Citation: *PM v Canada Employment Insurance Commission*, 2023 SST 429

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	P. M.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (0) dated September 23, 2022 (issued by Service Canada)

Tribunal member:	Teresa M. Day
Type of hearing:	Teleconference
Hearing date:	February 7, 2023
Hearing participant:	Appellant
Decision date:	April 6, 2023
File number:	GE-22-3188

Decision

[1] The appeal is allowed.

[2] The Commission did not exercise its discretion judicially when it decided to reconsider the payment of employment insurance (EI) benefits to the Appellant.

[3] The benefits should not be reconsidered in this case.

[4] This means the overpayment on the Appellant's claim must be removed and the debt cancelled.

Overview

[5] The Appellant received regular EI benefits between October 2020 and July 2021. But on September 7, 2021, the Commission decided the Appellant was not unemployed during this period. It said he was focused on self-employment and imposed a retroactive disentitlement on his claim from October 5, 2020. This resulted in an overpayment debt of $12,225.

[6] The Appellant asked the Commission to reconsider its decision. He said he should have been told to apply for benefits under a different program[1]. But the Commission maintained the disentitlement on his claim.

[7] He appealed to the General Division of the Social Security Tribunal (Tribunal). The General Division decided he was self-employed and had to repay the overpayment on his claim. He appealed that decision to the Tribunal's appeal division (the AD).

[8] The AD decided the General Division made a mistake in its decision. It ordered the appeal be returned to a different member of the Tribunal to decide the following 2 questions:

[1] At GD3-168, the Appellant said he should have been told to apply for the new Small Business Support program through Revenue Canada, but was "encouraged" to apply for EI benefits and identify himself as self-employed. So that's what he did.

a) Did the Commission properly exercise its discretion to retroactively reconsider the EI benefits paid to the Appellant from October 2020 to July 2021?

b) If not, should the benefits be reconsidered in this case?

[9] The appeal was assigned to me. Prior to the hearing, I gave the parties an opportunity to file fresh evidence and submissions on the 2 questions set out by the AD.

[10] There was no response from the Commission.

[11] The Appellant provided additional materials[2]. He says he declared his self-employment on his application for EI benefits and his claim was reviewed multiple times by Service Canada agents. They told him to utilize the EI system to obtain financial support during the Covid-19 pandemic. He should not be asked to repay the benefits he received when he followed the directions from Service Canada and answered all questions honestly.

[12] I find that the Commission failed to exercise its discretion judicially when it decided to reconsider the payment of EI benefits to the Appellant. I also find that the benefits should not be reconsidered in this case. This means the overpayment on the Appellant's claim must be removed.

[13] These are the reasons for my decision on the 2 questions the AD directed me to decide.

Issues

[14] Did the Commission properly exercise its discretion to retroactively reconsider the EI benefits paid to the Appellant from October 2020 to July 2021?

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

[2] See RGD3 and RGD4.

Analysis

[16] The Commission's reconsideration powers are set out in section 52 of the EI Act. This section says the Commission "may" reconsider a claim for EI benefits within 36 months of the benefits having been paid[3].

[17] If the Commission decides a claimant has received benefits they are not entitled to, the Commission must calculate the amount of money that has been overpaid and notify the claimant of its decision[4].

[18] But the decision to reconsider a claim under section 52 of the EI Act is a discretionary decision. This means that even though the Commission has the power to reconsider a claim, it doesn't have to do so[5].

[19] The law says that discretionary powers must be exercised in a judicial manner. 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[6].

[20] The Commission has developed a policy to help guide how it exercises its discretion to reconsider decisions under the EI Act. The Commission says the reason for the policy is "to ensure a consistent and fair application of section 52 of the EIA[7] and to prevent creating debt when the claimant was overpaid through no fault of their own". The policy provides that a claim will only be reconsidered when:

- benefits have been underpaid;
- benefits were paid contrary to the structure of the EIA

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[3] This section also says that, in situations where the Commission believes that a false or misleading statement has been made, then the Commission has 72 months to reconsider a claim.
[4] Section 52(2) of the EI Act. There is no issue that the Commission reconsidered the Appellant's claim within the timeframe provided by section 52 of the EI Act.
[5] See *GP v. Canada Employment Insurance Commission*, 2021 SST 791.
[6] See *(Attorney General) v. Purcell*, 1995 CanLii 3558 (FCA).
[7] 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[8].

