



Citation: *LH v Canada Employment Insurance Commission*, 2023 SST 1010

Social Security Tribunal of Canada General Division – Employment Insurance Section

Decision

Appellant:	L. H.
Representative:	C. Z.
Respondent:	Canada Employment Insurance Commission
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Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (0) dated October 28, 2022 (issued by Service Canada)
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Tribunal member:	Gary Conrad
Type of hearing:	Teleconference
Hearing date:	March 27, 2023
Hearing participant:	Appellant's representative
Decision date:	April 17, 2023
File number:	GE-22-3543

Decision

[1] The appeal is dismissed.

[2] When the Canada Employment Insurance Commission (Commission) decided to pay the Appellant Employment Insurance (EI) benefits starting March 2021, they made an initial decision.

[3] However, the Commission has the power to review this initial decision, which they did, and when they exercised this power, they did it judicially. This means that I cannot interfere with their decision to review the Appellant's claim, so any consequences from this decision to review her claim (such as overpayments) will stand.

Overview

[4] The Appellant applied for EI benefits and collected benefits from the end of March 2021 to the end of August 2021.

[5] The Appellant was in school while in receipt of EI benefits.

[6] On December 14, 2021, the Commission made a decision that they could not pay the Appellant EI benefits because she was not available while she was in school. This decision created a large overpayment.

[7] The Appellant asked the Commission to reconsider their December 14, 2021, decision.

[8] After reviewing information and speaking to the Appellant, the Commission upheld their December 14, 2021, decision.

[9] The Appellant appealed the decision of the Commission to the General Division of the Social Security Tribunal (Tribunal)

[10] The General Division decided that the Appellant was not available for work while in school and dismissed her appeal.

[11] The Appellant appealed the decision of the General Division to the Appeal Division at the Tribunal.

[12] The Appeal Division found the General Division had made a mistake; they had failed to decide whether the Commission should have acted and whether they did act judicially when they reviewed the Appellant's claim and decided she was not available.

[13] The Appeal Division returned the file to the General Division to decide on only whether the Commission should act and whether they acted judicially when deciding to reconsider the Appellant's claim.¹

Issues

[14] Did the Commission make an initial decision to approve the Appellant for benefits?

[15] If so, can they go back and review that decision?

[16] If they can review it, did they act judicially when they made their decision?

Analysis

Did the Commission make an initial decision?

[17] The Appellant says that her application for benefits was approved and for the entire time she was collecting benefits she reported all her schooling to the Commission. She says she not only reported this on her claim reports but also spoke to Commission agents over the phone about her schooling.

[18] She says that her information was continuously reviewed by the Commission, and they kept paying her benefits, despite knowing she was in school.

¹ *LH v Canada Employment Insurance Commission*, 2022 SST 1101. Paragraph 22

[19] The Commission submits that they never made an initial decision of the Appellant's entitlement. They say the first decision made on the Appellant's entitlement to EI benefits was their decision dated December 14, 2021.²

[20] The Commission says the Appellant received benefits because she qualified for them and then, later, they considered the Appellant's documentation when they went to verify whether or not she was entitled to receive benefits.³

[21] They say the decision they made using section 153.161(2) of the *Employment Insurance Act* when they went to verify the Appellant's availability was their initial entitlement decision and was not a reconsideration of a previous decision.⁴

[22] I disagree with the Commission's submissions.

[23] Instead, I find the Appeal Division decision *SF v Canada Employment Insurance Commission*, 2022 SST 1095 persuasive that the Commission cannot split its decision-making responsibility into two parts and indefinitely postpone making a decision about the Appellant's entitlement to benefits.

[24] I note that the text of section 153.161(1) of the *Employment Insurance Act* is inconsistent with the Commission's submission that payment is made based on qualifying requirements only. Section 153.161(1) says that a person is not entitled to be paid benefits for any working day in a benefit period for which they are unable to prove they are capable of and available for work. This provision suggests the Commission cannot pay benefits without any evidence a person was available for work. Payment must be based on some evidence of availability.

[25] So, I find that the Commission did make an initial decision when they decided to pay the Appellant benefits from March 28, 2021, onward.

² RGD3-3

³ RGD3-3

⁴ RGD3-2

Can the Commission go back and review a previous decision?

[26] Yes, the Commission can go back and review their initial decision to pay the Appellant benefits.

[27] I find that the Commission may, at any point after benefits are paid, verify that the Appellant is available for work within her benefit period. There is no time limit on when they can do this, and there are no requirements that must be fulfilled to allow them to do this and no restrictions stated on the Commission's power to review the Appellant's availability.⁵

[28] If the Commission wants to review the Appellant's claim they can, and that is what they chose to do.

Did they act judicially when they made their decision?

[29] Yes, the Commission did act judicially when they made their decision to review the Appellant's claim to verify her availability.

