nature of section 153.161 and the implication that the Commission's interpretation could mean in some cases no entitlement decision would be made. So, I don't find it persuasive.

[72] The Appeal Division has recently considered section 153.161 in *SF v Canada Employment Insurance Commission*.[21] There, the Appeal Division decided that section 153.161 should not be interpreted to mean that the Commission could split its

[21] See *SF v Canada Employment Insurance Commission*, 2022 SST 1095.

decision-making responsibility into two parts and indefinitely postpone making a decision about the Claimant's entitlement to benefits.

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

[74] However, I do agree, as was found in the *SF* case, that section 153.161 is still relevant to the question of the overpayment. Together, section 52 and section 153.161 give the Commission the power to retroactively verify a claimant's entitlement and to assess an overpayment, if appropriate.

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

[76] So, the General Division did not make an error of law when it decided that section 153.161 did not allow the Commission to make a delayed entitlement decision.

The General Division did not make an error of law or fact or fail to meaningfully analyze the evidence when it decided that the automatic approvals were initial decisions.

[77] The General Division decided that all of the instances of automatic approvals of the Claimant's training were decisions made by the Commission in relation to the Claimant's claim.[22]

[22] See paragraph 26 of the General Division decision.

[78] The General Division addressed the Commission's argument that the automatic approval of training was not a decision because it was automated. The General Division found that the Commission made a decision when they decided, as it was their choice to do so or not, to automatically allow all training. This reflected a conscious decision made by the Commission in light of the pandemic.

[79] The General Division also noted that it is the Commission's system, and they were in charge of it so the change to automatically allow training was a conscious decision made by the Commission in light of the pandemic.

[80] The Commission submits the General Division made an error of law when it decided the biweekly claimant reports were initial decisions. The Commission argues the General Division conflated qualification and entitlement in reaching that conclusion. It failed to have regard to the EI Act as a whole and the legal meaning of "qualified" in the legislation.

[81] The Commission submits that the only entitlement decision it made was on October 27, 2020, concerning the Claimant's training period from September 28, 2020, to December 7, 2020. The Commission says no other decision was made about the Claimant's entitlement until January 19, 2022, which related to the period from December 16, 2020, to September 4, 2021.

[82] The Commission also argues that the General Division did not have regard for the evidence and failed to consider it in a meaningful way when it determined the internet reporting service statements which said training was allowed or permitted to be payable represented a decision on entitlement.

[83] The Commission says the internet reporting service did not inform the Claimant her training was approved or that she was entitled to receive EI benefits. Rather, it instructed the Claimant that the training period was allowed, but proof of her availability for work may later be requested and it may affect her entitlement.[23]

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[23] GD3-101.

[84] The Commission maintains that the General Division failed to consider, as a result of the amendments to the EI Act, that these words meant an entitlement decision had not yet been made.

[85] The Claimant argues that the General Division found as a fact that initial decisions were made to approve the Claimant's training. It found: [24]

> "So, this means that all of the Claimant's benefits from September 28, 2020, to September 4, 2021, had an initial decision made by the Commission to allow the training and pay the Claimant benefits…."

[86] The Claimant submits that the General Division's conclusion was supported by the evidence and should not be disturbed.

[87] The Claimant submits that the claimant reports of February 7, 2021, and May 20, 2021, were initial decisions as they stated that Claimant's training was allowed in her claimant reports.[25]

[88] I have already addressed above that the General Division did not make an error of law when it decided that section 153.161 of the EI Act did not permit the Commission to delay its entitlement decisions.

[89] The Appeal Division can intervene only in certain kinds of errors of fact. The law says I can intervene only if the General Division based its decision on an erroneous finding of fact that it made perversely, capriciously, or without regard for the material before it.[26]

[90] A perverse or capricious finding of fact is one where the finding squarely contradicts or is unsupported by the evidence.[27]

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[24] See paragraph 33 of the General Division decision.
[25] GD3-101 and GD3-169.
[26] See section 58(1)(c) of the DESD Act.
[27] See *Garvey v Canada (Attorney General),* 2018 FCA 118; See also *Walls v Canada (Attorney General)*, 2022 FCA 47 (CanLII).

