



[TRANSLATION]

Citation: *JL v Canada Employment Insurance Commission*, 2023 SST 1074

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

Decision

Appellant: J. L.
Representative: Michel Lachance

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (447842) dated January 17, 2022 (issued by Service Canada)

Tribunal member: Charline Bourque

Type of hearing: Videoconference
Hearing date: March 15, 2023
Hearing participants: Appellant
Appellant's representative

Decision date: April 21, 2023
File number: GE-22-3544

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 overpayment has to be written off for the period from September 28, 2020, to July 12, 2021.

Overview

[3] The Claimant is a full-time student. She stopped working because of the health measures that the government imposed during the COVID-19 pandemic.

[4] On January 17, 2022, the Commission decided that the Claimant was disentitled from receiving Employment Insurance (EI) regular benefits from September 28, 2020, to July 12, 2021, because she was taking training on her own initiative and wasn't available for work.

[5] This decision resulted in a benefit overpayment of \$18,228.

[6] The Claimant appealed the Commission's decision, and the Tribunal decided to allow the appeal on May 24, 2022. The Commission appealed that decision to the Tribunal's Appeal Division.

[7] On October 28, 2022, the Appeal Division allowed the Commission's appeal on the issue of availability.

[8] But, the Appeal Division sent the file back to the General Division to decide whether the Commission could retroactively disentitle the Claimant and, if so, whether the Commission should have acted and did act judicially when it decided to reconsider the Claimant's claim.

[9] So, I have to address only that issue in this decision.

Issue

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

Analysis

[11] The Commission says that section 153.161 of the Act allows it to verify a claimant's entitlement after it has paid them benefits. The Commission says that in the context of section 153.161 of the Act, it may, at any point after benefits are paid to a claimant, verify that the claimant is entitled to be paid benefits, to make sure that the claimant meets the statutory criteria. The Commission argues that as a result, it isn't a reconsideration under section 52 of the Act.

[12] The Commission is of the view that it verified the Claimant's entitlement to EI benefits on November 23, so it wasn't a reconsideration decision. As a result, it determined that the Claimant was disentitled from receiving EI benefits from September 28, 2020, to July 12, 2021.¹

[13] 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.

[14] Section 52(1) of the Act allows the Commission to reconsider a claim for benefits within 36 months after the benefits have been paid.

[15] I disagree with the Commission's reasoning.

[16] In my view, from the moment the Commission decides to pay a claimant EI benefits, it is making a decision, even if no letter is issued.

¹ See the Commission's November 23, 2021, decision (GD3-31).

[17] In this case, the Claimant received EI benefits from September 27, 2020, to July 12, 2021. So, from the first payment, the Commission decided that the Claimant was entitled to benefits, since it decided to pay her benefits.

[18] This means that when it later makes a new decision for the same claim and benefit period, the Commission is reconsidering the claim to do so. It can't contradict the fact that it is reversing its decision, since it is asking the Claimant to pay back benefits she already received. Benefits could not have been paid without an initial decision.

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

[19] 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.² 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

[20] 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.³

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

[22] It is up to the Commission to show that it exercised its discretion judicially.⁴

[23] 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

² *GP v Canada Employment Insurance Commission*, 2021 SST 791.

³ See section 52 of the *Employment Insurance Act* (Act).

⁴ See *Dunham*, A-708-95; and *Purcell*, A-694-94.

discretionary power in a non-judicial manner or acted in a perverse or capricious manner without regard to the material before it.⁵

[24] In other words, I can set aside a discretionary decision of the Commission if, for example, a claimant 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 manner⁶

[25] The Commission's powers under sections 52 and 153.161(2) of the 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. [emphasis added]

– **The Commission's guidelines**

[26] 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.⁷

[27] 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

⁵ See *Canada (Attorney General) v Uppal*, 2008 FCA 388.

⁶ See *Canada (Attorney General) v Purcell*, FCA 1995.

⁷ See *Canada (Attorney General) v Hudon*, 2004 FCA 22; and *Canada (Attorney General) v Gagnon*, 2004 FCA 351.

arbitrary decision and that the Commission has to explain its decision if it chooses not to follow its own guidelines.

[28] The Claimant argues that the Commission was aware of her situation from the moment she applied for EI. She was diligent in finding out more about her situation and by calling about her scholarships. She got the Commission's approval a number of times concerning her studies.

[29] The Commission, meanwhile, indicates that it didn't act in bad faith or in a discriminatory manner. To verify the Claimant's entitlement to benefits, it considered the factors relevant to analyzing her availability, namely, the particulars of her studies, including her course schedule from Monday to Friday, the job search efforts she reported, the priority she gave to her studies, and the restrictions she placed on her availability. She wasn't singled out for her personal factors and wasn't discriminated against. The verification time and the outcome of having to pay back a significant overpayment aren't relevant considerations.