Issue 1: Did the Commission exercise its discretion properly when it decided to reconsider the payment of EI benefits to the Appellant?

[21] No, it did not.

[22] In defending its decision to reconsider the Appellant's claim, the Commission said:

> "Pursuant to section 52 of the Act, the Commission is ***obligated*** to correct the claimant's file and subject him to a retroactive disentitlement as of October 5, 2020 because he is considered not unemployed."[9] (*emphasis added*)

[23] This is not correct. Section 52 doesn't "obligate" the Commission to "correct" anything.

[24] Section 52 says the Commission "may" reconsider a claim for benefits within 36 months of the benefits being paid or payable. The use of the word "may" in this section does not create an obligation to correct claims – it merely gives the Commission discretion to reconsider whether a claimant is entitled to EI benefits.

[25] In a recent decision under the *Old Age Security Act*, the AD noted that a proper purpose for reconsidering entitlement decisions is so that only those who are entitled to benefits should receive them. However, balanced against that is the importance of claimants being able to rely on entitlement decisions without fear of having to return their benefits at a later date. The AD pointed out that in the absence of new information

[8] See *Digest of Benefit Entitlement Principles* Charter 17 – Section 17.3.3.
[9] At GD4-7.

likely to change the original result, reopening a decision that turned on the judgment of the decision-maker would be an improper exercise of discretionary power[10].

[26] I agree that the Commission should consider the above factors identified by the AD, and its own policy, when exercising its discretion to decide whether to reconsider a claim under section 52 of the EI Act.

[27] It did not do so in this case.

[28] There was no new information likely to change the original result when the Commission decided to reconsider the Appellant's EI benefits – he was clear all along that he was self-employed. And yet the Commission decided to reopen a decision that turned on the judgment of their representatives. I agree with the AD that this is an improper exercise of discretionary power[11].

[29] As well, the decision did not follow the Commission's own policy. I will discuss this further under Issue 2 below.

History of the Claim

[30] The Appellant applied for EI benefits on October 5, 2020. On his application, he said he was self-employed as a handy-man[12].

[31] He also said he started the business on February 1, 2020 after mental stressed caused him to quit his truck driving job[13]. He answered all of the questions about self-employment, including that he considered his self-employment to be his main source of income[14]; and that his "present intention" was to find full-time work while continuing self employment[15].

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[10] See *Minister of Employment and Social Development v. CB*, 2021 SST 765.
[11] See paragraph 26 above.
[12] GD3-9.
[13] GD3-10.
[14] GD3-14.
[15] GD3-14. At the hearing, I asked the Appellant what he meant when he checked that answer. He said "I'm a self-employed person and I was trying to build my business". He also said that when he answered this question – and similar questions on his claimant reports, he was trying to communicate that he was looking for work as a self-employed person and wanted to get to the point where he was working full-time

[32] His claim was established and he filed bi-weekly claimant reports by telephone to claim EI benefits starting on October 4, 2020 and continuing to July 17, 2021.

[33] In his claimant reports, the Appellant was asked if he worked or received any earnings during the period of the report. This included work for which he would be paid later, unpaid work or self-employment (including farming).

[34] The Appellant answered YES to this question on 12 of the 21 claimant reports he filed. And every time he answered YES, he disclosed hours of work and earnings – all of which were **specifically identified as from self-employment[16].**

[35] The Commission included copies of the Appellant's claimant reports in the reconsideration file. On 3 of the claimant reports where the Appellant disclosed earnings from self-employment[17] there is a notation on the report that says:

> "Call transferred to a representative for assistance"

According to the Commission, this notation means "the Telephone Reporting Service determined that the report required additional information or clarification" and transferred the call to an HRSDC employee[18].

[36] This means the Commission flagged the Appellant's claimant reports on December 20, 2020, January 3, 2021 and July 19, 2021 and, each time, spoke with him for additional information or clarification.

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hours at his self-employment. He said he explained this to both of the Service Canada agents on "both of the reviews" that happened while he was on claim. He says that he may not have understood the question as it was written, but he was always clear that he was never looking for work outside of self-employment. **See footnotes 25 and 27 below for his further testimony on this.**

[16] See the claimant reports filed on October 26, 2020, November 26, 2020, December 7, 2020, December 20, 2020, January 3, 2021, February 1, 2021, May 10, 2021, May 26, 2021, June 7, 2021, July 3, 2021, July 3, 2021 (Note: the Appellant filed 2 reports covering 2 different reporting periods on July 3, 2021, and in both July 3, 2021 reports he declared earnings and reported them as from self-employment), and July 19, 2021.

