[TRANSLATION]

Citation: *AD v Canada Employment Insurance Commission*, 2022 SST 1745

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	A. D.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (479390) dated May 31, 2022 (issued by Service Canada)

Tribunal member:	Normand Morin
Type of hearing:	Teleconference
Hearing date:	November 15, 2022
Hearing participant:	Appellant
Decision date:	December 30, 2022
File number:	GE-22-2459

Decision

[1] The appeal is allowed.

[2] I find that the Canada Employment Insurance Commission (Commission) didn't exercise its discretion judicially in deciding to verify and reconsider the Appellant's claim for benefits.[1] This means that the Commission could not retroactively determine that the Appellant wasn't entitled to Employment Insurance (EI) benefits.

[3] I find that the Appellant hasn't shown that she was available for work while in training during the period from December 14, 2020, to May 31, 2021, inclusive.[2]

[4] Since the Commission could not retroactively determine that the Appellant wasn't entitled benefits, there is no need to determine whether she has to pay back the benefits she was overpaid (overpayment).[3]

Overview

[5] In October 2020, the Appellant began full-time training at X. The training leads to a diploma of vocational studies in landscaping. It is given as part of the Government of Quebec's short-term training program (COUD) and sponsored by the employer she worked for from April 27, 2020, to November 13, 2020. The Appellant says that she was in training from October 5, 2020, to May 31, 2021,[4] including the two-week break from December 21, 2020, to January 3, 2021.

[6] On November 20, 2020, after a period of employment with the employer X from April 27, 2020, to November 13, 2020, inclusive,[5] the Appellant made an initial claim for

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[1] See sections 52 and 153.161 of the *Employment Insurance Act* (Act).
[2] See sections 18(1)(a) and 153.161 of the Act and sections 9.001 and 9.002(1) of the *Employment Insurance Regulations* (Regulations).
[3] See sections 43, 44, and 52 of the Act.
[4] See GD3-7, GD3-17 to GD3-21, and GD3-29.
[5] See GD3-12.

EI benefits (regular benefits).[6] A benefit period was established effective December 13, 2020.[7]

[7] On April 6, 2022, the Commission told the Appellant that it was unable to pay her EI benefits from December 14, 2020, to May 31, 2021, because she was taking a training course on her own initiative and hadn't proven her availability for work. The Commission said that she would receive a notice of debt if she owed money.[8]

[8] On May 31, 2022, after a request for reconsideration, the Commission told her that it was upholding its April 6, 2022, decision.[9]

[9] The Appellant explains that in the summer of 2020, her employer suggested that she take training related to her job. She says that she checked with the Commission to find out whether she could get benefits while taking that training. She says that she gave the Commission all the required information and documents and that her claim for benefits was approved. She explains that she was available to work evenings and weekends during her training. She says that she looked for work based on her availabilities while in training. She says that she reached out to the Commission several times during her benefit period to find out how to complete her reports and whether everything was fine with her EI file. She points out that it wasn't until a year and half after she applied for benefits that the Commission contacted her to tell her she wasn't entitled to benefits because of her training. She finds it unfair that it revisited its decision to grant her benefits when it had all the information it needed when it approved her claim for benefits. On July 20, 2022, the Appellant challenged the Commission's reconsideration decision. That decision is now being appealed to the Tribunal.

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[6] See GD3-3 to GD3-14.
[7] See GD3-1 and GD4-1.
[8] See GD3-22 and GD3-23. In its arguments, the Commission explains that there is a clerical error in the April 6, 2022, notice of decision. The notice says that benefits can't be paid to the Appellant from December 13, 2020, to May 31, 2021, but the Commissions says it should be from December 14, 2020, to May 31, 2021—GD4-2.
[9] See GD3-30.

Preliminary matters

[10] In this case, the Appellant primarily disputes having to pay back the benefits she was overpaid, despite the fact that she reported being in school, that she gave the Commission all the related information and documents, and that her claim for benefits was approved.[10] She points out that no one told her she could not get benefits during her training. She says that the Commission gave her this information about a year and a half after she applied for benefits, and it asked her to pay back the benefits she was overpaid.[11] She says that she is confused by this turn of events and asks for understanding of her distress over the Commission's decision.[12]

[11] The Commission, meanwhile, explains that it relied on sections 18 and 153.161 of the *Employment Insurance Act* (Act) in deciding that the Appellant hadn't proven that she was available for work during the period from December 14, 2020, to May 31, 2021.[13] It argues that under section 153.161(2) of the Act,[14] it may, at any point after benefits are paid to a claimant, verify that the claimant is entitled to those benefits by requiring proof that they were capable of work and available on any working day of their benefit period.[15]

[12] So, I will keep this situation in mind in my analysis and decision, while considering the Appellant's availability for work during her training.

Issues

[13] I have to determine whether the Commission had the power to retroactively decide whether the Appellant was entitled to EI benefits and, if so, determine whether it

[10] See GD2-3 and GD3-27.
[11] See GD2-3.
[12] See GD2-3 and GD3-27.
[13] See GD4-6, GD4-7, GD7-2, and GD7-3.
[14] See Part VIII.5 of the Act: Temporary Measures to Facilitate Access to Benefits.
[15] See GD4-5 and GD7-3.

used its discretion judicially in deciding to verify and reconsider the Appellant's claim for benefits.[16]

[14] In addition, I have to determine whether the Appellant has shown that she was available for work while in training during the period from December 14, 2020, to May 31, 2021.[17]

[15] I also have to determine whether the Appellant has to pay back the benefits that she received and that the Commission says she owes.[18]

Analysis

The Commission's exercise of discretion in deciding to verify and reconsider a claim for benefits

Issue 1: Did the Commission have the power to retroactively verify and review the Appellant's claim for benefits?