[30] In addition, the Commission says that even if it gave the Claimant information that was unclear or misleading, misinformation doesn't justify an exemption from the application of the Act.

– **When a claim will be reconsidered**

[31] I refer again to the Digest, where the Commission says, 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 received⁸

[32] 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.

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

– **Underpayment**

[34] Under the first factor, an overpayment of \$14,200 was created. After reconsideration, the amount is \$18,228.⁹

[35] The Commission's policy says that no overpayment will be created if it incorrectly paid benefits.¹⁰

– **Structure of the Act**

[36] 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*.¹¹

[37] 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**

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

⁸ See section 17.3.3 of the Digest of Benefit Entitlement Principles (Digest).

⁹ See the overpayment breakdown (GD3-35).

¹⁰ See section 17.3.2.2 of the Digest. An exception exists in cases where the Commission error resulted in a decision that is contrary to the structure of the Act. But that exception doesn't apply in this case.

¹¹ See section 17.3.3.2 of the Digest.

[39] 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.¹²

[40] 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.¹³ 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.

[41] The Commission hasn't made any specific arguments as to why it finds that the Claimant made false or misleading statements.

[42] The Commission decided that the Claimant wasn't available for work because she was taking a training course on her own initiative.¹⁴

[43] I note that the Claimant says that she indicated she was studying full-time on all her weekly reports during her period of study. The Commission didn't provide her reports with its file.

[44] Then, as of September 26, 2020, the Claimant indicated that she was taking training.¹⁵ On February 12, 2021, she filled out the training form again.¹⁶

[45] The Claimant also says that she contacted the Commission about her scholarships and whether she qualified for benefits. The Commission then unblocked her file and paid her benefits again.

¹² See section 52(5) of the Act.

¹³ See *Canada (Attorney General) v Langelier*, FCA A-140-01.

¹⁴ See the initial decision, dated November 23, 2021 (GD3-31).

¹⁵ See the claim for EI benefits (GD3-13 to GD3-17).

¹⁶ See the claim for EI benefits (GD3-18 to GD3-22).

[46] The Commission didn't contact the Claimant to verify this information until November 16, 2021.¹⁷

[47] 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 start. The Commission could not have been unaware of these facts and could not justify its reconsideration on facts it already knew.

[48] 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.

[49] "If the Commission erred in denying benefits, these benefits will be paid. **If the Commission incorrectly paid benefits, the error will be 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 [Act] , in which case the Commission corrects retroactively, even if an overpayment occurs...."¹⁸ [emphasis added]

[50] I note that the issue of availability isn't part of the structure of the Act.¹⁹

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

[51] 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, she reported being in

¹⁷ See the Commission's Supplementary Record of Claim (GD3-25).

¹⁸ See section 17.3.2.2 of the Digest.

¹⁹ See section 17.3.3.2 of the Digest.

school on a weekly basis, and she contacted the Commission about her situation a few times.

[52] 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.²⁰

[53] The Commission says that to verify the Claimant's entitlement to benefits, it considered the factors relevant to analyzing her availability, namely, the particulars of her studies, including her course schedule from Monday to Friday, the job search efforts she reported, the priority she gave to her studies, and the restrictions she placed on her availability. She wasn't singled out for her personal factors and wasn't discriminated against. The verification time and the outcome of having to pay back a significant overpayment aren't relevant considerations.

[54] I disagree with the Commission. I find that the Commission didn't take all the relevant circumstances into account and didn't consider important factors. It didn't follow its own guidelines. It assessed an overpayment even though the issue of availability isn't a decision that is contrary to the structure of the Act. Moreover, the Claimant didn't make any false or misleading statements.

[55] The Commission also had all the information relevant to the Claimant's situation from the moment she applied for EI. It paid benefits more than once, since the Claimant filled out the training form twice [and] contacted the Commission about her scholarships, which had the effect of unblocking her benefits.

[56] I am of the view that the Claimant had no way of knowing that there was no entitlement to the benefits received.

[57] 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

²⁰ See *Chartier v Canada Employment and Immigration Commission*, 1990 FCA A-42-90; and *Canada (Attorney General) v Uppal*, 2008 FCA 388.

153.16(2) [*sic*] of the Act. The Commission didn't follow its own reconsideration policy. 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.

Conclusion

[58] The appeal is allowed.

[59] 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 overpayment has to be written off for the period from September 28, 2020, to July 12, 2021.

Charline Bourque
Member, General Division – Employment Insurance Section