Citation: *AB v Canada Employment Insurance Commission*, 2023 SST 1698

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	A. B.
Representative:	Sepideh Khazei
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (476928) dated March 29, 2023 (issued by Service Canada)

Tribunal member:	Amanda Pezzutto
Type of hearing:	Videoconference
Hearing date:	August 30, 2023
Hearing participants:	Appellant Appellant's representative
Decision date:	September 21, 2023
File number:	GE-23-1008

Decision

[1] A. B. is the Appellant. The Canada Employment Insurance Commission (Commission) is asking him to repay Employment Insurance (EI) benefits. The Appellant is appealing this decision to the Social Security Tribunal (Tribunal).

[2] I am dismissing the Appellant's appeal. I find that the law gives the Commission the power to retroactively review his availability for work. I also find that the Commission used its decision-making power fairly when it verified his availability and entitlement to EI benefits. This means that the Appellant has to repay EI benefits.

Overview

[3] The Appellant was a full-time student. He collected several weeks of EI benefits while he was in school. After it paid EI benefits, the Commission reviewed his availability for work. The Commission decided that he hadn't been available for work while in school. The Commission asked him to repay all the EI benefits he had received.

[4] The Appellant says the Commission shouldn't ask him to repay benefits. This is because he says the law doesn't give the Commission to retroactively review his availability for work when there aren't any new facts. He says, even if the law gives the Commission this power, the Commission didn't use its review power fairly because he was always honest about his school obligations. He says the Commission didn't follow its reconsideration policy.

[5] The Commission disagrees. The Commission says that temporary measures because of the COVID-19 pandemic gave it the power to defer its decision-making about availability. So, it says it only made an initial decision about the Appellant's availability for work after it had already paid benefits. The Commission also says it used its decision-making power fairly.

Matter I have to consider first

[6] The General Division has already looked at the question of whether the Appellant was available for work while he was in school. It decided that he hadn't proven that he was available for work starting June 7, 2021.

[7] The Appellant appealed this decision to the Appeal Division. The Appeal Division decided that the General Division didn't make any errors when it decided that the Appellant hadn't proven that he was available for work. But the Appeal Division found that the General Division should have considered the question of whether the Commission had the power to retroactively review the Appellant, particularly when there aren't any new facts.

[8] So, the Appeal Division sent the file back to the General Division but said I can only look at the Commission's review power.

[9] This means that I won't make any decisions about whether the Appellant was available for work.

Issue

[10] I have to decide if the Commission has the power to retroactively disentitle Appellant. To make this decision, I will look at the following questions:

- Did the Commission make an initial decision, or did it defer the availability decision?
- Does the law give the Commission the power to review the Appellant's availability even if there aren't any new facts?
- If the Commission has the power to review the Appellant's entitlement, is this a discretionary power?
- If it is a discretionary power, did the Commission use its review power fairly in this case?

Analysis

The Commission made an initial decision; it didn't defer its decision-making

[11] The Commission argues that it didn't make an initial decision when it originally paid EI benefits to the Appellant. Instead, the Commission says section 153.161 of the *Employment Insurance Act* (EI Act) gives it the authority to defer its decision-making.

[12] The Appellant disagrees. He says that the law doesn't give the Commission the power to delay its decision. And he says that the Commission made a decision that he was available for work when it originally paid EI benefits.

[13] I agree with the Appellant on this point. I don't think the law gives the Commission the power to delay or defer its decision-making. I find that the Commission made an initial decision and then revised that decision when it verified the Appellant's availability for work.

[14] The Commission says it used section 153.161 of the EI Act. This part of the law says that students aren't entitled to EI benefits unless they can prove that they're available for work. It also says that the Commission can "verify" that a student was entitled to EI benefits by asking for proof of their availability for work. It says that the Commission can do this even after paying EI benefits.

[15] The Commission says this means that it can actually delay making a decision about availability for work.

[16] But the Appeal Division has looked at this question and disagrees with the Commission on this point. I think the Appeal Division's reasoning is persuasive and I will follow the same reasoning.[1]

[17] In its decision, the Appeal Division noted that section 153.161 of the EI Act implies a prior decision because it talks about verifying entitlement. In other words, in

[1] *RV V Canada Employment Insurance Commission*, 2022 SST 1543, paragraphs 64 to 72.

order for the Commission to verify that there was entitlement to EI benefits, the Commission had to make an entitlement decision in the first place.