[16] I find that the provisions of sections 52 and 153.161 of the Act give the Commission the power to retroactively verify and review the Appellant's claim for benefits.

[17] When it comes to the "reconsideration" of a claim, the Act says that the Commission has 36 months to reconsider a claim for benefits paid or payable to a claimant and that it has 72 months if, in its opinion, a false or misleading statement or representation has been made in connection with a claim.[19]

[18] If the Commission decides that a person has received an amount of money in benefits that they weren't qualified for or entitled to, it must calculate the amount of the money and notify the claimant of its decision.[20]

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[16] See sections 52 and 153.161 of the Act.
[17] See sections 18(1)(a) and 153.161 of the Act and sections 9.001 and 9.002(1) of the Regulations.
[18] See sections 43, 44, 52, and 153.161 of the Act.
[19] See section 52 of the Act.
[20] See section 52(2) of the Act.

[19] Because of the COVID-19[21] pandemic, changes were made to the Act to mitigate the economic effects of this situation and to facilitate access to benefits with the implementation of "temporary measures."

[20] Those changes include section 153.161 of Part VIII.5 of the Act. This section was in force from September 27, 2020, to September 25, 2021.

[21] This section says that the Commission may, at any point after benefits are paid to a claimant, verify that the claimant is entitled to those benefits by requiring proof that they were capable of and available for work on any working day of their benefit period.[22]

[22] Several decisions by the Tribunal's Appeal Division (Appeal Division) show the importance of addressing the question of the Commission's exercise of discretion when it comes to the application of section 153.161 of the Act.[23]

[23] In one of those decisions, the Appeal Division found that the Tribunal's General Division (General Division) could not refuse to exercise its jurisdiction to determine whether the Commission had the power to retroactively disentitle the claimant to benefits.[24]

[24] In another decision, the Appeal Division found that the file should return to the General Division for it to decide whether the Commission had the power to retroactively disentitle a claimant to benefits.[25] The Appeal Division said that if the General Division were to find that the Commission had this power, it must also determine whether the

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[21] Coronavirus disease 2019.
[22] See section 153.161(2) of Part VIII.5 of the Act.
[23] See the following Appeal Division decisions: *GP v Canada Employment Insurance Commission*, 2021 SST 791; *Canada Employment Insurance Commission v ER*, 2022 SST 761, AD-21-393; and *SF v Canada Employment Insurance Commission*, 2022 SST 1095, AD-22-143.
[24] See the Appeal Division decisions in *GP v Canada Employment Insurance Commission*, 2021 SST 791; and *Canada Employment Insurance Commission v ER*, 2022 SST 761, AD-21-393.
[25] See the Appeal Division decision in *Canada Employment Insurance Commission v ER*, 2022 SST 761, AD-21-393.

Commission exercised this power judicially when it decided to reconsider the claimant's claim for benefits.[26]

[25] In another case, the Appeal Division found that it should give the decision that the General Division should have given, since the General Division hadn't addressed the Commission's exercise of discretion.[27]

[26] In another decision, the Appeal Division also said that the Commission conceded that the General Division needed to address the issue of its exercise of discretion after the appellant in that case had alleged that it could not revisit its decision to grant him benefits, since he had given it all the information about his training.[28]

[27] In this case, I find that the Appellant's notice of appeal refers to the issue of the Commission's exercise of discretion when it decided to retroactively verify and review her claim for benefits, even though this issue isn't discussed using related legal terms.

[28] The Appellant applied for benefits on November 20, 2020, and a benefit period was established effective December 13, 2020.[29]

[29] The evidence on file indicates that the Appellant received benefits while in training, from the week of December 20, 2020, up to the week of December 5, 2021.[30]

[30] On April 6, 2022, the Commission told her about the decision in her case on the issue of availability for work.[31]

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[26] See the Appeal Division decision in *Canada Employment Insurance Commission v ER*, 2022 SST 761, AD-21-393.
[27] See the Appeal Division decision in *SF v Canada Employment Insurance Commission*, 2022 SST 1095, AD-22-143.
[28] See the Appeal Division decision in *RF v Canada Employment Insurance Commission*, AD-22-362 and AD-22-376, December 13, 2022, at paras 9 and 10.
[29] See GD3-1, GD3-3 to GD3-14, and GD4-1.
[30] See GD3-26.
[31] See GD3-22 and GD3-23.

[31] The evidence on file also indicates that in the weeks after her period was established effective December 13, 2020, the Commission contacted the Appellant on December 23, 2020, and on January 13, 2021, for information about her training.[32]

[32] On December 30, 2020, the Commission also contacted the employer the Appellant worked for from April 27, 2020, to November 13, 2020, for information about the type of training she was taking.[33]

[33] The Commission argues as follows:

a) The Act was changed through an interim order (Interim Order No. 10) that added section 153.161.[34] This section came into force on September 27, 2020.[35]

b) Section 153.161(2) of the Act says that the Commission may, at any point after benefits are paid to a claimant, verify that the claimant is entitled to those benefits by requiring proof that they were capable of and available for work on any working day of their benefit period.[36]

c) An explanatory note included with Interim Order No. 10 says that the new provision in the Act "enables a modified operational approach to the assessment of availability to work for claimants who are in training." This change makes it possible to verify availability after benefits are paid. Normally, the Commission did this beforehand.[37]

d) A disentitlement to benefits has to be imposed retroactively on a claimant who hasn't proven that they were available for work on any working day of their benefit period.[38]

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[32] See GD3-15 and GD3-17 to GD3-19.
[33] See GD3-16.
[34] See Part VIII.5 of the Act: Temporary Measures to Facilitate Access to Benefits.
[35] See GD7-3.
[36] See GD4-5 and GD7-3.
[37] See GD7-3.
[38] See GD4-5.