[30] While the law allows the Commission to go back and review their initial decision, their decision to do so is discretionary.

[31] This means they do not have to do a review, but they can choose to do a review if they want to, as the law says the Commission "may" verify a claimant's availability after benefits have been paid, not that they "must" review availability after paying benefits.⁶

[32] Since their decision to review a claim is discretionary, I can only interfere with, in other words change, the Commission's decision, if they did not exercise their discretion properly when they made the decision.⁷

⁵ See 153.161(2) of the *Employment Insurance Act*

⁶ See 153.161(2) of the *Employment Insurance Act*

⁷ *Canada (Attorney General) v Kaur*, 2007 FCA 287. The Commission's decision can only be interfered with if it exercised its discretionary power in a non-judicial manner or acted in a perverse or capricious manner without regard to the material before it: *Canada (Attorney General) v Tong*, 2003 FCA 281.

[33] In order for the Commission to have used their discretion properly they must not have acted in bad faith, or for an improper purpose or motive, took into account an irrelevant factor or ignored a relevant factor or acted in a discriminatory manner when they made the decision to review their initial decision.

[34] The Commission says they acted judicially when they made their decision.⁸

Bad faith

[35] The Appellant says the Commission acted in bad faith. She says that she kept them constantly apprised of her schooling, and despite knowing of her schooling, they kept paying her benefits. Instead, if they knew she would be ineligible for benefits because of her schooling they should have told her and stopped paying her at that time.

[36] Bad faith is a legal term which means an intentional dishonest act by not fulfilling some legal obligation or purposely misleading someone. I find the Commission did not do either of those things.

[37] In the Appellant's application she reported no schooling.⁹ While she did inform them of her schooling multiple times, the Commission says they did not review this information until they went to verify her availability.¹⁰

[38] Schooling can have an impact on a person's availability. I find it would not be dishonest, or misleading, for the Commission to choose to review their initial decision to pay the Appellant benefits to see if the information she provided them on her schooling would impact her availability.

[39] I would note that this is something the Appellant actually supports. She has not argued that the Commission should have never reviewed her schooling information, she

Discretion is exercised in a non-judicial manner if the decision-maker acted in bad faith, or for an improper purpose or motive, took into account an irrelevant factor or ignored a relevant factor or acted in a discriminatory manner: *Attorney General of Canada v Purcell*, A-694-94.

⁸ RGD3-3

⁹ GD03-7

¹⁰ RGD3-3

is simply arguing they should have done it much faster, to prevent being paid benefits for which she was not eligible.

[40] I find the fact the Commission delayed in their verification decision of the Appellant's availability while in school for 8 months from when they first were told of her schooling,¹¹ also does not mean their decision was made in bad faith.

[41] I do not see sufficient evidence to convince me the Commission delayed making a decision to review the Appellant's claim in order to verify her availability because they intended to mislead her or because they were being intentionally dishonest.

[42] The Commission has said the delay in choosing to review the Appellant's claim to verify her availability was because of COVID-19. Due to the impact of COVID-19 on the economy causing an increase in EI claims the Commission decided to purposely delay such decisions on claim reviews to process EI claims faster.¹²

[43] While this operational decision by the Commission to delay reviewing claims to verify availability has resulted in many bad outcomes, which means it was not a good decision, the Appellant has not convinced me the Commission made this decision to purposely mislead her or to be intentionally dishonest. Just because their decision has bad outcomes, does not mean it was made with misleading or dishonest intent. The intent behind the decision was good, an effort to get people money faster in light of the devastating impact of COVID-19 on the economy.

[44] So, while I can understand the frustration of the Appellant, having told the Commission all about her schooling and then having the Commission tell her almost a year later, that she does not qualify, it is important to remember that I am **not** looking at the Commission's decision to pay the Appellant benefits and whether that was done in bad faith. I am looking at whether the Commission's decision to **review** the Appellant's claim to verify her availability was done in bad faith.

¹¹ The Appellant first contacted them about her schooling on April 7, 2021, (GD03-18) and their decision regarding their review of their initial decision was made on December 14, 2021 (GD03-37)

¹² RGD03-1 and 2

[45] I find the Commission choosing to verify the Appellant's availability by reviewing the information she provided to them, despite it being many months after it was provided, is not intentionally dishonest or misleading and is a relevant part of their role in administering the EI program to ensure people who get paid benefits are actually entitled to receive them.

Improper purpose or motive

[46] The Appellant says the Commission acted for an improper purpose or motive because everything was done properly on her side and the Commission was aware she was going to school so this whole issue is not her fault.

[47] I find the Commission did not act for an improper purpose or motive.

[48] The Commission is in charge of administering the EI program. One of the things they need to do in their administrative capacity is determine if people can qualify to establish a benefit period and if they are able to be paid benefits.