[17] The ones filed on December 20, 2020, January 3, 2021 and July 19, 2021.
[18] See GD3-152. HRSDC stands for Human Resources and Social Development Canada, which is the department that oversees the EI program.

[37] In all 3 of the Supplementary Records of Claim for the follow-up calls with the Appellant (on December 20, 2020, January 4, 2021 and July 19, 2021), the Service Canada representatives noted that the Appellant was a "Self-employed person" making a "Self-employment Declaration of Earnings"[19].

[38] On August 10, 2021, a Service Canada representative interviewed the Appellant about his self-employment[20] and put a stop-payment on his claim.

The Exercise of Discretion

[39] On September 7, 2021, a different Service Canada representative interviewed the Appellant about his self-employment[21]. The Appellant said he had been working as a self-employed handyman since January 2020 and was not looking for any other work.

[40] The Commission decided he could not be paid EI benefits from October 5, 2020 because he was self-employed and therefore could not be considered unemployed[22]. A Notice of Debt was issued to the Appellant for $12,225.

[41] The Appellant asked the Commission to reconsider[23]. He wrote about how "Revenue Canada" had steered him to the EI program and provided details about the times he spoke with a Service Canada representative on the phone and how they had discussed his situation and reviewed his claim[24]. He said these representatives always "assured" him there were no issues with him receiving EI benefits and that he should continue reporting any earnings from self-employment - so that's what he did.

[42] But in the reconsideration interview, the Service Canada agent didn't even ask the Appellant about his discussions with Service Canada – even though he had detailed them in his Request for Reconsideration and obviously intended to rely on them. The Service Canada representative appears to have only been interested in establishing

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[19] See GD3-153 and GD3-154.
[20] See GD3-157 to GD3-158.
[21] See GD3-160.
[22] See the September 7, 2021 decision letter at GD3-161 to GD3-162.
[23] The Appellant's Request for Reconsideration is at GD3-166 to GD3-170.
[24] See GD3-168 to GD3-170.

that the Appellant was self-employed – which is something he had freely admitted to all long. The Supplementary Record of Claim from the reconsideration interview (at GD3-171) is very brief and documents only 4 questions asked. All of them relate to the legal test for self-employment. And all 4 were confirmatory questions (is that correct?) and do not show any allowance for the Appellant to expand on or explain his answers, let alone any inclination to hear from the Appellant on the points raised in his Request for Reconsideration.

[43] No consideration was given to the history of the Appellant's claim, the disclosure of his self-employed status from the outset and throughout his claim, or the guidance and information he received from Service Canada.

The Appellant's Evidence

[44] At the hearing, the Appellant testified that:

- When "the original CERB program stopped", things were still shut down in Ontario and there was no chance for him to make money.
- The government didn't have a small business program set up.
- Yes, there were still supports for "big business", but the government was "scrambling" to help small businesses.
- So what the federal government said at the time was that 'any small business person who has EI enough hours to qualify for EI benefits' should apply for EI benefits for financial support as the Covid pandemic continued.
- The federal government said the EI system was 'already set up and running smoothly and we can get the benefits out quickly'.
- He contacted "EI" to find out what benefits he was entitled to and the Commission's "own agents" directed him to apply for EI benefits. He asked if he qualified. They said he didn't have the hours to qualify, but the government would give him "the extra hours" to bump up his hours so he could qualify.

- A few weeks after his EI claim started, the government did set up a separate benefit program for small business.

- He knew another self-employed person who didn't have any EI hours and had gone for support under that program.

- But he (the Appellant) was "already up and running" with EI benefits.

- Then in December and January, he spoke with 2 different Service Canada "agents". They reviewed his situation "on 2 separate occasions" and did an "in-depth dive"[25] into his self-employment and all of his circumstances[26].

- Both times, he told the agents he was not looking for other work and had committed himself to "building my handyman self-employed little gig and getting to the point where I could try to support myself with my bag of tools"[27].

- At the conclusion of both interviews, the agents put him on hold to go and speak with their manager[28].

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[25] The Appellant testified that the first two agents asked him the same questions as the third agent, but the third agent was the one who said there was a problem and stopped payment of his benefits.

This supports the Appellant's testimony that the first two agents didn't have any issue with the Appellant's entitlement to EI benefits after their reviews and told him to continue doing what he was doing.