e) The Appellant's full-time training was reported and [translation] "allowed by the system" when she made her initial claim for benefits, and it was declared on each of her reports.[39]

f) The temporary transition measures in force and the provisions of section 153.161 of the Act facilitated access to benefits during the COVID-19 pandemic. But, the Commission reserved the right to carry out pre-verifications.[40]

g) Discretion has to be exercised judicially. When the Commission decides to reconsider or verify a claim, it must not act in bad faith or for an improper purpose or motive, take into account an irrelevant factor or ignore a relevant factor, or act in a discriminatory manner.[41]

[34] The Appellant, meanwhile, says that before applying for benefits on November 20, 2020, she checked with the Commission to find out whether she could get benefits given the training she had begun in October 2020.[42]

[35] On her application for benefits, she indicated that she was taking training, that she had an employer sponsor, and that she spent 25 or more hours per week on her training.[43]

[36] The Appellant says that in the weeks after she applied for benefits, she made other calls to the Commission, since she hadn't heard back from it. She says that after several weeks of waiting, the Commission agreed to pay her benefits after confirming that she was entitled to benefits.[44] She says that she started receiving benefits in January 2021.

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[39] See GD4-5.
[40] See GD4-5.
[41] See GD7-3.
[42] See GD3-17.
[43] See GD3-6.
[44] See GD3-17 and GD3-27.

[37] In her statement to the Commission on December 23, 2020, the Appellant explained that she was taking training as part of a Government of Quebec training program (COUD short-term training program).[45]

[38] On January 13, 2021, in another statement to the Commission, the Appellant indicated that her training took place in the daytime, Monday to Friday, and that she spent roughly 30 hours per week on it.[46] She said that she would not abandon it if it conflicted with a full-time job.[47]

[39] The Appellant says that she gave the Commission all the information and documents it needed about the training she had begun in October 2020.[48] She points out that the Commission had all the necessary information when it approved her claim for benefits.[49]

[40] The Appellant says that on her claimant reports, she always reported being in school as well as the amounts of money she had received while taking training.

[41] She says that she also reached out to the Commission during her benefit period to find out whether she had completed her reports properly and whether everything was fine with her EI file.

[42] The provisions of section 52 of the Act and those of section 153.161(2) of Part VIII.5 of the Act, despite being temporary, applied to the Appellant's case for her November 20, 2020, claim for benefits.

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

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[45] See GD3-15.
[46] See GD3-17 to GD3-19.
[47] See GD3-17 to GD3-19.
[48] See GD2-3.
[49] See GD2-3.

[44] Even though the Commission says that it relied on section 153.161(2) of the Act in making its decision,[50] I find that the provisions of section 52 of the Act continue to apply despite those of section 153.161(2) of the Act.

[45] In my view, the Commission recognizes that it has to exercise its discretion judicially, whether under section 52 or under section 153.161 of the Act.

[46] On this point, I note that in its arguments, the Commission says that discretion has to be exercised judicially, which means that when it decides to reconsider or verify a claim for benefits, it must not act in bad faith or for an improper purpose or motive, take into account an irrelevant factor or ignore a relevant factor, or act in a discriminatory manner.[51]

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

[48] Section 153.161(2) of the Act gives the Commission a power similar to the one it has under section 52(1) of the Act. The only difference between these two sections is that under the provisions of section 153.161(2) of the Act, the Commission's power isn't time-limited, but it is in the case of a reconsideration under section 52(1) of the Act.

[49] Under section 153.161(2) of the Act, the Commission may, at any point after benefits are paid to a claimant, verify that the claimant is entitled to those benefits.[52] This section also shows that the Commission has the discretion to verify a claim for benefits.

[50] Under section 52 of the Act, the Commission may reconsider a claim for benefits within 36 months after the benefits have been paid or would have been payable, or within 72 months if, in its opinion, a false or misleading representation has been made.[53]

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[50] See GD4-5, GD7-2, and GD7-3.
[51] See GD7-3.
[52] See section 153.161(2) of the Act.
[53] See sections 52(1) and 52(5) of the Act.

[51] While section 153.161(2) is broader in time than section 52 of the Act, the question remains whether the Commission used its discretion to reconsider judicially.

[52] In making its decision, the Commission used its powers under section 153.161(2) of the Act. As a result of its verification, it changed its decision, finding that the Appellant wasn't entitled to benefits. It made a new decision in accordance with the procedure set out in section 52(2) of the Act.

[53] I also note that even though section 153.161(2) of the Act says that the Commission may, "at any point" after benefits are paid to a claimant, "verify" that the claimant is entitled to those benefits, this section specifies that the Commission may do so, but "by requiring proof" that the claimant was capable of and available for work on any working day of their benefit period.[54]

[54] I find that the Commission didn't verify the Appellant's entitlement to benefits under section 153.161(2) of the Act. It didn't apply the related provisions of this section. It didn't ask the Appellant to prove her entitlement to benefits under section 153.161(2) of the Act. I note that the Commission had at least two opportunities to do this from the start of her benefit period: when it spoke with her on December 23, 2020,[55] and on January 13, 2021.[56]

[55] I find that before making its decision on April 6, 2022,[57] more than a year after the Appellant applied for benefits, the Commission didn't tell her about the job search required to show her availability for work or about the proof she had to provide, before retroactively disentitling her from receiving benefits.

[56] Having established that the Commission reconsidered the Appellant's claim for benefits under section 52 of the Act, while relying on the provisions of section 153.161(2) of the Act, I now have to determine whether it exercised its

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[54] See section 153.161(2) of the Act.
[55] See GD3-15.
[56] See GD3-17 to GD3-19.
[57] See GD3-22 and GD3-23.

discretion judicially when it decided to retroactively verify the claim, reconsider it, and change its decision.

