

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:

C. L.

Respondent:

Canada Employment Insurance Commission

Decision under appeal:

Canada Employment Insurance Commission
reconsideration decision (457308) dated November 10,
2022 (issued by Service Canada)

Tribunal member:

Catherine Shaw

Type of hearing:

Teleconference

Hearing date:

April 11, 2023

Hearing participant:

Appellant

Decision date:

April 25, 2023

File number:

GE-22-3692

Decision

[1] The appeal is allowed.

[2] The Canada Employment Insurance Commission (Commission) didn't properly exercise its discretion when it decided to review the Appellant's entitlement to benefits.

[3] Her benefits should not be reviewed. This means the overpayment on the Appellant's claim must be removed.

Overview

[4] The Appellant was paid EI benefits between January and May 2021. Then, on December 24, 2021, the Commission decided she was not available for work because she was attending school during this time. This resulted in an overpayment of \$7,052.

[5] The Appellant says the Commission didn't act properly when it decided to review her entitlement to benefits. She had told the Commission that she was attending school throughout her claim. And the Commission used information about her school attendance for the semester **after** she was paid benefits when it decided she wasn't available.

[6] The Commission says it did act properly when it decided to retroactively disentitle the Appellant. It paid the Appellant benefits because she declared she was available for work on her bi-weekly reports. Then, when it learned the Appellant couldn't work during the day, it decided she wasn't entitled to the benefits she had received.

Matter I have to consider first

The Appellant's appeal was returned from the Appeal Division

[7] The Appellant first appealed the Commission's decision that she wasn't available for work to the Tribunal's General Division in March 2022. She told the Tribunal about her availability. She also said that she had told the Commission that she was attending school numerous times throughout her claim. So, it didn't make sense that the Commission paid her benefits and later disentitled her for that reason.

[8] The General Division decided the Appellant had shown she was available for work. The Commission appealed this decision to the Tribunal's Appeal Division.

[9] The Appeal Division agreed with the Commission that the Appellant wasn't available for work. But, it said the General Division had failed to decide whether the Commission properly exercised its discretion when it decided to review the Appellant's availability. The Appellant had put this issue before the General Division, so by failing to make a decision on it, the General Division had failed to exercise its jurisdiction.

[10] The Appeal Division ordered the appeal to be returned to the General Division for a new hearing on this issue alone. This decision is a result of that hearing.

Issues

[11] Did the Commission properly exercise its discretion when it decided to review the Appellant's availability?

[12] If not, should the benefits be reconsidered in this case?

Analysis

[13] The law gives the Commission broad powers to review any of its decisions about EI benefits.¹ But, the Commission has to follow the time limits set out by the law. Usually, the Commission has three years to review its decisions.² If the Commission paid you EI benefits that you weren't really entitled to receive, it can ask you to repay those EI benefits.³

[14] The law specifically gives the Commission the power to review students' availability for work. The law gives the Commission this review power even if it already paid EI benefits.⁴

¹ See section 52 of the *Employment Insurance Act* (EI Act). The Federal Court of Appeal sets out the Commission's broad power under this section in *Briere v Canada Employment and Immigration Commission*, A-637-86.

² See section 52(1) of the EI Act and *Canada (Attorney General) v Laforest*, A-607-87.

³ See section 52(3) of the EI Act.

⁴ See section 153.161(2) of the EI Act.

[15] Even though the law gives the Commission this power, it doesn't say that the Commission **must** use this power. The Commission has the choice to use its review power or not. In other words, the power to review is a discretionary power.

[16] When the Commission decides to use its discretion to review your entitlement to EI benefits, it has to show that it used this power properly. This is called using its discretion judicially.

[17] To show that it used its discretion judicially, the Commission has to show that it:

- Acted in good faith
- Didn't ignore relevant factors
- Didn't consider irrelevant factors
- Didn't act for an improper purpose
- Didn't act in a discriminatory way⁵

The Commission had the power to review the Appellant's availability

[18] Yes. I find the Commission respected the law about time limits when it reviewed the Appellant's entitlement to benefits. This is because the Commission paid EI benefits to the Appellant starting in January 2021. The Commission finished its review and notified the Appellant of its decision on December 24, 2021, less than a year later.

The Commission didn't act properly when it reviewed her availability

[19] No. I find the Commission didn't use its discretion judicially when it decided to review the Appellant's entitlement to benefits. This is because it considered irrelevant information about her availability.

⁵ The Federal Court of Appeal sets out what it means for the Commission to exercise its discretion judicially in *Canada (Attorney General) v Purcell*, A-694-94.

[20] The Commission says that it acted judicially, because:

- The Appellant reported that she was in a training program while claiming benefits, but also attested that she was available for work.⁶
- Later, it became aware that the Appellant couldn't work during the day because of her course schedule.⁷
- On this basis, the Commission retroactively reconsidered the Appellant's claim and decided she was not available for work from January 25, 2021, to May 7, 2021.⁸

[21] The Appellant agreed that she had reported that she was in school on her application and her bi-weekly claim reports. She had also spoke to Commission officers several times and told them that she was in school. She had told them her class schedule and that she had to attend classes.

[22] The Appellant was working when she started school. She had to take leave from her job for health reasons, but says she was otherwise available for work while she was in school.