[18] In some situations, the Commission can delay or defer decision-making. But I don't think the Commission has shown that this happened in the Appellant's case. The Commission didn't send the Appellant a letter explaining that it was deferring making a decision about his availability. It didn't warn the Appellant that it hadn't made any decisions yet about his availability.

[19] Instead, the Appellant has always said that the Commission told him that it had made a decision to pay EI benefits. The Commission has never made any arguments about the Appellant's credibility and so I believe him. I believe that the Commission told him that it was making a decision about his availability for work when it started paying EI benefits.

[20] So, when I look at the Appeal Division decision, the choice of words in section 153.161 of the EI Act, and the Appellant's statements, I find that the Commission made an entitlement decision when it decided to pay EI benefits. When the Commission verified the Appellant's entitlement to EI benefits later on, this was a second decision. In other words, the Commission retroactively reconsidered the Appellant's entitlement to EI benefits.

[21] So now, I will look at whether the law gives the Commission the power to retroactively review the Appellant's entitlement.

The law gives Commission the power to review the Appellant's availability

[22] The Appellant argues that the law doesn't give the Commission the power to retroactively review the Appellant's entitlement to EI benefits. The Appellant argues that the Commission can only retroactively review his entitlement if there are new facts.

[23] I disagree with the Appellant. I find that the law – specifically, section 52 of the EI Act – gives the Commission broad power to reconsider any claim for benefits. There

doesn't have to be any new facts for the Commission to use its power under this part of the law.

[24] There are two parts of the EI Act that give the Commission the power to retroactively review a claim for EI benefits. Section 111 of the EI Act specifically says the Commission can rescind or amend a decision if there are new facts.

[25] Section 52 of the EI Act says, "despite section 111," the Commission can reconsider a claim for benefits within certain time frames.

[26] I have to assume that every choice of words in the EI Act is deliberate. So, I find that the law would specifically say that section 52 is limited to new facts if that is what lawmakers intended. Section 52 doesn't explicitly limit the Commission's review power to cases when there are new facts, and I think this is a deliberate choice. This is especially true because section 52 of the EI Act refers back to section 111 – the section that talks about the requirement for new facts.

[27] There is a Federal Court of Appeal decision that looks at similar sections of the law, but in an older version of the law. This decision looks at the two different kinds of review powers and says that the power in section 52 is broader and allows the Commission to change any decision on its own initiative.[2]

[28] And when I read section 52 of the EI Act along with section 153.161 of the EI Act, I find that this also shows that the law gives the Commission the power to retroactively review the Appellant's entitlement to EI benefits. This is because section 153.161 of the EI Act says the Commission can verify entitlement any time after paying benefits. These two sections of the law, read together, don't say that the Commission can only verify entitlement when there are new facts.

[29] So, I find that only section 111 of the EI Act requires new facts; in contrast, section 52 of the EI Act doesn't require any new facts. Instead, this part of the law gives the Commission very broad review powers as long as it respects certain time limits

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[2] *Briere v Canada Employment and Immigration Commission*, A-637-86

when it does this review. I find that the law – section 52 of the EI Act, read along with section 153.161 – gives the Commission the power to retroactively review the Appellant's entitlement to EI benefits, even when there aren't any new facts.

[30] I understand that the Appellant has also made arguments about the Commission's reconsideration policy. But the reconsideration policy isn't part of the law. So, I think it is more appropriate to look at the reconsideration policy when I decide if the Commission used its decision-making power fairly (or judicially).

The Commission's retroactive review power is a discretionary power

[31] There isn't any dispute on this issue. The Appellant argues that, if the Commission has the power to retroactively review his entitlement, then this is a discretionary power.

[32] The Commission agrees. It says that it has the discretion to retroactively review the Appellant's entitlement to EI benefits.

[33] I also note that section 52 of the EI Act doesn't say that the Commission must use its review power. Instead, it says the Commission "may" review any claim for benefits. So, this means that the Commission has the choice to use this power or not. In other words, the power to review is a discretionary power.

The Commission used its discretionary power in a way that was fair

[34] The Appellant says the Commission didn't use its discretionary power in a way that was fair. The Appellant says the Commission had all the information it needed to make a decision about his availability from the beginning. The Appellant also says that the Commission's reconsideration policy doesn't allow it to make retroactive decisions about "judgement call" issues like availability.

[35] The Commission disagrees. It says it used its decision-making power fairly.

[36] I agree with the Commission. I find that the Commission used its discretion fairly.

[37] When the Commission decides to use its discretion to review your entitlement to EI benefits, it has to show that it used this power fairly. Another way of saying this is that the Commission has to use its discretion judicially.

