[TRANSLATION]

Citation: *SS v Canada Employment Insurance Commission*, 2022 SST 1788

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

# Decision

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| **Appellant:** | S. S. |
| **Representative:** | L. P. |
| **Respondent:** | Canada Employment Insurance Commission |

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| **Decision under appeal:** | Canada Employment Insurance Commission reconsideration decision (473920) dated May 26, 2022 (issued by Service Canada) |

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| **Tribunal member:** | Charline Bourque |
| **Type of hearing:** | Videoconference |
| **Hearing dates:** | October 4, 2022<br>October 18, 2022 |
| **Hearing participants:** | Appellant<br>Appellant's representative |
| **Decision date:** | November 3, 2022 |
| **File number:** | GE-22-2141 |

## Decision

[1] The appeal is allowed.

[2] The Canada Employment Insurance Commission (Commission) didn't exercise its discretion judicially. So, it could not retroactively reconsider the Claimant's claim. This means that the appeal is allowed, and the Claimant is entitled to Employment Insurance (EI) benefits from September 27, 2020.

## Overview

[3] The Commission decided that the Claimant was disentitled from receiving EI regular benefits from September 27, 2020, because she wasn't available for work.

[4] A claimant has to be available for work to get EI regular benefits. Availability is an ongoing requirement. This means that a claimant has to be searching for a job.

[5] I have to decide whether the Claimant has proven that she was available for work. The Claimant has to prove this on a balance of probabilities. This means that she has to show that it is more likely than not that she was available for work.

[6] The Commission says that the Claimant wasn't available because she was in school full-time.

[7] The Claimant disagrees. She says that she was available for full-time work and that her school schedule allowed her to continue working. She explains that she stopped working because of COVID-19 and that she was already working and taking training at the same time.

[8] The Claimant also says that she doesn't understand why her EI benefits were cut off retroactively. She says that she was always honest in answering the Commission's questions about her training and that she was available and looking for work.

# Issue

[9] Could the Commission reconsider the Claimant's claim for benefits retroactively?

[10] Was the Claimant available for work while in school?

# Analysis

## Issue 1: Did the Commission have the power to retroactively review the Claimant's claim for benefits?

[11] The Commission says that the entitlement decision under section 153.161(2) of the Act is made after benefits have been paid. This modified approach facilitated payment of EI benefits to claimants taking non-referred training during the COVID-19 pandemic. However, availability was still assessed in the same way, and claimants taking a non-referred training course had to prove their availability. Section 153.161(2) of the Act allowed the Commission to verify entitlement to benefits at a later time. In the Claimant's case, she received benefits because she had applied for benefits and reported being available. Even though she had completed her claim and reports in good faith, the Commission decided that she wasn't available under sections 18 and 153.161 of the Act.[1]

[12] I note that the Claimant established a claim for benefits effective March 12, 2020. After she received emergency response benefits, a claim for EI regular benefits was established on September 27, 2020, and she received benefits until May 22, 2021.

[13] The Commission made a retroactive decision on the issue of the Claimant's availability on April 1, 2022,[2] that is, within 36 months.

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[1] See the Commission's arguments to the Tribunal (GD4-7).
[2] See the Commission's initial decision, dated April 1, 2022 (GD3-22).

## Did the Commission exercise its discretion judicially when it reconsidered the Claimant's claim for benefits?

[14] The Tribunal's Appeal Division has found that the Tribunal's General Division can't refuse to exercise its jurisdiction to determine whether the Commission had the power to retroactively disentitle the claimant to benefits.[3] So, I have to determine whether the Commission exercised its discretion judicially when it reconsidered the Claimant's claim for benefits.

### – The Commission's discretion

[15] In general, section 52 of the Act gives the Commission the power to reconsider a claim for benefits within 36 months after the benefits have been paid or would have been payable. And it has 72 months to reconsider a claim if, in its opinion, a false or misleading statement or representation has been made in connection with the claim.[4]

[16] In this case, the Commission reconsidered the claim for benefits within 36 months. This time frame isn't in issue.

