



[TRANSLATION]

Citation: *Canada Employment Insurance Commission v LK*, 2023 SST 886

## Social Security Tribunal of Canada Appeal Division

# Decision

**Appellant:** Canada Employment Insurance Commission  
**Representative:** Julie Meilleur

**Respondent:** L. K.  
**Representative:** C. W.

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**Decision under appeal:** General Division decision dated  
December 6, 2022 (GE-22-1614)

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**Tribunal member:** Pierre Lafontaine

**Type of hearing:** Teleconference

**Hearing date:** June 13, 2023

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

**Decision date:** July 5, 2023

**File number:** AD-22-964

## Decision

[1] The appeal is allowed. The file returns to the General Division to determine whether the Claimant was entitled to benefits from September 27, 2020, when she was taking training.

## Overview

[2] The Appellant, the Canada Employment Insurance Commission (Commission), decided that the Respondent (Claimant) was not entitled to Employment Insurance (EI) regular benefits from September 27, 2020, because she was taking unauthorized training and was not available for work. The Claimant appealed the Commission's reconsideration decision to the General Division.

[3] The General Division determined that the Commission had not used its discretion judicially in deciding to verify and reconsider the Claimant's claim for benefits. It found that the Commission could not retroactively determine that the Claimant was not entitled to EI benefits.

[4] The Appeal Division gave the Commission permission to appeal the General Division decision. The Commission argues that the General Division made an error of law in its interpretation of section 153.161 of the *Employment Insurance Act* (EI Act).

[5] I have to decide whether the General Division made an error of law in its interpretation of section 153.161 of the EI Act.

[6] I am allowing the Commission's appeal on the issue of the exercise of judicial power.

[7] The file returns to the General Division to determine whether the Claimant was entitled to benefits from September 27, 2020, when she was taking training.

## Issue

[8] Did the General Division make an error of law in its interpretation of section 153.161 of the EI Act?

## Analysis

### Appeal Division's mandate

[9] The Federal Court of Appeal has established that the Appeal Division's mandate is conferred to it by sections 55 to 69 of the *Department of Employment and Social Development Act*.<sup>1</sup>

[10] The Appeal Division acts as an administrative appeal tribunal for decisions made by the General Division and does not exercise a superintending power similar to that exercised by a higher court.

[11] So, unless the General Division failed to observe a principle of natural justice, made an error of law, or based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it, I must dismiss the appeal.

### Preliminary remarks

[12] The Claimant filed a document after the hearing. I decided to accept it, since the facts mentioned in it are consistent with the Claimant's testimony before the General Division.

### Did the General Division make an error of law in its interpretation of section 153.161 of the EI Act?

[13] The General Division determined that the Commission had not used its discretion judicially in deciding to verify and reconsider the Claimant's claim for benefits. It found

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<sup>1</sup> *Canada (Attorney General) v Jean*, 2015 FCA 242; *Maunder v Canada (Attorney General)*, 2015 FCA 274.

that the Commission could not retroactively determine that the Claimant was not entitled to EI benefits.

[14] The Commission argues that it exercised its discretion judicially when it decided, under section 153.161 of the EI Act, that the Claimant was not entitled to benefits. It argues that its reconsideration policy is not relevant to this case given that section 153.161 of the EI Act is what applies to this situation.

[15] The Claimant argues that the General Division did not make an error in finding that the Commission had not exercised its power judicially, since she reported being in training full-time before and after applying for benefits and when completing her reports. She was always honest.

[16] To determine whether the General Division made errors, it is important to look at the Commission's reconsideration powers first before considering the impact of the temporary pandemic measures to facilitate access to benefits.

[17] The Commission's reconsideration powers are set out in section 52 of the EI Act. This section says that the Commission may reconsider a claim for benefits within 36 months after the benefits have been paid.<sup>2</sup>

[18] Case law has established that the only limitation on the Commission's power to reconsider under section 52 of the EI Act is time. This means that the Commission may reconsider a claim under section 52 even if there are no new facts. In other words, it can withdraw its earlier approval and require claimants to repay the benefits paid under that approval.<sup>3</sup>

[19] During the pandemic, the government temporarily changed the EI Act. Section 153.161 was added to the EI Act and came into force on September 27, 2020.

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<sup>2</sup> In situations where the Commission is of the opinion that a false or misleading statement has been made, the Commission has 72 months to reconsider a claim.

<sup>3</sup> *Brisebois v Canada (Employment and Immigration Commission)*, A-582-79; *Brière v Commission (Attorney General)*, A-637-86.

This provision applies to the Claimant, who established an initial claim for EI benefits on September 27, 2020.

[20] Section 153.161 of the EI Act says:

### Availability

#### **Course, program of instruction or non-referred training**

**153.161 (1)** For the purposes of applying paragraph 18(1)(a), a claimant who attends a course, program of instruction or training to which the claimant is not referred under paragraphs 25(1)(a) or (b) is not entitled to be paid benefits for any working day in a benefit period for which the claimant is unable to prove that on that day they were capable of and available for work.

