



[TRANSLATION]

Citation: *Canada Employment Insurance Commission v CC*, 2023 SST 868

Social Security Tribunal of Canada Appeal Division

Decision

Appellant: Canada Employment Insurance Commission
Representative: Julie Meilleur

Respondent: C. C.
Representative: J. D.

Decision under appeal: General Division decision dated
November 10, 2022 (GE-22-2068)

Tribunal member: Jude Samson

Type of hearing: Teleconference

Hearing date: April 5, 2023

Hearing participants: Appellant's representative
Respondent
Respondent's representative

Decision date: June 30, 2023

File number: AD-22-894

Decision

[1] I am allowing the appeal by the Canada Employment Insurance Commission (Commission) and returning the matter to the General Division for it to consider the substantive issue.

Overview

[2] C. C. is the Claimant in this case. He applied for Employment Insurance (EI) regular benefits, and the Commission paid him benefits.

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

[4] The Claimant appealed the Commission's decision to the Tribunal's General Division. He argued that he should not have to pay back the overpayment, since the Commission knew that he was a student from the start. He had given it this information several times.

[5] The General Division allowed the Claimant's appeal, saying that the Commission hadn't exercised its discretion to reconsider judicially.

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

[7] The Commission is correct. I am allowing its appeal.

Issues

[8] The issues are as follows:

- a) Did the General Division make an error of law in finding that the Commission hadn't judicially exercised its discretion to review the Claimant's availability after the payment of benefits?
- b) If so, what is the appropriate remedy?

Analysis

[9] The law allows me to intervene in this case if the General Division made an error of law.¹

The General Division made an error of law

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

– Sections 52 and 153.161 of the *Employment Insurance Act* operate together

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

[12] This means that the law gives the Commission fairly broad powers to revisit an earlier decision and recover overpayments to a person.²

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

² See *Canada Employment Insurance Commission v PJ*, 2022 SST 1311; and *SF v Canada Employment Insurance Commission*, 2022 SST 1095.

[13] The Commission developed a reconsideration policy to guide the exercise of its discretion to reconsider under section 52.³ 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
- the claimant ought to have known there was no entitlement to the benefits received

[14] In this case, the General Division found that the Commission hadn't exercised its power to **verify** under section 153.161(2) of the EI Act. In support of its decision, the General Division noted that the Commission hadn't asked the Claimant to prove his entitlement as required by the relevant section.

[15] This finding allowed the General Division to focus its decision on the power to **reconsider** set out in section 52 of the EI Act and on the associated reconsideration policy.

[16] However, the Appeal Division has consistently held that sections 52 and 153.161 of the EI Act operate together in cases like this one.⁴ In addition, the Commission's reconsideration policy can't prevail over Parliament's intent as expressed in section 153.161.

³ The Commission's reconsideration policy is in chapter 17 of the Digest of Benefit Entitlement Principles.

⁴ See, for example, *SF v Canada Employment Insurance Commission*, 2022 SST 1095; *Canada Employment Insurance Commission v PJ*, 2022 SST 1311; and *GP v Canada Employment Insurance Commission*, 2023 SST 192.

[17] This means that the General Division made an error of law by ignoring section 153.161 of the EI Act and by basing its decision almost exclusively on compliance with the Commission's reconsideration policy.

– **The Commission didn't have to require more evidence from the Claimant on the issue of his entitlement to benefits**

[18] Regardless of the above finding, the Claimant says that the Commission didn't exercise its discretion judicially because it didn't ask him to prove his entitlement in the manner described in section 153.161(2) of the EI Act. He says that this oversight prevented the Commission—and then the General Division—from reviewing his entitlement to benefits.

[19] In support of his argument, the Claimant highlights in particular the words below:

Verification

(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.

[20] The Appeal Division has already rejected the Claimant's argument, in a decision called *PJ*.⁵ I add the following observations:

- The Commission asked the Claimant for more information about his studies and his availability for work throughout his benefit period and when reconsidering his file.⁶
- Even though the General Division rescinded the Commission's discretionary decision, the law gives it the power to give the decision that the Commission should have given.⁷

⁵ See *Canada Employment Insurance Commission v PJ*, 2022 SST 1311 at para 29.

⁶ See GD3-19 to GD3-25, GD3-27 to GD3-31, GD3-40 to GD3-44, GD3-45, GD3-50 to GD3-54, GD3-64 to GD3-66, GD3-73, and GD3-74 in the appeal record.

⁷ See sections 54 and 64 of the DESD Act.

[21] The Commission says that it had enough information to make a decision about the Claimant's availability.

[22] So, in my view, the way that the Commission verified the Claimant's file doesn't mean that it exercised its discretion in a non-judicial manner. Moreover, this approach didn't prevent the General Division from considering the issue of the Claimant's availability.

I am returning the matter to the General Division for reconsideration

[23] The Commission exercised its discretion judicially when it verified the Claimant's file.

[24] However, the main issue still hasn't been decided: Has the Claimant shown his availability for work for the relevant periods? This issue turns on an assessment of several factors.⁸

[25] I am returning the matter to the General Division for it to hear and assess all the evidence relating to these factors.

Conclusion

[26] I am allowing the Commission's appeal. The General Division made an error of law in finding that the Commission hadn't judicially exercised its discretion to review the Claimant's availability after the payment of benefits.

[27] I am returning the matter to the General Division for it to consider the substantive issue: Has the Claimant shown his availability for work for the relevant periods?

Jude Samson
Member, Appeal Division

⁸ Factors that can be considered include the student's history of working and studying, the flexibility of their course schedule, their willingness to change or abandon their program of study, and their efforts to find a new job: T. Stephen Lavender, *The 2022 Annotated Employment Insurance Act* (Toronto, Ontario: Thomson Reuters, 2021), at pages 137 and 138.