[91] Factual findings being made without regard to the evidence would include circumstances where there was no evidence to rationally support a finding or where the decision maker failed to reasonably account at all for critical evidence that ran counter to its findings.[28]

[92] I can assume that the General Division considered all the evidence, even if it didn't refer to every piece of it. However, the General Division must address important pieces of evidence, especially evidence that is counter to its findings.[29]

[93] The biweekly reports state, "I declare that the answers provided to the questions on the Employment Insurance online report are true to the best of my knowledge. I understand this information will be used to determine my eligibility for employment insurance benefits. I understand the information I have provided is subject to verification and that giving false information for myself or someone other than myself constitutes fraud. I also understand there are penalties for knowingly making false statements."[30]

[94] Certain of the biweekly reports also said that "the training period was allowed, but proof of her availability for work may later be requested and it may affect her entitlement." [31]

[95] The General Division's finding of fact that initial decisions were made after the biweekly claimant reports were filed was supported by the evidence. A few of the reports confirmed that training was allowed. That doesn't mean that the entitlement was verified. It just means a decision was made the Claimant was entitled to ongoing benefits based on the limited information in those reports.

[96] I would point out that the language in the biweekly reports was significantly changed as of September 5, 2021. As the General Division noted the biweekly report from September 5, 2021, contained a specific statement that, "The training details you have provided have been referred to a Service Canada Centre for review. Your

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[28] See *Walls v Canada (Attorney General),* 2022 FCA 47 (CanLII).
[29] See *Simpson v Canada (Attorney General),* 2012 FCA 82.
[30] See, for example, GD3-83.
[31] GD3-101 and GD3-169.

payment will be delayed until a decision is made. Let us know immediately once you have finished your course or if your schedule changes."[32]

[97] In other words, unlike the prior reports, as of September 5, 2021, the biweekly report makes clear that, by that point, the Commission had returned to a delayed entitlement decision until the training details had been reviewed.

[98] The General Division did not address the specific wording in the biweekly reports. However, it didn't need to, as that evidence does not run counter to its findings.

[99] The statements that the claimant understands this information will be used to determine eligibility for employment insurance benefits and that the information is subject to verification as well as a statement that training is allowed, but proof of availability for work may later be requested and it may affect entitlement do not say an entitlement decision has not been made. Rather they suggest "verification" of entitlement has not been done.

[100] I find the General Division did not make an error of law or fact or fail to meaningfully analyze the evidence when it decided that, up until September 4, 2021, the automatic approvals represented initial decisions about the Claimant's entitlement.

The General Division did not consider the relevance of section 153.161 to the Commission's exercise of discretion in reconsidering the claim

[101] Respectfully, the General Division made an error of law when it assessed the Commission's exercise of discretion without considering the relevance of section 153.161 of the EI Act to that decision.

[102] The General Division decided that the Commission had not exercised its discretion judicially when it retroactively reviewed its initial decision for the period from September 28, 2020, to September 4, 2021.

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[32] GD3-243.

[103] The General Division said this was because the Commission had considered an irrelevant fact about the time the Claimant spent on her schooling that was not linked to the time under review. Further, the General Division pointed out that the Commission had ignored relevant facts such as periods when the Claimant was not attending school or only attending school part-time. As well, the General Division said the Commission also ignored the relevant fact that the Claimant had already been approved for benefits as a full-time student to December 15, 2020, and her status had not changed.

[104] The General Division therefore substituted its own decision for the Commission's and decided that since nothing had changed in the Claimant's situation to trigger a review of the initial decisions finding her available and allowing benefits, the initial entitlement decisions should not have been reviewed.

[105] The Commission submits that the General Division erred in its assessment of its exercise of discretion. The Commission maintains that the Claimant reported an increase in hours to 30 hours per week, and this brought into question her earlier availability. The Commission argues that it did not base its decision to retroactively assess an overpayment on the increase in hours alone but considered all the information about her availability including the fact she was attending a full-time four-year program, she was not willing to leave her studies to pursue a suitable job, and she was working part-time while attending school full-time.

[106] The Commission submits further that although the General Division may not have agreed with how the Commission weighed those factors, that does not mean it acted in a non-judicial way. The Commission maintains it is bound by the EI Act and cannot vary the requirements and the Claimant had not proven her availability for work, which is a requirement for entitlement.