The notes from the first two agents' interviews deal with the reporting of earnings and indicate the Appellant was "notified of the decision" (see GD3-153 and GD3-154). Since his EI benefits continued after both interviews, a decision on entitlement must have been made in his favour.

The notes from the third agent's review also deal with the reporting of earnings and also indicate the Appellant was "notified of the decision" (see GD3-155). But this time, his benefits were stopped, so the decision on entitlement must have gone against him.

[26] See also footnote 15 above. The Appellant testified that he attempted to get recordings of these interviews but was not successful.

[27] The Appellant explained that he "lost" his daughter in 2012 and hasn't been able "to function" in the years since. He has been on medication and under a doctor's care. He attempted to go back into the workforce, but once again his anxiety and stress levels prevented him from functioning, and he lost that job. He realized he can't be around people and "keep his shit together". He needs to work by himself, so he started "a little handyman maintenance business". He said, "at no time did I tell anyone I was attempting to get back into the workforce" because "it's not healthy for me".

[28] See footnote 27.

- And both times, the agents came back on the phone and told him he was entitled to EI benefits[29].

- Both times, the agents encouraged him to continue filing his claimant reports and said he was "doing the right thing"[30].

- This is why he continued reporting "faithfully" using the telephone reporting system "under the prompts of self-employed" income.

- In his mind, he was getting his "Covid support" by "utilizing the EI system per the government direction".

- The Commission had at least 2 opportunities to "review and correct the situation", but rather than "correct it", they told him to continue doing what he was doing[31].

- Yet when the Commission decided to disentitle him, it never looked at what he was told "at the outset" of his claim **and** while he was on claim – by its own representatives – which is why he was utilizing the EI system in the first place and why he continued to file his claimant reports as he did.

- If they had "looked back" at all of this information, they would have seen it was "unfair" and inappropriate for them to reconsider his claim and ask him to repay his benefits.

- The Commission didn't look at all of the relevant information about his particular case before they made their decision.

- They just looked at whether he qualified for EI benefits "on paper". They didn't look at **why** he was "in the EI system" in the first place or why he continued making claims after the other program came out.

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[29] See footnote 25.
[30] See footnote 25.
[31] See footnote 25.

- The Commission's failure to even "entertain" this information ("about the whole situation", from the start of his claim until his benefits stopped) means they didn't exercise their discretion properly.

- If he'd been told by the agents he spoke with in December or January that he should have been in the other program, he could have switched to the other program at that time.

- Had he been told that, he would have switched over "immediately".

- But he wasn't told to switch. He was told to continue doing what he was doing.

- He followed the Commission's own representative's advice to continue filing his reports for EI benefits as a self-employed person

- It wasn't until a "third agent" reviewed his claim in July that he was told he didn't qualify for EI benefits and his benefits stopped.

- He was not "defrauding" the system.

- He answered all of the questions he was asked honestly and followed the directions he was given.

- Had the Commission corrected him when they had the chance to (on either the December or January review of his claim), he would have received the same amount of money but from the other program.

[45] I accept the Appellant's testimony in its entirety.

[46] It was thoughtful, forthright, and consistent with the contemporaneous documentary evidence in the reconsideration file. The Appellant also answered difficult, direct questions from me without hesitation and without deviating from his version of events. He also expanded on the answers documented by the Commission (in the Supplementary Records of Claim) and filled in the gaps with details that were consistent with the administration of his claim.

My Findings

[47] The Commission did not exercise its discretion properly.

[48] Firstly, the Commission did not consider all of the relevant information when it decided to reconsider the claim.

[49] I agree with the Appellant that the Commission failed to consider the history of the Appellant's claim. Of particular concern is the Commission's failure to take into account the fact that 2 different Service Canada representatives made entitlement decisions on the Appellant's claim that allowed his EI benefits to continue **– based on the same facts** that caused the third representative to stop his benefits[32]. This is highly relevant to a decision to impose a retroactive disentitlement, yet there is no mention of any of this information in the reconsideration interview[33].

[50] Secondly, the Commission acted for an improper purpose when it decided to reconsider the claim.

[51] In *Minister of Employment and Social Development v. CB*, the AD said that in the absence of **new information** likely to change the original result, reopening a decision **that turned on the judgment of the decision-maker** would be an improper exercise of discretionary power[34].