Issue 2: Did the Commission exercise its discretion judicially when it decided to retroactively verify the Appellant's claim for benefits, reconsider it, and change its decision?

[57] I find that the Commission didn't exercise its discretion judicially when it decided to retroactively verify the Appellant's claim for benefits, reconsider it, and change its decision.

[58] Concerning the Appellant's training and availability for work, I find that the Commission failed to consider all the relevant factors before it. I also find that it took into account an irrelevant factor when it said that the Appellant's [translation] "behaviour" was, in its view, contrary to the "principles underlying" the EI system.[58]

[59] The Federal Court of Appeal (Court) has held that there is no authority to interfere with discretionary decisions of the Commission unless it can be shown that the Commission "exercised its discretionary power in a non-judicial manner or acted in a perverse or capricious manner without regard to the material before it."[59]

[60] It is up to the Commission to show that it exercised its discretion judicially. In other words, it has to show that it acted in good faith, considered all relevant factors, and ignored irrelevant ones.[60]

[61] Since the Commission's power to reconsider is discretionary, its decisions can be interfered with only if it didn't exercise this power judicially.[61]

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[58] See GD4-6.
[59] The Federal Court of Appeal (Court) established this principle in *Uppal*, 2008 FCA 388.
[60] The Court established or reiterated this principle in the following decisions: *Uppal*, 2008 FCA 388; *Tong*, 2003 FCA 281; *Dunham*, A-708-95; and *Purcell*, A-694-94.
[61] See the Court's decisions in *Chartier*, A-42-90; and *Uppal*, 2008 FCA 388.

[62] The Court has recognized various times that the fact that the Commission has guidelines or guides dealing with its discretion helps to make that discretion consistent.[62]

[63] The Digest of Benefit Entitlement Principles (Digest), a document prepared by the Commission, sets out conditions for reconsideration to determine whether the Commission considered all relevant factors in exercising its discretion.

[64] This document says that the Commission will reconsider a claim when:

- benefits have been underpaid
- benefits were paid contrary to the structure of the Act
- benefits were paid as a result of a false or misleading statement
- the claimant ought to have known there was no entitlement to the benefits received[63]

[65] Even though the Digest predates the changes made to the Act to mitigate the economic effects of the COVID-19 pandemic, the fact is that this document still serves for the Commission as a guide that helps it exercise its discretion consistently. The pandemic and the resulting legislative changes didn't negate the scope of this document or the conditions for applying the "Reconsideration Policy" that it contains.[64] The "Reconsideration Policy" refers to section 52 of the Act. This section is still in force despite the changes to the Act due to the pandemic. Also, in the wake of the COVID-19 pandemic, the Commission didn't make changes to its Digest concerning the application of its "Reconsideration Policy" or its exercise of discretion. If it had, this could result in inconsistency in exercising its discretion.

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[62] This principle was established or reiterated in the following decisions: *Hudon*, 2004 FCA 22; and *Gagnon*, 2004 FCA 351.
[63] See section 17.3.3 of the Digest of Benefit Entitlement Principles (Digest).
[64] See section 17.3.3 of the Digest.

[66] The Commission says that it exercised its discretion judicially.[65]

[67] It argues that it didn't act in bad faith or for an improper purpose or motive in deciding to review the Appellant's availability for work. It says that it verified her file after benefits had been paid, as set out in Interim Order No. 10.[66]

[68] The Commission says that it considered the Appellant's full-time student status, the details of her studies, her willingness to accept a job that conflicted with her course schedule, her efforts to find a job, and any restrictions on accepting a job.[67] It says that it didn't single her out based on personal factors or discriminate against her.[68]

[69] The Commission says that it considered the relevant factors, didn't take into account an irrelevant factor, and didn't act in a discriminatory manner.[69]

– **Benefits underpaid**

[70] I find that the benefit "underpayment" factor doesn't apply to the Appellant.

[71] Based on the documents the Commission submitted and the calculations it made after reviewing the Appellant's file, the Appellant was overpaid $2,795 in benefits (overpayment).[70] In this case, it isn't that "benefits have been underpaid."

[72] The Digest says that the Commission always reconsiders if the claimant has been denied benefits that may become payable as the result of reconsideration.[71]

[73] In the case of an overpayment, the Commission may reconsider a claim for benefits, as set out in the Act.[72]

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[65] See GD7-4.
[66] See GD7-3 and GD7-4.
[67] See GD7-3.
[68] See GD7-3.
[69] See GD7-4.
[70] See GD3-24 to GD3-26.
[71] See section 17.3.3 of the Digest.
[72] See section 52 of the Act.

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

[74] I find that when the Appellant's claim was set up and she was paid benefits, this was done in accordance with the "structure of the Act," that is, in accordance with the related basic elements of the Act.

[75] The Digest says that a "period of non-availability" falls outside the definition of *Structure of the Act*. But it says that this element can be reconsidered as long as it meets one of the other conditions set out under the policy that deals with this (Commission's Reconsideration Policy).[73]

[76] I find that the Commission didn't make a decision contrary to the structure of the Act.

– **Benefits were paid as a result of a false or misleading statement**

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

[78] However, in my view, the factor for benefits being paid as a result of a false or misleading statement is irrelevant to the Appellant's case.

[79] If, in its opinion, a false or misleading statement or representation has been made in connection with a claim, the Commission may reconsider the claim within 72 months after the benefits have been paid or would have been payable to the claimant.[74] There is no time limit for section 153.161(2) of the Act, since the Commission may verify that the claimant is entitled to benefits at any point after benefits are paid.[75]

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[73] See section 17.3.3.2 of the Digest.
[74] See section 52(5) of the Act. See also the following Court decisions: *Dussault*, 2003 FCA 372; and *Pilote*, A-868-97.
[75] See section 153.161(2) of the Act.