[107] The Claimant argues that the General Division did not make any reviewable errors when it decided the Commission had not exercised its decision properly. She says the General Division was correct to find that the Commission cannot reconsider a

"judgment call" type of decision like availability without retroactive effect, absent new information and this is codified in the Commission's reconsideration policy.[33]

[108] The Claimant points out that it is always open for the Commission to retroactively disentitle a claimant who has not been forthright, and it can look at facts and made a new decision disentitling a claimant going forward. But it can't take a fresh look at the same facts and amend or rescind a previous decision with retroactive effect.

[109] The Claimant submits that the General Division correctly concluded that the Commission was not justified in reconsidering the claim on the basis that the Claimant reported on her application for benefits she was spending up to 24 hours a week in school and then 16 months later, in January 2022, she reported spending up to 30 hours per week.

[110] The Claimant argues that the General Division's found as a fact that the reference to 30 hours per week did not relate to the period covered by the claim and this finding of fact was not called into question. So, the Claimant argues, the General Division properly decided this was not a relevant basis upon which to reconsider the claim.

[111] I find the General Division made an error of law in how it reviewed the Commission's exercise of discretion.

[112] As above, together, section 52 and section 153.161 of the EI Act give the Commission the power to retroactively verify a claimant's entitlement and to reconsider a claim and assess an overpayment, if appropriate.

[113] The Commission's powers under sections 52 and 153.161(2) of the EI Act are discretionary. This means that the Commission may verify a person's entitlement to benefits they have already received, and the Commission may reconsider a claim, but it doesn't have to.

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

[114] Discretionary powers must be exercised in a judicial manner. This means when the Commission decides to verify entitlement or to reconsider a claim, it can't:

- act in bad faith
- act for an improper purpose or motive
- take into account an irrelevant factor
- ignore a relevant factor, or
- act in a discriminatory manner.

[115] The Commission has a policy to help guide its exercise of discretion under section 52 of the EI Act. The policy provides that if the Commission incorrectly paid benefits, the error will be corrected currently, and no overpayment will be created unless the error resulted in a decision that is contrary to the EI Act. The policy provides that a claim will only be reconsidered when:[34]

- benefits have been underpaid
- benefits were paid contrary to the structure of the EI Act (the policy notes this does not include a decision about availability)
- benefits were paid as a result of a false or misleading statement
- the claimant ought to have known there was no entitlement to the benefits received.

[116] The policy provides the Commission will only impose a retroactive decision which results in an overpayment if one of the situations described above applies.

[117] The Commission's reconsideration policy reflects the notion that claimants should generally be able to rely on decisions made by the Commission as being final.

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

[118] However, the Commission's policy was developed prior to the addition of section 153.161 to the EI Act. The policy does not refer to section 153.161 of the EI Act or provide any guidance on how section 153.161 should inform the Commission's exercise of discretion under section 52 of the EI Act.

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

[120] It is important to note that section 153.161 does not refer to verification of the accuracy of information provided by a claimant, but rather verification of entitlement. This tells me that the legislature specifically contemplated the possibility of the Commission reconsidering claims for students in non-referred training, even if a claimant had provided accurate information previously, and even after benefits were paid.

[121] In other words, in the specific circumstances of the pandemic, with the implementation of section 153.161, the legislature signalled its intention that reconsidering a claim in circumstances where verification is sought and a claimant cannot prove their entitlement, outweighs the principle of finality.

[122] The General Division focused on the fact that there were no new facts that allowed the Commission to change its initial entitlement decisions. But the General Division did not consider how section 153.161 of the EI Act might have impacted that finding. This was an important and relevant provision to consider when deciding if the Commission's discretion had been exercised judicially.

[123] Since the General Division made an error of law, I can intervene in the decision. I don't need to consider whether the General Division made any other errors.[35]

[35] See section 58(1) of the DESD Act.

Remedy

[124] 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.[36]

[125] The Claimant submits there are no reviewable errors and asks me to dismiss the appeal. In the alternative, she submits that if a decision needs to be made about her availability, this should be returned to the General Division.

[126] The Commission asks that I substitute my decision to allow the appeal and find that the Claimant was not entitled to regular EI benefits from September 28, 2020, to September 4, 2021, for reason she was not available for work.

[127] I find the parties had a full and fair hearing on the question of whether the Commission exercised its discretion judicially so I will substitute my decision on that issue.

