[TRANSLATION]

Citation: *Canada Employment Insurance Commission v ML*, 2023 SST 553

# Social Security Tribunal of Canada
## Appeal Division

# Decision

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| **Appellant:** | Canada Employment Insurance Commission |
| **Representative:** | Julie Meilleur |
| **Respondent:** | M. L. |

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| **Decision under appeal:** | General Division decision dated November 4, 2022 (GE-22-1792) |

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| **Tribunal member:** | Jude Samson |
| **Type of hearing:** | Teleconference |
| **Hearing date:** | February 14, 2023 |
| **Hearing participant:** | Appellant's representative |
| **Decision date:** | May 9, 2023 |
| **File number:** | AD-22-874 |

## Decision

[1] I am allowing the appeal by the Canada Employment Insurance Commission (Commission). The General Division made an error of law. This error allows me to give the decision the General Division should have given: The Claimant, M. L., was unavailable for work, which means that she wasn't entitled to the Employment Insurance (EI) benefits she received while in school.

## Overview

[2] The Claimant applied for EI regular benefits. The Commission paid her benefits from July 2021.

[3] Several months later, the Commission found that the Claimant wasn't available for work while in school, so she wasn't entitled to the benefits she had received during that period.[1] The Commission's decision created an overpayment on the Claimant's account.

[4] The Claimant argues that she should not have to pay back the overpayment, since the Commission knew that she was a full-time student from the beginning of her studies.

[5] The Claimant appealed the Commission's decision to the Tribunal's General Division. It allowed the appeal, saying that the Commission hadn't used its discretion judicially in deciding to reconsider the Claimant's claim for benefits.

[6] The Commission is now appealing the General Division decision to the Appeal Division. It argues that the General Division made errors of law.

[1] Sections 18(1)(a) and 153.161(1) of the *Employment Insurance Act* (EI Act) say that a person isn't entitled to be paid benefits unless they can prove (among other things) that they were available for work.

[7] I accept the Commission's arguments. In addition, I can give the decision the General Division should have given: The Claimant was unavailable for work while in school, that is, from August 20, 2021, to May 25, 2022.

# Issues

[8] The issues are as follows:

a) Did the General Division make an error of law in finding that the Commission had used its discretion to reconsider the Claimant's claim for benefits in a non-judicial manner?

b) If so, what is the appropriate remedy?

c) Was the Claimant available for work while in school?

# Analysis

[9] The law allows me to intervene in this case if the General Division made an error of law.[2]

## The General Division made an error of law

[10] The General Division made an error of law in finding that the Commission hadn't used its discretion judicially when it reviewed the Claimant's availability after the payment of benefits.

[11] Essentially, the General Division elevated the Commission's reconsideration policy to the level of a legislative authority. As a result, it unduly fettered the Commission's discretionary powers.

### – The law gives the Commission discretionary powers

[12] The Commission's powers under sections 52 and 153.161(2) of the *Employment Insurance Act* (EI Act) are discretionary. The Commission **may** reconsider a claim for

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

benefits and **may** verify a person's entitlement to benefits they have already received, but it doesn't have to.

[13] The Commission has to use its discretion judicially.

[14] The Tribunal can set aside a discretionary decision if, for example, a person can establish that the Commission:

- acted in bad faith
- acted for an improper purpose or motive
- took into account an irrelevant factor
- ignored a relevant factor
- acted in a discriminatory manner[3]

[15] In this case, the General Division found that the Commission had ignored the relevant factors set out in the Commission's reconsideration policy, found in Chapter 17 of the *Digest of Benefit Entitlement Principles*.[4] It reads:

> **17.3.3 Reconsideration policy**
>
> The Commission has developed a policy to ensure a consistent and fair application of section 52 of the EIA [*Employment Insurance Act*] and to prevent creating debt when the claimant was overpaid through no fault of their own. A claim will only be reconsidered when:
>
> - benefits have been underpaid
> - benefits were paid contrary to the structure of the EIA
> - benefits were paid as a result of a false or misleading statement

[3] See *Canada (Attorney General) v Purcell*, 1995 CanLII 3558 (FCA).
[4] See, for example, *MD and JD v Canada Employment Insurance Commission*, 2020 SST 1163; *JP v Canada Employment Insurance Commission*, 2021 SST 109; and *SL v Canada Employment Insurance Commission*, 2021 SST 889. They support the Claimant's argument.