[80] The Commission hasn't presented any arguments to support that the Appellant made false or misleading statements or representations. It also hasn't shown any basis for finding that she may have made such statements or representations.

[81] I find that the Commission wasn't faced with false or misleading statements in connection with the Appellant's claim.

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

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

[83] The Commission argues as follows:

a) The Appellant can't be considered available for work.[76]

b) Under the temporary measures to facilitate access to benefits,[77] any training declared between September 27, 2020, and September 25, 2021, was [translation] "automatically allowed by the system" to avoid payment delays for claimants.[78]

c) The Appellant's full-time training was reported and [translation] "allowed by the system" when she made her initial claim for benefits, and it was declared on each of her reports.[79]

d) When they apply for benefits online, claimants are automatically and systematically told about their rights and responsibilities. The Appellant accepted her rights and responsibilities when she applied, since her application was received.[80] She indicated that she was a full-time student and had limited availability for work. She also indicated that she understood that

[76] See GD4-4 to GD4-8 and GD7-1 to GD7-3.
[77] See section 153.161 of Part VIII.5 of the Act: Temporary Measures to Facilitate Access to Benefits.
[78] See GD4-5.
[79] See GD4-5.
[80] See GD4-5.

the information she had given would be used to determine her eligibility for benefits. She didn't meet the criteria related to her availability for work.[81]

e) The Appellant said more than once that she prioritized her training over her job and that she wasn't prepared to abandon it.[82] Her [translation] "behaviour" is contrary to the principles underlying the EI system because an employee can't impose the economic burden of their decision on contributors to the EI fund.[83]

f) The Appellant's availability for work, in connection with her training, was verified after benefits had been paid, in accordance with section 153.161 of the Act.[84]

g) Under this section, 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 work and available on any working day of their benefit period.[85]

h) This section, which came into force on September 27, 2020, was added through Interim Order No. 10, which includes an explanatory note saying that this provision of the Act "enables a modified operational approach to the assessment of availability to work for claimants who are in training." This change makes it possible to verify availability after benefits are paid. Normally, the Commission did this beforehand.[86]

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[81] See GD4-5 and GD4-6.
[82] See GD4-6.
[83] See GD4-6.
[84] See GD4-5.
[85] See GD4-5 and GD7-3.
[86] See GD7-3.

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

a) Before applying for benefits, she checked with the Commission to find out whether she could get benefits given her training.[87]

b) She gave the Commission all the requested information and documents about her training.[88]

c) On her application for benefits, in her dealings with the Commission, and on her claimant reports, she indicated that she was taking training. She says that she always told the truth about her training.[89]

d) She reached out to the Commission to find out how to complete her reports and whether her EI file was okay.[90]

e) She was never told that she might be in the wrong concerning her claim for benefits until she was informed she wasn't entitled to benefits in April 2021.[91]

[85] Despite its finding that the Appellant hadn't proven she was available for work while taking training, I find that the Commission hasn't shown that she could assume that there was no entitlement to the benefits received.

[86] In my view, the Commission hasn't shown that the Appellant ought to have known (had "knowledge") that there was no entitlement to the benefits received—one of the rules set out in the Digest to show that it has exercised its discretion judicially.

[87] I find that the Appellant was transparent about her training and her availability for work. She was consistent in her statements to the Commission.

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[87] See GD2-3 and GD3-27.
[88] See GD2-3.
[89] See GD2-3, GD3-6, GD3-15, and GD3-17 to GD3-19.
[90] See GD2-3.
[91] See GD2-3.

[88] I am of the view that the Appellant could reasonably believe that when she gave the Commission information about her training and she received benefits, this meant she was entitled to those benefits.

[89] I find that the Commission didn't follow the "Reconsideration Policy" it developed to ensure a consistent and fair application of section 52 of the Act and to prevent creating debt when the claimant was overpaid through no fault of their own, as the policy states.[92]

[90] Even though the Commission says that it relied on the provisions of section 153.161 of the Act in making its decision, this doesn't exempt it from using its discretion judicially, as it is required to do for the purposes of section 52 of the Act.

[91] When the Act was changed with the implementation of temporary measures because of the COVID-19 pandemic, those changes were meant to facilitate access to EI benefits.

[92] However, I am of the view that these legislative changes weren't intended to absolve the Commission from having to exercise its discretion judicially to recover amounts of money in benefits overpaid to a specific category of claimants, namely students.

[93] I find that if Parliament had intended this, it would have said so by including a specific condition related to this in the changes it made to the Act as part of the temporary measures in question.

[94] Although the Commission describes the wording of Interim Order No. 10 as a change that "enables a modified operational approach to the assessment of availability to work for claimants who are in training,"[93] this doesn't exempt it from having to exercise its discretion judicially and from doing so in accordance with its own rules, the

[92] See section 17.3.3 of the Digest.
[93] See GD7-3.

provisions of the Act, and Court decisions about the exercise of this discretion.[94] I note that the interim order in question isn't a provision of the Act.

[95] In my view, such an operational approach isn't meant to restrict the entitlement of a category of claimants—students—to be treated in a way that guarantees that the Commission will exercise its discretion at its discretion [*sic*], as must always be the case for all other categories of claimants.

[96] I find that Parliament didn't intend to permit such a distinction and to exclude a category of claimants as a result. To do so would be to discriminate against a category of claimants, namely students who are in training.

[97] I find that in implementing temporary measures to facilitate access to benefits during the pandemic, Parliament certainly wanted to insist on the Commission's power to verify that a claimant was entitled to benefits while taking training, even after it has started paying them benefits.

[98] However, I find that Parliament didn't set any specific parameters or any conditions that would allow the Commission to do this other than by exercising its discretion judicially, as was the case before these temporary measures were implemented.

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

[100] Although the Commission says that the Appellant's full-time training was reported and [translation] "automatically allowed by the system" when she made her initial claim for benefits,[95] the fact is that she declared her training several times after that.