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

- Acted in good faith
- Didn't act for an improper purpose
- Didn't consider irrelevant factors
- Didn't ignore relevant factors
- Didn't act in a discriminatory way[3]

[39] The Commission also has to show that it respected the time limits described in section 52 of the EI Act.

[40] The Appellant hasn't made any arguments about the time limits. And I find that the Commission respected the time limits set out in section 52 of the EI Act. This is because the Commission paid EI benefits to the Appellant starting June 6, 2021. The Commission finished its review and notified the Appellant of its decision and the overpayment on March 16, and March 19, 2022, less than a year later.

[41] So, one way the Commission used its discretion fairly is by respecting the time limits described in the law.

[42] I understand that the Appellant says that the Commission didn't use its discretion fairly because it didn't follow its reconsideration policy. The Appellant says the reconsideration policy says the Commission can't revisit decisions like availability to make an overpayment when there aren't any false statements.

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[3] In *Canada (Attorney General) v. Purcell*, A-694-94, the Federal Court of Appeal describes what it means for the Commission to exercise its discretion judicially.

[43] I agree that the Commission has never said that the Appellant made false statements. In the first General Division decision, the Tribunal found that the Appellant had always been honest with the Commission about his school. Nothing in the appeal file makes me doubt the Appellant's credibility.

[44] The Commission's reconsideration policy says that it will only retroactively reconsider a claim for benefits in the following situations:

- Benefits have been underpaid
- Benefits were paid contrary to the structure of the EI Act (this doesn't include decisions about availability)
- Benefits were paid as a result of a false or misleading statement
- The claimant should have known that they weren't entitled to EI benefits[4]

[45] None of these apply to the Appellant's situation. And so, I agree with the Appellant on this point. The Commission didn't follow its reconsideration policy when it asked the Appellant to repay benefits.

[46] But even so, I think the Commission used its decision-making power fairly.

[47] Again, the Appeal Division decision I referred to above looks at this question. I find the Appeal Division's reasoning persuasive. I will follow the same reasoning.[5]

[48] In particular, I think it is important to follow this Appeal Division decision because it is recent and looks specifically at how sections 52 and 153.161 of the EI Act relate to each other and to the Commission's reconsideration policy. I understand that the Appellant also refers to case law that he says shows that the Commission shouldn't create an overpayment unless there are new facts. But I don't think these Umpire decisions are as persuasive as the recent Appeal Division decision.

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[4] *Digest of Benefit Entitlement Principles*, chapter 17.3.3
[5] *RV V Canada Employment Insurance Commission*, 2022 SST 1543, paragraphs 91 to 112.

[49] This is because the case law the Appellant gives me predates section 153.161 of the EI Act. And I think this is important, because this is a new part of the law that gives the Commission extraordinary powers specifically because of the COVID-19 pandemic. So, I think I have to be very cautious when I look at the reconsideration policy. Specifically, I have to consider how section 153.161 of the EI Act relates to the reconsideration policy.

[50] The Appeal Division decision notes that lawmakers had a specific intent when they drafted section 153.161 of the EI Act. They meant to give the Commission the power to review the availability of students.

[51] I agree with the Appeal Division's reasoning, and I find that the intent of section 153.161 of the EI Act outweighs the reconsideration policy. This is because section 153.161 is an extraordinary measure in response to the COVID-19 pandemic.

[52] So, I agree that the Commission didn't follow the reconsideration policy. But I don't think this means that the Commission used its review power unfairly.

[53] And there isn't anything else in the appeal file that makes me think the Commission used its decision-making power unfairly. The Appellant hasn't shown that the Commission acted in bad faith. Nothing makes me think the Commission acted in a discriminatory manner. There isn't anything in the appeal file that suggests the Commission targeted the Appellant more than any other student in a similar situation. There isn't any evidence showing that the Commission focused on irrelevant factors or failed to consider an important factor when it reviewed the Appellant's entitlement.

[54] I find that the Commission used its retroactive review power for an appropriate purpose: to review the Appellant's availability for work and to verify his entitlement to EI benefits.

[55] And so, I find that the Commission used its decision-making power judicially when it reviewed the Appellant's availability for work and his entitlement to EI benefits.

Conclusion

[56] I am dismissing the Appellant's appeal. I find that the law gives the Commission the power to retroactively review his availability for work, even if there aren't any new facts. This is a discretionary power, but I find that the Commission used its review power judicially.

[57] This decision means that the Appellant's overpayment remains in place.

Amanda Pezzutto
Member, General Division – Employment Insurance Section