[52] In the Appellant's case, there was **no** new information when the Commission decided to reconsider the Appellant's benefits. He was honest and forthright about his self-employment from the start; and told all 3 of the Service Canada representatives who reviewed his claim that he was self-employed and not looking for work outside of his self-employment. The first 2 Service Canada representatives made decisions about the Appellant's entitlement to EI benefits that **turned on their judgment**. Their decisions had the effect of confirming the Appellant's entitlement to benefits because, after a fullsome review, the representatives allowed his benefits to continue. I agree

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[32] See footnote 25 above.
[33] See paragraphs 41 to 43 above.
[34] See *Minister of Employment and Social Development v. CB*, 2021 SST 765.

with the AD's reasoning and find that reopening their decisions under such circumstances is an improper exercise of discretionary power.

[53] For these reasons, I find the Commission did not exercise its discretion in a judicial manner when it reconsidered the Appellant's entitlement to EI Benefits.

[54] Since the Commission did not exercise its discretion properly, I can intervene in the decision and make my own decision as to whether the Appellant's EI benefits should be reconsidered.

Issue 2: Should the payment of EI benefits be reconsidered?

[55] No, it should not.

[56] The Commission has a policy to help guide how it exercises its discretion to reconsider decisions under the EI Act and ensure "a consistent and fair application of section 52 of the EIA[35] and to prevent creating debt when the claimant was overpaid through no fault of their own". The policy provides that 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[36].

[57] This type of internal guideline is not binding, but the courts have repeatedly supported the use of such guidelines to guarantee some consistency and avoid arbitrariness[37].

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[35] The EI Act.
[36] See *Digest of Benefit Entitlement Principles* Charter 17 – Section 17.3.3.
[37] For example, see *Canada (Attorney General) v Gagnon*, 2004 FCA 351, *Baker v Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC).

[58] I believe the 4 policy factors noted above are relevant to the discretionary decision under section 52 of the EI Act and should be considered when deciding whether or not to exercise the discretion to reconsider a claim[38].

[59] The Appellant does not satisfy any of them.

[60] First, there is no evidence the Appellant was underpaid benefits between October 2020 and July 2021.

[61] Second, the payment of benefits to the Appellant was not contrary to the structure of the EI Act. The EI Act does not preclude payment of benefits to self-employed claimants.

[62] Third, the Appellant did not receive EI benefits because of a false or misleading statement. For the reasons set out under Issue 1 above, I have accepted the Appellant's testimony that he was always honest and forthright about all aspects of his self-employment.

[63] Fourth, there is no evidence the Appellant ought to have known he was not entitled to the EI benefits he received. Indeed, the evidence credibly shows the Appellant relied on the Commission's advice that he was entitled to EI benefits and should continue filing his claimant reports as he had been doing.

[64] I acknowledge that the 4 policy factors are not an exhaustive list of factors that might be relevant to a discretionary decision under section 52 of the EI Act. But I see no other factor that weighs in favour of reconsidering benefits in the Appellant's case.

[65] The Commission can exercise its discretion **not to reconsider** a claim for benefits under section 52 of the EI Act. That is what should have happened in the Appellant's case, but the Commission exercised its discretion improperly.

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[38] I am guided by this Tribunal's decisions on this point, such as the decisions in *SL v Canada Employment Insurance Commission*, 2021 SST 889 and *JP v Canada Employment Insurance Commission,* 2021 SST 109). The Commission did not appeal these decisions.

[66] I have therefore done my own analysis and find that the Appellant's claim for EI benefits should **not** be reconsidered.

Issue 3: What happens to the overpayment on the Appellant's claim?

[67] Because I have found that the Commission exercised its discretion under section 52 of the EI Act improperly, I am able to make the decision the Commission should have made.

[68] I have found that the exercise of discretion in the Appellant's case should have been **not** to reconsider his claim for benefits.

[69] This means the Appellant's claim for EI benefits is not reopened, the previous decisions to pay him EI benefits remain in place, an overpayment is not created, and there is no debt.

[70] As a final matter, I apologize to the Appellant for taking longer to issue this decision than originally anticipated. This was due to unforeseen circumstances and events beyond my control. I thank him for his patience.

Conclusion

[71] The Commission did not exercise its discretion judicially when it decided to reconsider the payment of EI benefits to the Appellant under section 52 of the EI Act.

[72] The benefits should not be reconsidered in the Appellant's case.

[73] This means the overpayment on the Appellant's claim must be removed and the debt cancelled.

[74] The appeal is allowed.

Teresa M. Day

Member, General Division – Employment Insurance Section