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[94] See the following Court decisions: *Uppal*, 2008 FCA 388; *Tong*, 2003 FCA 281; *Dunham*, A-708-95; *Purcell*, A-694-94; and *Chartier*, A-42-90.
[95] See GD4-5.

[101] I find that the Commission ignored the information the Appellant had given it about her training and availability for work, both verbally and in writing, several times—before she applied for benefits, when she applied,[96] and soon after applying.[97]

[102] When she filled out her application for benefits on November 20, 2020,[98] the Appellant told the Commission that she was in school and that she spent 25 or more hours per week on her studies.[99]

[103] On December 23, 2020, and January 13, 2021, the Appellant spoke with Commission representatives to tell them that she was taking training.[100]

[104] On January 13, 2021, the Appellant told a Commission representative that she had begun training on October 5, 2020; that it took place in the daytime, Monday to Friday; and that she spent roughly 30 hours per week on it.[101]

[105] On December 30, 2020, the Commission contacted the employer the Appellant worked for from April 27, 2020, to November 13, 2020, for information about her training.[102]

[106] I find that the Commission ignored the information that it itself got from this employer less than three weeks after the Appellant's benefit period was established.[103]

[107] The Appellant declared that she was taking training on her claimant reports. The Commission acknowledges that her training was declared on each of her reports.[104]

[108] In my view, just because the Appellant's claim for benefits was [translation] "automatically allowed by the system" initially doesn't mean that this absolves the

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[96] See GD3-3 to GD3-14.
[97] See GD3-15 and GD3-17 to GD3-19.
[98] See GD3-3 to GD3-14.
[99] See GD3-6.
[100] See GD3-15 and GD3-17 to GD3-19.
[101] See GD3-17 to GD3-19.
[102] See GD3-16.
[103] See GD3-16 and GD4-1.
[104] See GD4-5.

Commission of its responsibility to verify and determine whether she was available for work after speaking with her several times, including on December 23, 2020,[105] and January 13, 2021,[106] soon after her benefit period was established.

[109] The Commission waited over a year before reacting to the information the Appellant had given it about her training, verbally and in writing, only to find that she wasn't entitled to benefits and tell her that it was changing its decision because of this.

[110] I find that the Commission can't hold an automated system responsible for processing all the training information given by the Appellant and, in doing so, avoid its responsibility to properly process her application.

[111] So, I don't accept the Commission's argument that it considered the Appellant's full-time student status, the details of her studies, her willingness to accept a job that conflicted with her course schedule, her efforts to find a job, and any restrictions on accepting a job.[107] The Commission had all this information and decided to pay benefits, only to revisit its decision over a year later.

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

[113] I find that the Commission didn't consider all relevant factors in doing so. These factors refer to all the training information given by the Appellant on her application for benefits, in her dealings with the Commission (including at the start of her benefit period), and on her claimant reports. These factors also refer to the training information that the Commission got from the employer she worked for from April 27, 2020, to November 13, 2020.

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[105] See GD3-15.
[106] See GD3-17 to GD3-19.
[107] See GD7-3.

[114] In my view, the Commission's failure to consider all relevant factors amounts to wilful blindness on its part and suggests that it didn't act in good faith in handling the Appellant's case.

[115] In addition, it seems to me that in analyzing the Appellant's case, the Commission took into account an irrelevant factor when it said that her [translation] "behaviour" was, in its view, contrary to the principles underlying the EI system because an employee can't impose the economic burden of their decision on contributors to the EI fund.[108]

[116] On this point, I find that the Commission hasn't said what that behaviour was or shown how it may have been contrary to the principles underlying the EI system.

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

[118] I find that the Commission could not verify the Appellant's claim for benefits by reconsidering it, since it didn't exercise its discretion to do so judicially, after making the decision to grant benefits.

Availability for work while in training

[119] The Court has held that a person who is in school full-time is presumed to be unavailable for work.[109] This is called "presumption of non-availability." It means we can suppose that this person isn't available for work when the evidence shows that they are taking training full-time.

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[108] See GD4-6.
[109] See the Court's decision in *Cyrenne*, 2010 FCA 349.

[120] But this presumption can be rebutted if certain conditions are met. The Court tells us that principles related to returning-to-studies cases can help rebut the presumption of non-availability.[110] These principles include:

- the attendance requirements of the course
- the claimant's willingness to give up their studies to accept employment
- whether the claimant has a history of being employed at irregular hours
- the existence of "exceptional circumstances" that would enable the claimant to work while taking their course[111]

[121] Although this presumption of non-availability can be rebutted, the student still has to show that they are actually available for work.

[122] Two sections of the Act indicate that claimants have to show that they are available for work.[112] Both sections deal with availability, but they involve two different disentitlements.[113]

[123] First, a claimant isn't entitled to receive benefits for a working day in a benefit period for which the claimant fails to prove that on that day the claimant was capable of and available for work and unable to find a suitable job.[114]

[124] Second, to prove availability for work, the Commission may require the claimant to prove that they are making reasonable and customary efforts to find a suitable job.[115]

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[110] The Court established or reiterated these principles in the following decisions: *Lamonde*, 2006 FCA 44; *Cyrenne*, 2010 FCA 349; *Wang*, 2008 FCA 112; *Gagnon*, 2005 FCA 321; *Rideout*, 2004 FCA 304; *Boland*, 2004 FCA 251; *Loder*, 2004 FCA 18; *Primard*, 2003 FCA 349; and *Landry*, A-719-91.
[111] The Court established or reiterated these principles in the following decisions: *Lamonde*, 2006 FCA 44; *Cyrenne*, 2010 FCA 349; *Wang*, 2008 FCA 112; *Gagnon*, 2005 FCA 321; *Rideout*, 2004 FCA 304; *Boland*, 2004 FCA 251; *Loder*, 2004 FCA 18; *Primard*, 2003 FCA 349; and *Landry*, A-719-91.
[112] See sections 18(1)(a) and 50(8) of the Act.
[113] See sections 18(1)(a) and 50(8) of the Act.
[114] See section 18(1)(a) of the Act.
[115] See section 50(8) of the Act.