The Commission exercised its discretion properly for only part of the period under review

[128] I find the Commission did not exercise its discretion judicially to verify the Claimant's entitlement and reconsider the claim for the period from September 28, 2020, to December 15, 2020.

[129] However, the Commission did exercise its discretion judicially to verify the Claimant's entitlement and reconsider the claim for the period from December 16, 2020, to September 4, 2021.

[130] The claimant completed a training questionnaire on September 15, 2020.[37] She reported attending full-time, non-referred training from September 9, 2020, until December 8, 2020. She reported spending 15 to 24 hours per week on her training, but her course obligations occurred outside of her normal work hours. She noted she was

[36] See section 59(1) of the DESD Act.
[37] GD3-26 to GD3-29.

obligated to attend classes. She also said that she was as available for work as she had been prior to starting the course but would not leave the course to accept employment. She noted the cost of the period of study to be $2300.00.

[131] An officer of the Commission spoke with the Claimant on October 27, 2020, regarding her training.[38] The notes of this conversation indicate the main issue as availability. The notes say the Claimant advised she was participating in school for 20 hours per week, from September 9, 2020, until December 15, 2020.

[132] At that time, the Commission's officer determined that the Claimant was entitled to benefits while participating in training from September 9, 2020, until December 15, 2020. The notes provide, "The claimant was advised of the decision, of its impact on the claim, of his or her right to file a formal request for reconsideration of the decision and of the applicable time."[39]

[133] I have listened to the audio recording of the General Division hearing. The Claimant testified that she was contacted by the Commission, and they were concerned about her availability. She testified that "they" said they will look through this and let her know if she could receive payment or not. She said right after that, they accepted it after looking through everything.[40]

[134] After completing a training questionnaire on September 18, 2021, the Commission completed notes on September 23, 2021, that said the main issue was "availability" and that the electronic questionnaire was completed but the Claimant did not meet all the questions on the questionnaire.[41]

[135] The Commission made several attempts to contact the Claimant after that but did not speak to her until January 11, 2022.[42] On that date, the Commission obtained

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[38] GD3-30.
[39] GD3-30.
[40] I heard this from the audio recording of the General Division hearing at approximately 0:34:40 to 0:40:18.
[41] GD3-258.
[42] GD3-260 to GD3-261.

information about the Claimant's schooling, that she worked part-time while in school and took summer school so could not work full-time then either.

[136] The Commission also obtained information that the Claimant said she was looking for part-time work. She described the type of jobs she was looking for which were part-time or casual. She explained she was casually employed and picked up hours based on her availability and worked a minimum of 11 hours per week. She also confirmed she would accept a job as long as she could delay the start to finish the course and would not leave the course for full-time work. The cost of her program was $3000.00 per semester, and she was only available after her school hours or when not in school. She said she spends over 30 hours per week in her studies.

[137] The Claimant also described her current classroom schedule and noted she had previously worked at a retailer from January 20, 2020, to March 18, 2020, for 25 hours along with 20 hours of schooling.

[138] The Commission then decided to render a decision that the Claimant was not entitled to EI benefits from September 28, 2020.[43]

[139] The Commission submits it made that decision on the basis that the Claimant reported studying 30 hours a week, which was different than she had reported initially in her training questionnaire of September 15, 2020, that she spent 15 to 24 hours per week on her schooling and the 20 hours she reported to the Commission's agent.

[140] The Commission says the report of a sudden increase in schooling hours reasonably brought into question her previous availability.

[141] The Commission submits that it acted judicially in retroactively assessing the overpayment. The Commission says it considered the relevant factors that the Claimant was attending a full-time year-round program, she was not willing to leave her studies to pursue a suitable job, she was working part-time while attending school and was only

[43] GD3-263.

available for work around her schooling. Considering those factors, she was not able to prove her availability for work.

[142] The Commission also argues that the Claimant declared she was available for work on her claimant reports, but that was not accurate as she was not available for work.

[143] The Commission disputes the General Division's finding of fact that the report of hours of study of 30 hours per week related to the time of the phone call of January 11, 2022.[44]

[144] The Commission says the Claimant was given an opportunity to clarify what the 30 hours related to when she spoke to the reconsideration agent. She was asked by the reconsideration agent, "you stated that throughout your schooling, you were generally spending 30 hours per week including classroom time and self-study is that correct?" The response was "Yes that is correct."[45]

[145] The Claimant maintains the Commission did not exercise its discretion judicially. It essentially changed the decisions it made without any new facts.