[17] The 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.[5]

[18] In addition, it is up to the Commission to show that it exercised its discretion judicially.[6]

[19] In short, I am of the view that since the Commission's power to reconsider is discretionary, I can interfere with the Commission's decision only if I find that it didn't

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[3] See *GP v Canada Employment Insurance Commission*, 2021 SST 791.
[4] See section 52 of the *Employment Insurance Act* (Act).
[5] See *Canada (Attorney General) v Uppal*, 2008 FCA 388.
[6] See *Dunham*, A-708-95; and *Purcell*, A-694-94.

exercise its discretion judicially—in other words, that it didn't act in good faith, taking into account all relevant factors and ignoring any irrelevant factors.[7]

### – The Commission's guidelines

[20] The Federal Court of Appeal has recognized that it is helpful for the Commission to have guidelines governing the exercise of its discretion. The Federal Court of Appeal has reiterated many times that the Commission was justified in establishing guidelines for itself to guarantee some consistency nationally and avoid arbitrary decisions.[8]

[21] These guidelines are found in the Digest of Benefit Entitlement Principles (Digest). I note that I am not bound by these guidelines, since they don't have the force of law. Still, I am of the view that they are an important tool that the Commission can use in making EI decisions. So, I find that these guidelines reduce the risk of an arbitrary decision and that the Commission has to explain its decision if it chooses not to follow its own guidelines.

[22] The Act says that when a claimant hasn't received benefits they were entitled to or has received benefits they weren't entitled to, the Commission may reconsider a claim for benefits within 36 months after the benefits have been paid or would have been payable.[9]

[23] The Claimant says that she doesn't understand why her EI benefits were cut off. She says that she was always honest in answering the Commission's questions about her training and about the fact that she was available and looking for work.

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[7] See *Chartier v Canada Employment and Immigration Commission*, 1990 FCA A-42-90; and *Canada (Attorney General) v Uppal*, 2008 FCA 388.
[8] See *Canada (Attorney General) v Hudon*, 2004 FCA 22; and *Canada (Attorney General) v Gagnon*, 2004 FCA 351.
[9] See section 52 of the Act.

### – When a claim will be reconsidered

[24] I refer again to the Digest, where the Commission determined, in its reconsideration policy, that a claim will only be reconsidered 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[10]

[25] As a result, I find that the Commission determined that it was reconsidering the Claimant's file and that, in so doing, it decided that the information presented warranted reconsideration and that it was within the time frame. So, it made a decision in accordance with its own guidelines, calculated the amount to be repaid (overpayment), and notified the Claimant of its decision.

[26] So, I will look at the four factors that the Commission considered.

### – Underpayment

[27] Under the first factor, an overpayment of $17,000 was created.[11]

[28] So, this isn't an underpayment.

### – Structure of the Act

[29] Concerning the structure of the Act, section 17.3.3.2 of the Digest clearly states that a period of non-availability falls outside the definition of *Structure of the Act*.[12]

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[10] See section 17.3.3 of the Digest of Benefit Entitlement Principles (Digest).
[11] See the notice of debt (GD3-23).
[12] See section 17.3.3.2 of the Digest.

[30] But, the Commission can reconsider an element that falls outside the definition of *Structure of the Act* as long as it meets one of the other conditions set out under the policy. I find that this isn't the case here.

– **False or misleading statements**

[31] The third factor under which the Commission will reconsider earlier decisions concerns the payment of benefits as a result of false or misleading statements.

[32] The Commission may reconsider a claim for benefits within 36 months after the benefits have been paid. If, in its opinion, a false statement has been made, the time can be extended to 72 months.[13]

[33] I recognize that the burden on the Commission isn't as strict when it comes to determining whether a false or misleading statement has been made compared to the burden it has to impose a penalty. For example, it doesn't have to show that the false statements were made knowingly.[14] In my view, this reasoning is valid for both reconsiderations within 36 months and reconsiderations within 72 months. But the Commission's opinion alone isn't enough to find that benefits were paid as a result of false or misleading statements.