[125] In its arguments, the Commission says that its decision deals primarily with sections 18 and 153.161 of the Act.[116]

[126] To determine whether a claimant is available for work, I have to consider the specific criteria set out in the Act for determining whether the claimant's efforts to find a suitable job are reasonable and customary.[117] According to these criteria, the efforts must be 1) sustained, 2) directed toward finding a suitable job, and 3) consistent with nine specified activities that can be used to help claimants get a suitable job.[118] These activities include assessing employment opportunities, registering for job search tools or with online job banks or employment agencies, contacting prospective employers, and submitting job applications.[119]

[127] The notion of "availability" isn't defined in the Act. Court decisions have set out criteria for determining a person's availability for work and whether they are entitled to EI benefits.[120] These three criteria are:

- wanting to go back to work as soon as a suitable job is available
- expressing that desire through efforts to find a suitable job
- not setting personal conditions that might unduly limit the chances of going back to work[121]

[128] Whether or not a person who is taking a full-time course is available for work is a question of fact that has to be determined in light of the specific circumstances of each

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[116] See GD7-1.
[117] See section 9.001 of the Regulations.
[118] See section 9.001 of the Regulations.
[119] See section 9.001 of the Regulations.
[120] The Court established or reiterated this principle in the following decisions: *Faucher*, A-56-96; *Bois*, 2001 FCA 175; and *Wang*, 2008 FCA 112.
[121] The Court established or reiterated this principle in the following decisions: *Faucher*, A-56-96; *Bois*, 2001 FCA 175; and *Wang*, 2008 FCA 112.

case but based on the criteria set out by the Court. The claimant's attitude and conduct have to be considered.[122]

[129] In this case, the Appellant hasn't met the above criteria to show that she was available for work during the period from December 14, 2020, to May 31, 2021, inclusive. She hasn't shown that her efforts to find a job during that period were reasonable and customary.

Issue 1: Has the Appellant rebutted the presumption that she wasn't available for work?

[130] I find that none of the principles related to returning-to-studies cases help the Appellant show that she has rebutted the presumption that she wasn't available for work while in training during the period from December 14, 2020, to May 31, 2021.

[131] The Appellant doesn't dispute that she was a full-time student at that time.

[132] She says that she spent roughly 30 hours per week on her studies, including assignments.[123]

[133] The Appellant says that she was in class Monday to Friday from 9 a.m. to 3 p.m.[124]

[134] She says that her classes were in person from October 2020 to December 2020. She says that when she continued her training on January 4, 2021, after the holiday break, classes were distance learning until the end of January 2021 because of the COVID-19 pandemic. She says that during that period, she attended classes from home at specific times (for example, 9 a.m. for half an hour) or when it was convenient for her. She says that classes were in person again beginning in February 2021.

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[122] See the following Court decisions: *Carpentier*, A-474-97; *Whiffen*, A-1472-92; and *Rondeau*, A-133-76.
[123] See GD3-6, GD3-17 to GD3-21, and GD3-29.
[124] See GD3-17 to GD3-21 and GD3-29.

[135] Concerning the "attendance requirements of the course," I find that the Appellant hasn't shown that her situation as a student supports that she was available for work during the period from December 14, 2020, to May 31, 2021.

[136] For most of her training period, she didn't have the flexibility to take the training when it was convenient for her. The only time she had this flexibility was in January 2021.

[137] In my view, the attendance requirements of the Appellant's course and the time she chose to spend on it affected her availability for work and her search for a suitable job for the period from December 14, 2020, to May 31, 2021.

[138] Concerning her willingness to give up her studies to accept employment, I find that the Appellant hasn't shown that she was prepared to do so during that period.

[139] Several of her statements to the Commission indicate an unwillingness to abandon her training if it conflicted with a full-time job.[125]

[140] On the issue of whether a claimant has a history of being employed at irregular hours, I find that the Appellant hasn't shown that she has significant experience combining work and study (work-study history).

[141] The Appellant says that when she worked for X, her job title was landscaper during the period from April 27, 2020, to October 4, 2020. She says that from October 5, 2020, to November 13, 2020, she was considered an intern and was paid.[126] She says that her training was part of the Government of Quebec's short-term training program (COUD program).[127]

[142] The Appellant says that her training obligations didn't occur outside the normal hours of her usual employment.[128]

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[125] See GD3-17 to GD3-21 and GD3-29.
[126] See GD3-17 to GD3-19.
[127] See GD3-15 and GD3-17 to GD3-19.
[128] See GD3-20 and GD3-21.

[143] In a statement to the Commission on December 30, 2020, the employer X said that the Government of Quebec's training program (COUD program) is a program that allows en employee to alternate between working and taking training.[129]

[144] I find that the Appellant hasn't shown a work-study history that helps her rebut the presumption that she wasn't available for work during the period from December 14, 2020, to May 31, 2021.

[145] I note that the Appellant has shown that she was able to work while taking training full-time only for the period from October 5, 2020, to November 13, 2020.

[146] I find that the Appellant hasn't presented any exceptional circumstances to support that for the period in question, she can rebut the presumption that a person taking a full-time training course on their own initiative isn't available for work.

[147] The Court hasn't yet told us how the presumption and the sections of the Act dealing with availability for work relate to each other. Because the relationship is unclear, I am going to continue on to decide the sections of the Act dealing with this issue, even though I have already found that the Appellant is presumed to be unavailable for work for the period from December 14, 2020, to May 31, 2021.

