[TRANSLATION]

Citation: *AC et al. v Canada Employment Insurance Commission*, 2023 SST 1876

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	A. C.
Representative:	Jean-Guy Ouellet
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (381617) dated December 31, 2020 (issued by Service Canada)

Tribunal member:	Josée Langlois
Type of hearing:	In person
Hearing dates:	May 9 and 10, 2023
Hearing participants:	Appellant Appellant's representative Witnesses
Decision date:	May 30, 2023
File number:	GE-21-160

Decision

[1] The appeal is allowed.

[2] I find that the Commission wasn't justified in reconsidering the Appellant's benefit periods starting December 23, 2012, December 22, 2013, and December 21, 2014.

Overview

[3] The Appellant made three claims for Employment Insurance (EI) benefits, on January 14, 2013, January 5, 2014, and January 9, 2015, respectively. Each time, he indicated that he had stopped working because of a shortage of work.

[4] The employer issued a Record of Employment indicating that the factory was closed during each period in question.

[5] On December 31, 2020, the Canada Employment Insurance Commission (Commission) decided that the Appellant was disentitled from receiving EI regular benefits because he wasn't available for work during all three benefit periods.

[6] Essentially, the Commission says that the Appellant wasn't entitled to benefits because he had an early retirement agreement that included one authorized day off per week, he was restricting his schedule to work four days per week, and he didn't make efforts to find a job during those periods.

[7] To get EI regular benefits, the Appellant has to be available for work each working day of his benefit period. Availability is an ongoing requirement. This means that the Appellant has to be searching for a job.

[8] The Appellant argues that the Commission could not reconsider his benefit periods because it was aware of his situation when it established each benefit period. He says that he sought help from a Commission employee with completing his claims for benefits and that a Commission employee even went to the employer to provide information on how to make claims for benefits, given that most employees would claim benefits during shutdowns.

[9] In addition, the Appellant acknowledges that he entered into an early retirement agreement effective November 6, 2011.[1] But he says that he was available for work even on Fridays, his weekly day off. He argues that every time he stopped working, it was at the employer's initiative, and that he was available for work every day of the week. More importantly, he argues that he asked a Commission employee for help because he didn't know how to make his claims for benefits and that he disclosed his entire situation, including the fact that he was in pre-retirement. He says that the Commission can't now act as though it didn't know his situation when it established his benefit periods.

[10] I have to decide whether the Appellant was available for work. He has to prove this on a balance of probabilities. This means that he has to show that it is more likely than not that he was available for work.

[11] I also have to decide whether the Commission was justified in reconsidering the Appellant's benefit periods.

[12] The Commissions' discretionary decisions can't be interfered with unless it can be shown that the Commission exercised its discretionary power in a non-judicial manner or acted in a perverse or capricious manner without regard to the material before it.

Preliminary matter

[13] Since the Commission issued reconsideration decisions in 40 files dealing mainly with availability during phased retirement, and since the appellants had the same representative, the files were joined to facilitate hearing management.

[14] The 40 joined files are the following: GE-21-153, GE-21-160, GE-21-162, GE-21-163, GE-21-164, GE-21-165, GE-21-166, GE-21-167, GE-21-168, GE-21-170, GE-21-172, GE-21-174, GE-21-176, GE-21-177, GE-21-178, GE-21-185, GE-21-186, GE-21-187, GE-21-188, GE-21-189, GE-21-190, GE-21-192, GE-21-193, GE-21-194,

[1] See GD3-24 in file GE-21-160.

GE-21-195, GE-21-196, GE-21-198, GE-21-199, GE-21-201, GE-21-205, GE-21206, GE-21-209, GE-21-211, GE-21-212, GE-21-233, GE-21-234, GE-21-235, GE-21-238, GE-21-239, and GE-21-240.

[15] However, to properly reflect the circumstances of each appellant, I am giving an individual decision. This decision relates to the files of A. C.: GE-21-160, GE-21-162, and GE-21-163.

Issues

[16] First, I will decide whether the Commission was justified in reconsidering the Appellant's files:

- Did the Commission act judicially when it reconsidered the Appellant's benefit periods?

[17] If I find that the Commission was justified in reconsidering the Appellant's benefit periods, I will decide whether the Appellant was available for work:

- Was the Appellant available for work from December 23, 2012, from December 22, 2013, and from December 21, 2014?

Analysis

Reconsideration

[18] The Commission may reconsider a claim for benefits within 36 months after the benefits have been paid. If, in the opinion of the Commission, a false statement has been made, the time can be extended to 72 months.[2]

[2] See section 52(5) of the *Employment Insurance Act*.

[19] To reconsider a claim for benefits within 72 months, the Commission doesn't have to show that the Appellant "knowingly" made false statements. But it has to do so when it imposes a penalty.[3]

[20] The Commission didn't impose any penalties in the Appellant's files.