#### **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.

[21] This temporary provision says that for the purposes of applying section 18(1)(a) of the EI Act, the Commission may **verify** that a claimant is entitled to benefits by requiring proof of their **availability** for work at any point after benefits are paid. This means that the verification of availability may not have happened while benefits were being paid.

[22] Section 52 of the EI Act is written differently. It says that the Commission may **reconsider a claim for benefits** within 36 months after the benefits have been paid. In my view, this power is not similar to the one under section 153.161 of the EI Act.

[23] The Commission argues that the Claimant's entitlement was not verified until February 8, 2022. However, I find no evidence before the General Division that the entitlement decision was delayed.<sup>4</sup> Instead, the Claimant's evidence shows that she

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<sup>4</sup> The Commission's submissions to the General Division are not evidence of the facts that they summarize: See *MM v Canada Employment Insurance Commission*, 2015 SSTAD 1045.

checked with the Commission before applying for benefits to find out whether she could get benefits given her training. She then received benefits. She also had communications with the Commission in May 2021 to make sure she was still entitled to benefits. On her reports, she always reported being in school.

[24] I find that the evidence before the General Division shows, on a balance of probabilities, that the Commission already verified the Claimant's entitlement before paying her benefits.

[25] That being said, I am of the view that section 153.161 has to be read together with section 52 of the EI Act. One section allows the Commission to verify entitlement to benefits if it has not done so, and if it has, the other section allows it to reconsider its decision. Both sections are concerned with recovering amounts that claimants should not have received.

[26] In addition, the decision to seek verification under section 153.161 or to reconsider a claim under section 52 is discretionary. This means that, although the Commission has the power to seek verification of entitlement or to reconsider a claim, it does not have to do so.

[27] The law says that discretionary powers must be exercised judicially. This means that when the Commission decides to reconsider a claim, it cannot 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.<sup>5</sup>

[28] The Commission developed a policy to help it exercise its discretion to reconsider decisions under section 52 of the EI Act. The Commission says that the reason for the policy is "to ensure a consistent and fair application of section 52 of the [EI Act] and to prevent creating debt when the claimant was overpaid through no fault of their own." The policy says that a claim will only be reconsidered when:

- benefits have been underpaid

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<sup>5</sup> See *Canada (Attorney General) v Purcell*, 1995 CanLII 3558 (FCA).

- benefits were paid contrary to the structure of the [EI 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<sup>6</sup>

[29] The policy says that a period of non-availability is not a situation where benefits were paid contrary to the structure of the EI Act.<sup>7</sup> The Claimant did not make any false or misleading statements and could not have known that she was not entitled to the benefits received. None of the factors mentioned in the Commission's policy justify reconsidering the Claimant's claim, since she acted in good faith and repeatedly reported her training to the Commission.

[30] I have no doubt that the Claimant acted in good faith and repeatedly reported her training to the Commission. The Commission reconsidered the claim on the facts that were available to it when the initial entitlement decision was made and benefits were paid.

[31] Absent section 153.161 of the EI Act, I would agree that the Commission would have had to consider the above factors and its own policy when making the discretionary decision to reconsider the Claimant's claim.

[32] However, I find that during the temporary pandemic measures, the Commission's discretionary decision whether to reconsider a claim had to be made with the legislative intent of section 153.161 of the EI Act in mind.

[33] In implementing this section during the pandemic, Parliament clearly wanted to insist on the Commission's power to verify that a claimant taking a course, program of instruction, or training was entitled to EI benefits, even after the payment of benefits.

[34] One of the principles of statutory interpretation is that Parliament does not speak in vain. In implementing section 153.161 of the EI Act, Parliament clearly decided that

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<sup>6</sup> See Digest of Benefit Entitlement Principles, Chapter 17 - Section 17.3.3.

<sup>7</sup> See Digest of Benefit Entitlement Principles, Chapter 17 - Section 17.3.3.2.

reconsidering an initial decision about a student's availability made during the pandemic outweighed the importance of the initial decision being final.

[35] I find that the Commission exercised its discretion within the parameters set by Parliament during the pandemic.

[36] Considering the above factors, I find that the General Division made an error in deciding that the Commission had not exercised its power judicially and, as a result, could not retroactively determine that the Claimant was not entitled to EI benefits.

[37] This means that I am justified in intervening.

## **Remedy**

[38] For the above reasons, I find that the Commission used its discretion judicially under sections 52 and 153.161 of the EI Act.

[39] The Commission considered all the relevant information in deciding to verify availability. No new relevant facts were provided at the General Division hearing that the Claimant had not already provided to the Commission. There is no indication that the Commission considered irrelevant information or acted in bad faith or in a discriminatory manner. The Commission also acted for a proper purpose in verifying the Claimant's entitlement to benefits.

[40] However, given the General Division's findings, the file has to return to the General Division to determine whether the Claimant was entitled to benefits from September 27, 2020, when she was taking training.

## **Conclusion**

[41] The Commission's appeal is allowed on the issue of the exercise of judicial power.



[42] However, the file returns to the General Division to determine whether the Claimant was entitled to benefits from September 27, 2020, when she was taking training.

Pierre Lafontaine  
Member, Appeal Division