– September 28, 2020, to December 15, 2020

[146] I find that the Commission verified the Claimant's entitlement to benefits under section 153.161 for the period from September 9, 2020, to December 15, 2020, when it had a conversation with her about her training on October 27, 2020. I find the Commission was satisfied the Claimant had proven her availability and made a decision that she was entitled to benefits.[46]

[147] I find the Commission then sought verification of the Claimant's entitlement for the period from September 9, 2020, to December 15, 2020, a second time on January 11, 2022. At the same time, the Commission also sought verification of the Claimant's

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[44] See paragraph 54 of the General Division decision.
[45] GD3-270.
[46] See GD4-2 where the Commission confirms the decision was the Claimant was entitled to benefits from September 9, 2020, to December 15, 2020.

entitlement for the period from December 16, 2020, to September 4, 2021, which it had not previously verified.

[148] I see no evidence that the Commission acted in bad faith, considered irrelevant factors, ignored relevant factors, or acted in a discriminatory manner when it decided to verify the Claimant's entitlement to benefits on January 11, 2022. The reported increase in hours raised a question about her availability for the entire period.

[149] However, I find the Commission did not exercise its discretion properly to reconsider the claim for the period from September 28, 2020, to December 15, 2020.

[150] The Commission submits that the Claimant made false statements that she was available for work on her claimant reports. But I don't see any evidence in the record that this was a consideration when the Commission exercised its discretion to reconsider the claim. The evidence suggests the only reason the claim was reconsidered was the Commission's decision that the Claimant hadn't proven her availability for work.

[151] The Commission points out that it had a new fact that allowed it to change its initial decision. The new fact was that the claimant was spending 30 hours per week on her schooling, rather than the 20 hours previously reported.

[152] The Claimant reported 30 hours of training on January 11, 2022. I cannot accept at face value the General Division's finding of fact that the 30 hours related to the time of the call, as the General Division did not address the contradictory evidence that the Claimant had told the reconsideration agent that the 30 hours related to all of her schooling.

[153] So, I will make my own finding of fact on this point. I think it is important to note that the report of 30 hours was made on January 11, 2022. The initial reporting of 20 hours was on October 27, 2020, which was much more contemporaneous to the Claimant's actual schooling period. So, of the two reports, I find the initial report of 20 hours more reliable as to the hours being spent on training. So, I find as a fact there was no increase in hours spent on training for the period from September 28, 2020, to

December 15, 2020. The hours spent were 20 hours per week. So, this was not a relevant factor to be considered in the exercise of discretion to reconsider the claim.

[154] In the usual circumstances of delayed verification of entitlement followed by reconsideration, I find the Commission's discretion would not be limited by the factors in the Commission's reconsideration policy, given that policy was implemented prior to section 153.161 of the EI Act and was not considered in that policy.

[155] However, in the particular circumstances of this case, where the Commission had already verified entitlement at the time of its initial entitlement decision, I find the factors in that policy are relevant. I will explain this in more detail below.

[156] I find the factors relevant to the Commission's exercise of discretion were:

- The Commission decided the Claimant had not proven her availability for work.
- A decision about availability is not a decision that is contrary to the structure of the EI Act.
- Section 153.161(2) of the EI Act allowed the Commission to verify entitlement even after benefits were paid.
- The Commission had already verified the Claimant's entitlement on October 27, 2020, for the period from September 9, 2020, to December 15, 2020.
- The Claimant did not make any false or misleading statements
- The Claimant couldn't have known she wasn't entitled to EI benefits, having been told she was entitled to them for this period.

[157] When the Commission decided to reconsider the claim, it did not consider the relevant fact that it had already verified the Claimant's entitlement on October 27, 2020, for the period from September 9, 2020, to December 15, 2020. So, it did not exercise its discretion judicially.

[158] I can, therefore, substitute my decision for that of the Commission. This is because I am giving the decision the General Division should have given and the General Division can give the decision the Commission should have given.

[159] The factors in favour of reconsideration are that the Commission was permitted to verify the Claimant's claim after benefits were paid under section 153.161(2) of the EI Act and the Commission had decided the Claimant had not proven her availability for work. The remainder of the factors argue against reconsideration.