[23] She claimed EI benefits during her first semester of school, from January to May 2021. She then attended her second semester from May to August, and her final semester from September to December.

[24] The Commission contacted her on December 3, 2021, and asked her about her availability. The officer asked her questions about her course schedule and if it conflicted with her ability to work during the day. She answered honestly that it did.

⁶ See the Commission's supplementary representations at RGD06. In the GD8 and RGD06 documents, the Commission says its automated services approved and accepted the Appellant's availability based on this information provided by the Appellant.

⁷ See the Commission's notes of a conversation it had with the Appellant on December 3, 2021, at GD3-24, and its submissions in GD8 and RGD06.

⁸ See the Commission's decision letter dated December 24, 2021, at GD3-25.

[25] She told the Commission officer that she couldn't work during the day because of her classes. However, the officer didn't ask her about her course schedule in her first semester, and whether that schedules conflicted with her ability to work during the day.

[26] The Appellant's school schedule had changed for her last semester. Her schedule was more condensed. She didn't have as many free periods. For example, she had five courses during her first semester, but had **seven** courses plus a work placement during her final semester.

[27] The Appellant testified that she had answered the Commission's questions about her school schedule and availability based on her schedule in her **final** semester. This is because the Commission contacted her in December 2021, when she was in her final semester of school. And because the officer didn't ask her about her availability before this semester.

[28] After the Commission decided she wasn't available for work, the Appellant asked for a reconsideration of that decision. She tried to clarify the difference between her school schedule between semesters and its impact on her availability when she spoke to another Commission officer. However, the Commission officer decided the Appellant's statements lacked credibility and maintained its decision based on her previous statement that she couldn't work during the day.

[29] I find the Appellant was credible in her statements before the Tribunal. She gave open and direct testimony that was consistent with her statements to the reconsideration officer. She was able to answer difficult questions in a straightforward manner. She provided documentary evidence supporting her testimony. I accept her testimony in its entirety.

[30] I find the Commission considered the Appellant's school schedule and her ability to work during the day during her final semester of school. This information was irrelevant to whether she was available for work while she was receiving benefits during her first semester. In other words, the Commission considered on irrelevant information when it decided to review the Appellant's EI benefits.

[31] For this reason, I find it didn't exercise its discretion judicially when it reviewed the Appellant's entitlement to benefits.

[32] Because I have found the Commission didn't exercise its discretion judicially, I am able to make the decision the Commission should have made. I will now look at whether the Appellant's entitlement to benefits should be reviewed.

Should the Appellant's entitlement to benefits be reviewed?

[33] No. I find the Appellant's entitlement to benefits should not be reviewed.

[34] The Commission has a policy to help guide how it exercises its discretion to review its decisions about EI benefits. It says this policy ensures "a consistent and fair application" of the law and prevents "creating debt when the claimant was overpaid through not fault of their own."⁹

- The Commission's policy states that a claim will only be reviewed when:
- Benefits have been underpaid
- Benefits were paid contrary to the structure of the law
- Benefits were paid as a result of a false or misleading statement
- The claimant ought to have known they weren't entitled to the benefits they received.

[35] The Commission's policy is not the law. It is not binding. But, the courts have repeatedly supported the use of such guidelines to guarantee some consistency and avoid arbitrary decision-making.¹⁰

⁹ See section 17.3.3 of the *Digest of Benefit Entitlement Principles* (Chapter 17).

¹⁰ See *Canada (Attorney General) v Gagnon*, 2004 FCA 351 and *Baker v Canada (Minister of Citizenship and Immigration)*, 1999 CanLii 699 (SCC).

[36] I think the four factors set out in the policy are relevant to the decision to review a claim and should be considered when deciding whether to revisit a claimant's EI benefits.¹¹

[37] The Appellant's circumstances do not meet any of these factors.

[38] First, she was not underpaid benefits from January 24 to May 8, 2021.

[39] Second, the payment of benefits to the Appellant was not contrary to the structure of the law. The *Employment Insurance Act* doesn't preclude payment of benefits to claimants who are attending school.

[40] Third, didn't receive EI benefits because of a false or misleading statement. As set out above, I have accepted her testimony that she reported that she was attending school and stated that she was available for work if not for her illness during her first semester.

[41] And fourth, there is no evidence that she should have known she wasn't entitled to the EI benefits she received. Rather, the Appellant testified that she spoke to the Commission several times and was told she was entitled to EI benefits and should continue filing her bi-weekly reports as she had been doing.

[42] I recognize that these four factors are not a complete list of information that might be relevant to deciding whether to review a claimant's entitlement to benefits. But, I don't see any other information that recommends reconsidering the Appellant's entitlement to benefits.

[43] Based on the circumstances of the Appellant's case, I find her entitlement to benefits should not be reviewed.

So, does the Appellant have an overpayment?

¹¹ While also not binding, I am guided by other Tribunal decisions on this matter. For example, *SL v Canada Employment Insurance Commission*, 2021 SST 889 and *JP v Canada Employment Insurance Commission*, 2021 SST 109.

[44] No. The Appellant's benefits should not have been reviewed. So, the previous decision to pay her EI benefits from January 24 to May 8, 2021, remains in place. As a such, the overpayment is removed.

Conclusion

[45] The appeal is allowed.

Catherine Shaw
Member, General Division – Employment Insurance Section