[34] In its arguments, the Commission indicates that the reason the employment ended—related to COVID-19—has no connection with the decision on availability. The COVID-19 situation [was] already taken into account, since the temporary measures apply to the claim in question. The entitlement decision under section 153.161(2) of the Act is made after benefits have been paid. This modified approach facilitated payment of EI benefits to claimants taking non-referred training during the COVID-19 pandemic. However, availability was still assessed in the same way, and claimants taking a non-referred training course had to prove their availability. Section 153.161(2) of the Act allowed the Commission to verify entitlement to benefits at a later time. In the Claimant's case, she received benefits because she had applied for benefits and

[13] See section 52(5) of the Act.
[14] See *Canada (Attorney General) v Langelier*, FCA A-140-01.

reported being available. Even though she had completed her claim and reports in good faith, the Commission decided that she wasn't available under sections 18 and 153.161 of the Act.[15]

[35] So, on April 1, 2022, the Commission decided that the Claimant wasn't available for work from September 27, 2020, because she was taking a training course on her own initiative.[16]

[36] I note that the Claimant filled out the training form on August 28, 2020, and on December 5, 2020.[17] Also, on her August 23, 2020, report, she declared her training and reported restrictions on the hours she could work.[18] I note that her reports weren't included in the Commission's file.

[37] This means that the Commission knew this information when it established the claim. In my view, the Commission's making an automated decision based on an incomplete assessment of the information the Claimant had provided about her availability doesn't change the fact that a decision was made.

[38] I find, on a balance of probabilities, that the Claimant's statements weren't false or misleading statements. She reported being in school full-time from the moment she applied for benefits. The Commission could not have been unaware of these facts and could not justify its reconsideration on facts it already knew.

[39] I note that the Digest even considers this type of situation. It says:

> **A Commission error occurs when the Commission has all the relevant information needed to make a decision but the final decision is not supported by the information.** The error can occur in the adjudication process or in failing to enter a decision into the computer system.
>
> If the Commission erred in denying benefits, these benefits will be paid. If the Commission incorrectly paid benefits, the error will be

[15] See the Commission's arguments to the Tribunal (GD4-7).
[16] See the initial decision (GD3-22).
[17] See the training forms (GD3-13 to GD3-18).
[18] See the Claimant's report (GD6-2 to GD6-6).

> corrected currently and no overpayment will be created. The only exception is when the Commission error resulted in a decision that is contrary to the structure of the EIA , in which case the Commission corrects retroactively, even if an overpayment occurs ….[19] [emphasis added]

[40] I note that the issue of availability isn't part of the structure of the Act.[20]

– **The Claimant ought to have known there was no entitlement to the benefits received**

[41] The last situation described in the Digest is when a claimant ought to have known there was no entitlement to the benefits received. In this case, there is no indication that the Claimant ought to have known she could not get benefits, especially since she had mentioned being a full-time student from the start.

[42] In conclusion, I find that the Commission didn't follow its own reconsideration guidelines. I find that it exercised its discretion arbitrarily and in a non-judicial manner. In my view, it didn't act in good faith, taking into account all relevant factors and ignoring any irrelevant factors.[21]

[43] I find that the Commission didn't take all the relevant circumstances into account and didn't consider important factors. In my view, an extenuating circumstance to consider is the challenge of paying back such a large debt.

[44] The Commission also had all the information relevant to the Claimant's situation from the moment she applied for EI. I am of the view that she had no way of knowing that there was no entitlement to the benefits received. In addition, even though the Commission had all the information it needed to make its decision as early as September 2020, it took 17 months for it to do so. It didn't make its decision until April 2022.

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[19] See section 17.3.2.2 of the Digest.
[20] See section 17.3.3.2 of the Digest.
[21] See *Chartier v Canada Employment and Immigration Commission*, 1990 FCA A-42-90; and *Canada (Attorney General) v Uppal*, 2008 FCA 388.

[45] In conclusion, given all the evidence and the circumstances presented, I find that the Commission didn't exercise its discretion judicially in applying sections 52 and 153.16(2) [*sic*] of the Act. Having myself considered all of the Claimant's circumstances as indicated above, I find that a reconsideration of the claim for benefits is unwarranted, even if done within less than 36 months.

[46] So, I find that I don't have to decide the issue of the Claimant's availability.

## Conclusion

[47] The Commission didn't exercise its discretion judicially. So, it could not retroactively reconsider the Claimant's claim. This means that the appeal is allowed, and the Claimant is entitled to EI benefits from September 27, 2020.

[48] This means that the appeal is allowed.

Charline Bourque
Member, General Division – Employment Insurance Section