[160] Absent section 153.161 of the EI Act, the Commission's reconsideration policy would be relevant and, according to that policy, the claim would not be reconsidered. Despite section 153.161 of the EI Act, in the particular circumstances of this case, I find the factors and principles from the Commission's reconsideration policy are relevant.

[161] The intent of section 153.161(2) was to allow delayed verification where it was not possible to do so at the time the entitlement decision was made. In those circumstances, the reconsideration policy isn't applicable as it doesn't take into account that section 153.161(2) permitted delayed verification of entitlement.

[162] But delayed verification of entitlement didn't happen here. Rather, the Claimant's entitled was verified on October 27, 2020, and a decision made that the Claimant was entitled to benefits. So, I think the factors in the reconsideration policy apply. Section 153.161(2) wasn't intended to be used to verify entitlement a second time after the Commission had already verified entitlement, which is what happened here.

[163] Having regard to all the relevant factors, I find the principle of finality outweighs the fact the Commission decided the Claimant was not available for work in this case. The Commission had the opportunity to verify the Claimant's entitlement before making a decision and it did so.

[164] The availability decision was not one contrary to the structure of the EI Act. There is no evidence of any false or misleading statements by the Claimant. The Claimant couldn't have known she wasn't entitled to the benefits, having been told she was

entitled to benefits. If the Commission made a mistake in its initial decision, that mistake shouldn't be visited on the Claimant.

[165] So, the claim for the period from September 28, 2020, to December 15, 2020, is not to be reconsidered. That means the initial decision of October 27, 2020, is reinstated and there is no overpayment for the period from September 28, 2020, to December 15, 2020.

– December 16, 2020, to September 4, 2021

[166] I find the Commission exercised its discretion in a judicial manner for the period from December 16, 2020, to September 4, 2021.

[167] For this period, the Commission had not verified entitlement until January 11, 2022. It decided then that the Claimant had not proven her availability for work.

[168] It is relevant that the Claimant was honest in her declarations. However, it is also relevant that the Commission had not verified the Claimant's entitlement previously for this period and when it did, it decided the Claimant had not proven her availability for work.

[169] As noted above, section 153.161 does not refer to verification of the accuracy of information provided by a claimant, but rather verification of entitlement.

[170] The legislature specifically contemplated the possibility of the Commission reconsidering claims for students in non-referred training, even if a claimant had provided accurate information previously, and even after benefits were paid.

[171] So, I find for this period, the Commission's decision that the Claimant couldn't prove her availability for work outweighs the principle of finality.

[172] The Commission reconsidered the claim within the permitted 36-month period.

[173] The Commission considered all the relevant information in deciding to reconsider the claim. There were no new facts relevant to the exercise of discretion provided by the

Claimant at the General Division hearing. There is no indication that the Commission considered irrelevant information or acted in bad faith or in a discriminatory manner.

[174] Since the Commission exercised its discretion judicially to reconsider the claim for the period from December 16, 2020, to September 4, 2021, I cannot intervene in that decision.

Availability for work from December 16, 2020, to September 4, 2021

[175] I find the record is not complete enough for me to decide this issue.

[176] There are gaps in the evidence. For example, there were significant periods when the Claimant was not in school but the evidence relating to the legal test for availability was not canvassed for these periods.

[177] So, I find it necessary to return the issue of the Claimant's availability for work for the period from December 16, 2020, to September 4, 2021, to the General Division for reconsideration.

Conclusion

[178] The appeal is allowed in part.

[179] The General Division made an error of law in how it assessed the Commission's exercise of discretion.

[180] The Commission did not exercise its discretion judicially in reconsidering the claim from September 28, 2020, to December 15, 2020. The claim is not to be reconsidered for this period. This means the Commission's decision of January 19, 2022, is rescinded with respect to this period only and the Commission's initial decision of October 27, 2020, is reinstated.

[181] The Commission exercised its discretion judicially in reconsidering the claim from December 16, 2020, to September 4, 2021.

[182] However, I'm returning the appeal to the General Division for reconsideration on the issue of whether the Claimant is available for work from December 16, 2020, to September 4, 2021.

Charlotte McQuade
Member, Appeal Division