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

[16] The General Division looked at all four situations and found that none of them applied in this case. It then concluded that the Commission could not reconsider the Claimant's claim for benefits.[5]

– **The General Division elevated the Commission's reconsideration policy to the level of a legislative authority**

[17] I find that the General Division made an error of law in coming to this conclusion. It elevated the Commission's reconsideration policy to the level of a legislative authority.[6]

[18] Its conclusion reads (at paragraph 78 of the decision):

> 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.

[19] The Commission's reconsideration policy was developed well before the COVID-19 pandemic. Because of this, the policy—and the General Division decision—doesn't take into account section 153.161 of the EI Act or the modified operational approach that the Commission used to deal with the pandemic.[7]

[20] This new approach was meant to enable more efficient processing of claims for benefits while empowering the Commission to verify a student's entitlement to benefits "at any point after benefits are paid."[8] So, I agree that the General Division decision unduly fetters the Commission's powers.

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[5] See the General Division decision at paragraphs 76 to 78.
[6] See *Maple Lodge Farms v Government of Canada*, 1982 CanLII 24 (SCC); and *Stemijon Investments Ltd v Canada (Attorney General)*, 2011 FCA 299.
[7] See Interim Order No. 10 Amending the *Employment Insurance Act* (Employment Insurance Emergency Response Benefit), and the explanatory note included with it.
[8] See section 153.161(2) of the EI Act.

[21] The Commission did consider some information given by the Claimant and postponed considering all the factors related to her entitlement in more detail. Although this approach may have had a negative impact on the Claimant, the Commission felt that it would allow it to save processing time and pay benefits more efficiently.[9]

[22] So, I find that the Claimant hasn't met the high standard of showing that the Commission acted in bad faith, arbitrarily, or for an improper purpose or motive. In reconsidering the Claimant's claim for benefits and verifying her entitlement to benefits, the Commission acted in accordance with its modified operational approach and within its statutory powers. As a result, I find that it exercised its discretionary powers judicially.

## I will give the decision the General Division should have given

[23] In its written submissions, the Commission argued that I should send the matter back to the General Division to reconsider the issue of the Claimant's availability. But at the hearing, the Commission agreed that the evidence is complete and that I would also be able to give the decision the General Division should have given.

[24] I find that I should give the decision the General Division should have given.[10]

[25] The Claimant isn't arguing that she was prevented from presenting her case in any way. The main facts aren't in dispute, and the issue is a rather narrow one.

[26] This means that I can decide whether the Claimant was available for work while in school.

## The Claimant wasn't available for work while in school

[27] As I mentioned above, a person who wants EI regular benefits has to show (among other things) that they are "capable of and available for work" but aren't able to find a suitable job.[11] The law doesn't define "available," but the Federal Court of Appeal

[9] See the Commission's supplementary representations at GD8-3 in the appeal record.
[10] Sections 59(1) and 64(1) of the DESD Act give me the power to fix the General Division's errors in this way. Also, see *Nelson v Canada (Attorney General)*, 2019 FCA 222 at paragraphs 16 to 18.
[11] See section 18(1)(a) of the EI Act.

established three factors in *Faucher* to guide the Tribunal when assessing a person's availability.

### – The law presumes that full-time students are unavailable for work

[28] The law presumes that full-time students are unavailable for work.[12] The presumption is especially strong for people who leave full-time work to go to school.

[29] The presumption appears to be shorthand for the fact that, to accommodate their course schedule, full-time students normally restrict their availability in a patchwork fashion. As a result, it is often challenging for full-time students to meet the third *Faucher* factor. More specifically, EI claimants must not set personal conditions that might unduly (overly) limit their chances of going back to work.