Issue 2: Did the Appellant show a desire to go back to work as soon as a suitable job was available?

[148] I find that the Appellant didn't show a desire to go back to work as soon as a suitable job was available during the period from December 14, 2020, to May 31, 2021. In my view, her first intention at that time was to take training.

[149] The evidence on file indicates that the Appellant and her employer from April 27, 2020, to November 13, 2020, agreed that she would take training.[130] She says the employer is the one who suggested the training, which she began in October 2020.

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[129] See GD3-16.
[130] See GD3-6, GD3-15, GD3-16, and GD3-27.

[150] The Appellant says that she was available to work part-time, that is, evenings and weekends, while in training.[131]

[151] She says that she wasn't available for work under the same conditions as she was before she started her training.[132]

[152] I find that even though she says she was available for work and has shown that she worked as an intern during part of her training, from October 5, 2020, to November 13, 2020, the fact is that the Appellant chose to study full-time, spending roughly 30 hours per week on her studies.

[153] I find that this choice affected her availability and her desire to work in a suitable job during the period from December 14, 2020, to May 31, 2021, since she prioritized her training.

Issue 3: Did the Appellant express that desire through efforts to find a suitable job?

[154] I find that the Appellant didn't express a desire to go back to work through efforts to find a suitable job during the period from December 14, 2020, to May 31, 2021.

[155] The Appellant says that she looked for a part-time evening or weekend job so that she could continue taking training full-time.[133]

[156] She says that she could work in fields other than landscaping, her field of study, namely in food service or in grocery stores.

[157] She says that her efforts started in December 2020 and included going to grocery stores (for example, IGA). She says that options were very limited because of the COVID-19 pandemic.

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[131] See GD3-17 to GD3-21.
[132] See GD3-20 and GD3-21.
[133] See GD3-17 to GD3-19.

[158] In this case, I find that the Appellant didn't make "reasonable and customary efforts" in the "search for suitable employment"—that is, sustained efforts directed toward finding a suitable job and consistent with nine specified activities that can be used to help claimants get a suitable job.[134]

[159] Even though the Appellant worked as an intern for part of her training, she hasn't shown that she would have been available for work for any potential employer each working day in her benefit period if the hours conflicted with her course schedule.

[160] The Court tells us that a person's availability is assessed for each working day in a benefit period for which they can prove that on that day they were capable of and available for work and unable to find a suitable job.[135]

[161] I find that during her training period, the Appellant's availability for work didn't lead to sustained efforts to find suitable employment with potential employers.

[162] The Court tells us that it is up to the claimant to prove availability for work. To get EI benefits, a claimant must be actively looking for suitable employment, even if it seems reasonable to them not to do so.[136]

[163] To be able to get EI benefits, the Appellant was responsible for actively looking for a suitable job.

[164] I find that she didn't fulfill this responsibility during the relevant period.

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[134] See section 9.001 of the Regulations.
[135] The Court established this principle in the following decisions: *Cloutier*, 2005 FCA 73; and *Boland*, 2004 FCA 251.
[136] The Court established this principle in the following decisions: *De Lamirande*, 2004 FCA 311; and *Cornelissen-O'Neill*, A-652-93.

Issue 4: Did the Appellant set personal conditions that might have unduly limited her chances of going back to work?

[165] I find that the Appellant set "personal conditions" that unduly limited her chances of going back to work in a suitable job during the period from December 14, 2020, to May 31, 2021.

[166] In my view, the personal conditions that the Appellant set during that period are related to her priority to continue her training at the expense of her search for a suitable job.

[167] I find that the Appellant has shown that she set such conditions, given the number of hours she mentioned spending on her training—roughly 30 hours per week—and the work availability she indicated, that is, evenings and weekends.

[168] In addition, the Appellant consistently stated that she would not have abandoned her training if it conflicted with a full-time job.[137]

[169] I find that the Appellant's explanations about her availability for work show that her training affected her search for a suitable job.

[170] In my view, the Appellant's decision to take training full-time hurt her desire and efforts to continue working in a suitable job.

[171] Despite her work availabilities, I find that the Appellant hasn't shown that she wanted to be fully available for potential employers while in training or that she would have accepted a job with hours that coincided with her training hours.

[172] The Court tells us that a claimant who restricts their availability and is only available for employment outside their course schedule hasn't proven availability for work within the meaning of the Act.[138]

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[137] See GD3-17 to GD3-21 and GD3-29.
[138] The Court established this principle in the following decisions: *Duquet*, 2008 FCA 313; and *Gauthier*, 2006 FCA 40.

[173] I find that while in school during the period from December 14, 2020, to May 31, 2021, the Appellant set personal conditions that unduly limited her chances of going back to work in a suitable job.

[174] In summary, the Appellant hasn't shown that she was available for work from December 14, 2020, to May 31, 2021.

Repayment of benefits that were overpaid

[175] Since I have found that the Commission didn't exercise its discretion judicially when it decided to verify the Appellant's claim for benefits and when it reconsidered the claim, there is no need to determine whether she has to pay back the benefits that she was overpaid and that the Commission says she owes.[139]

Conclusion

[176] I find that the Commission didn't use its discretion judicially in deciding to verify and reconsider the Appellant's claim for benefits, even though she hasn't shown that she was available for work while in training during the period from December 14, 2020, to May 31, 2021, inclusive. The Commission could not retroactively determine that the Appellant wasn't entitled to EI benefits.

[177] Since the Commission could not retroactively determine that the Appellant wasn't entitled to benefits, there is no need to decide whether she has to pay back the money she owes in overpaid benefits.

[178] This means that the appeal is allowed.

Normand Morin
Member, General Division – Employment Insurance Section

[139] See sections 43, 44, and 52 of the Act.