[49] Qualifying to establish a benefit period and being able to be paid benefits are two different concepts. A claimant may meet the requirements to establish a benefit period, but there may be something preventing them from being paid benefits.

[50] In the Appellant's case they found she could qualify to establish a benefit period and at the time she applied, she did not mention anything about schooling,¹³ so the Commission seemingly had no issue with her ability to be paid benefits at that time.

[51] The law says that if the Appellant is attending school, she cannot be paid benefits for any working day in a benefit period where she is unable to prove that on that day she was capable of and available for work.¹⁴

[52] The Appellant did report to the Commission that she was attending school.

¹³ GD03-7

¹⁴ Section 153.161(1) of the *Employment Insurance Act* is applicable to the Appellant's claim since her benefit period started when it was still in force.

[53] Since the Commission is the administrator of the EI program, it is up to them to determine if the Appellant would be able to be paid benefits while attending school. To do that they would need to see if she had proven she was capable of and available for work on the working days she was in school.

[54] Verifying the Appellant's availability to see if there is anything that would prevent her from being paid benefits, which the Commission is allowed to do under the law, is not acting for an improper purpose or motive, but is instead acting in their capacity of administering the EI program to try and ensure that only the people who meet the requirements to get paid benefits receive EI, which is a proper purpose. The fact the Commission waited so long to do this also does not make their actions for an improper reason or motive.

Ignore Relevant factor

[55] The Appellant says the Commission ignored a relevant factor when they made their decision to review her claim. The Appellant says the Commission had the information on her schooling well before they made the decision in December 2021 that she could not be paid benefits, but they did nothing with it.

[56] The Appellant says she spoke to multiple agents of the Commission about her schooling and it was ignored for months and months.

[57] The Appellant says the Commission ignored the fact that she was totally honest with them and that due to the fact she was totally honest, and because of the Commission's delay, they should have made an exception for her.

[58] I find the Commission did not ignore a relevant factor.

[59] I find the Commission did in fact consider all the information on the Appellant's schooling as this is what caused them to decide to go back and verify if she was available.

[60] The fact the Appellant was totally honest about her schooling was not something ignored by the Commission, as they accepted the information she gave to them, but her honesty was not something that should have prevented them from reviewing her claim.

Considered an irrelevant factor

[61] The Appellant did argue the Commission considered irrelevant factors, but her arguments were actually more relevant factors she felt the Commission ignored, so I considered them in the previous point.

[62] However, while the Appellant did not reference any particular irrelevant factors she felt the Commission considered, I looked through the evidence to determine if the Commission considered any irrelevant issues.

[63] I find the Commission did not consider any irrelevant issues when they made their decision to go back and review the Appellant's claim. The evidence supports that the factors which led to the Commission's decision to review the Appellant's claim was the schooling information she had provided to them. I find this information is entirely relevant to the Commission's decision to verify the Appellant's availability as schooling may have an impact on her availability.

Discriminated against

[64] The Appellant says that she feels she was discriminated against as she wonders why, amongst millions of EI claims, hers was chosen to be reviewed.

[65] The Appellant says that the Commission should never have come after her since the Commission is at fault not her, and suggests they chose her claim to review because they saw she was under 18 and a student.

[66] I find the Commission did not discriminate against the Appellant when they decided to review her claim. I do not see any evidence the Commission singled out the Appellant based on any particularly characteristic, such as her age.

[67] The fact the Commission reviewed her claim because she was a student is not discriminatory, as verifying a student's availability is necessary in order for the Commission to know whether a student is entitled to benefits.¹⁵

Did the Commission act judicially?

[68] I find the Commission did act judicially when they made their decision to go back and review the Appellant's claim to verify her availability as they did not act in bad faith, or for an improper purpose or motive; did not take into account an irrelevant factor or ignore a relevant factor; and did not act in a discriminatory manner when they made the decision to review their initial decision.

[69] This means I cannot interfere in their decision to go back and review the Appellant's claim, so the results flowing from their review will stand.

Summary

[70] The Commission made an initial decision when they decided to pay the Appellant benefits from March 28, 2021, onward.

[71] Despite having made an initial decision, the Commission can choose to go back and review the Appellant's claim, which they did.

[72] When they made their decision to review the Appellant's claim they acted judicially, which means I cannot interfere in their decision to review the Appellant's claim.

Conclusion

[73] The appeal is dismissed.

[74] The Commission made an initial decision when they decided to pay the Appellant EI benefits starting March 2021.

¹⁵ Section 153.161(1) of the *Employment Insurance Act*

[75] The Commission has the power to review this initial decision, which they did, and when they exercised this power, they did it judicially. This means that I cannot interfere with their decision to review the Appellant's claim, so any consequences from this decision to review her claim (such as overpayments) will stand.

Gary Conrad
Member, General Division – Employment Insurance Section