[30] However, the presumption doesn't apply to students who can show that they have exceptional circumstances.[13]

### – The Claimant hasn't shown that she was available for work

[31] The presumption of non-availability applies to the Claimant.

[32] The Claimant was a full-time student, and she hasn't shown exceptional circumstances that help rebut the presumption of non-availability.

[33] Before her studies, the Claimant worked full-time, generally during normal office hours.[14] When she started her studies, she wasn't available to work the same hours anymore.[15]

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[12] For example, see *Landry v Canada (Attorney General)* (1992), 152 NR 121 (FCA); *Canada (Attorney General) v Rideout*, 2004 FCA 304; and *Canada (Attorney General) v Cyrenne*, 2010 FCA 349.
[13] Factors that can be considered when assessing whether a person has exceptional circumstances include their history of working and studying, the flexibility of their course schedule, their willingness to change or abandon their program, and their efforts to find a new job: T. Stephen Lavender, *The 2022 Annotated Employment Insurance Act* (Toronto, ON: Thomson Reuters, 2021) at pages 137 and 138.
[14] See GD3-20 in the appeal record. See also GD3-18 in the appeal record, where the Claimant answered "Yes" to the question, "In your usual occupation, do you normally work daytime hours on a Monday to Friday basis?"
[15] The Claimant answered the questions related to her course schedule and her availability for work on a form and during phone calls with the Commission: See GD3-13 to GD3-19 and GD3-23 in the appeal

[34] For valid reasons, the Claimant prioritized school.

[35] However, her course schedule imposed a significant limit on her availability for work. She became unemployed and looked for a job with very different hours. She repeatedly told the Commission that she would not leave her program or adjust her course schedule for the sake of accepting work.[16] In addition, at the General Division hearing, she said that she had turned down job offers because the jobs didn't fit with her studies.[17]

[36] In the circumstances, I am unable to find a meaningful difference between this case and others in which the courts concluded that a person's course schedule restricted their availability in a way that meant they were unavailable for work and not entitled to EI benefits.[18]

[37] After the General Division hearing, the Claimant provided information from the Commission's website. In her opinion, this information supports her position that a person can go to school while receiving EI regular benefits.[19]

[38] However, the Commission's website makes a distinction between programs of study that people take on their own initiative and those approved by a government authority.

[39] In this situation, where the person is taking a program of study on their own initiative, the person still has to prove that they are capable of and available for work and actively looking for a job. Unfortunately, the Claimant is unable to prove her availability.

record. At the General Division hearing, the Claimant corrected one of the answers at GD3-18: Listen to the audio recording of the General Division hearing starting at about 0:15:20.
[16] See GD3-16 and GD3-18 in the appeal record.
[17] Listen to the audio recording of the General Division hearing starting at about 0:19:00.
[18] In addition to the cases above, see also *Horton v Canada (Attorney General)*, 2020 FC 743 at paragraph 35.
[19] See GD9-35 to GD9-41 in the appeal record.

## Conclusion

[40] The General Division made an error of law in finding that the Commission had used its discretion to reconsider the Claimant's claim for benefits in a non-judicial manner. On the contrary, the Commission acted in accordance with its modified operational approach and within its statutory powers. This means that it exercised its discretionary powers judicially.

[41] The General Division's error allows me to give the decision the General Division should have given about the Claimant's availability. Essentially, the Claimant has failed to rebut the presumption of non-availability that applies to full-time students.

[42] As a result, I am allowing the Commission's appeal.

[43] Lastly, I sympathize with the Claimant. And I do understand how the Commission's modified operational approach might have put her in a difficult financial situation.

[44] If she hasn't already done so, the Claimant could contact the Canada Revenue Agency to ask whether her debt could be reduced (or written off) because it is causing her serious financial hardship.[20] Alternatively, she could ask for a feasible repayment plan.

Jude Samson
Member, Appeal Division

[20] See section 56 of the *Employment Insurance Regulations*. The Canada Revenue Agency's Debt Management Call Centre can be reached at 1-866-864-5823.