[21] So, the Commission may reconsider a claim for benefits within 72 months if, "in its opinion," a false or misleading statement has been made.[4]

[22] The Commission argues that it was justified in reconsidering the Appellant's claims for benefits. It says that the Appellant made false statements when he said he was ready and willing to work each day of his benefit periods. According to the Commission, the Appellant failed to report that he had an early retirement agreement. The agreement included having Fridays off.

[23] The Commission argues that the Appellant wasn't available for work each working day of his benefit periods, as he alleges, because he wasn't available to work for his employer one day per week. The Commission says that he mentioned being available for work on Fridays, when this wasn't true.

[24] Lastly, the Commission specifically argues that it was the Appellant's responsibility to provide the right information at the right time.

[25] The Appellant says he didn't make false or misleading statements because, while he admits he had an early retirement agreement and reduced his availability by one day per week while in pre-retirement, not only was he available for work every day, but he also met with a Commission employee for help completing his reports. At that time, he explained his entire situation to find out how to make his claims for benefits.

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[3] As indicated in *Langelier*, 2002 FCA 157.
[4] This principle is explained in the following decisions: *Dussault*, 2003 FCA 372 (CanLII); and *Attorney General of Canada v Pilote*, (1998) 243 NR 203 (FCA).

[26] The Appellant's representative argues that the Commission [translation] "was well aware" of the pre-retirement program for X employees for several reasons.

[27] He relies on several decisions from the Tribunal and the Court.[5] He also discussed the history of Parliament's intent, which shows that Parliament wants to keep seniors in the workforce and that its primary intention wasn't to restrict their access to EI benefits.

[28] In describing this history, the Appellant's representative also acknowledged the shifts in case law in terms of the application of the notion of "availability" for claimants.

[29] A claimant must be available for work each working day of their benefit period. They show their availability through their efforts to find a job.

[30] The Appellant's representative relies on previous decisions by both the Tribunal's General Division and Appeal Division that accepted that a worker who was laid off for a short period would wait to be recalled by the employer. The principle was that, given the short duration of the layoff and the known return-to-work date, waiting to be recalled by their usual employer was the worker's best assurance of employment.

[31] In addition, the Appellant's representative says that the principle was still accepted when the Appellant claimed benefits, which would partly explain the Commission's tolerating the Appellant's situation during those periods. For this reason, he argues that it is unacceptable for the Commission to now act retroactively on this issue.

[32] Moreover, the Appellant's representative argues that the Commission could not reconsider the benefit period starting December 23, 2012, because the 72-month period had passed. He also says that the Appellant hadn't made any false or misleading statements and had been honest by disclosing his situation.

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[5] See the documents filed during the hearing at GD52-1 to GD52-713.

[33] Section 52(5) of the *Employment Insurance Act* (Act) refers to a false or misleading statement. This provision indicates that, when a false or misleading statement or representation has been made, the Commission may reconsider the claim within 72 months.

[34] The Commission may, **at any time in a specific period, reconsider its decision and, if it decides that a person has received money for which they weren't qualified, it must calculate the amount due or payable and notify the claimant**.[6]

[35] So, section 52(1) of the Act says that the Commission "may reconsider a claim for benefits" within 36 months. Section 52(5) of the Act says that the time frame is 72 months when a false or misleading statement has been made. In both cases, the power to reconsider a benefit period is a discretionary power.

[36] In a recent decision, the Tribunal's Appeal Division even confirmed that the power to reconsider under section 52 of the Act is a discretionary power, whether the time frame is 36 months or 72 months, since the Commission **can choose whether or not it will reconsider the claim**.[7] The Appeal Division then stated that Commission policy isn't binding and that the Commission can choose not to follow its policies so long as it has considered the relevant factors.

[37] To decide whether the Commission judicially exercised its discretion to reconsider, I have to determine whether it properly exercised this discretion. In other words, I must properly determine whether it considered all relevant factors when it decided to exercise its power to reconsider, and/or whether it acted in a perverse or capricious manner. "**This means that a decision made in bad faith, for an improper**

[6] This principle is explained in *Brière v Attorney General of Canada*, A-637-86.
[7] See *MS v Canada Employment Insurance Commission*, 2022 SST 933.

purpose, in a discriminatory manner, considering irrelevant factors, or failing to consider relevant factors, must be set aside."[8]

[38] The mayor of X, who was the director of human resources at X during those periods, testified that a Commission employee had visited the employer a few times to provide workers with information on how to complete their reports.

[39] The union representative also testified that a Commission employee had met with the workers a few times. He explained that, during shutdowns, many workers would claim benefits at the same time, resulting in crowding at the Service Canada office. To reduce crowding, and since the appellants needed help making their claims for benefits, a Commission employee visited a few times to provide the necessary information.

[40] He testified that the Commission employee knew that the employer had a pre-retirement program and that it could not be otherwise. He also said that if, at that time, the Commission had provided information that workers in the pre-retirement program weren't entitled to benefits, both the employer and the union would have notified the workers, and they would likely have decided differently.

[41] At the hearing, two other witnesses—X employees—also indicated that they had visited the Service Canada office a few times, that they had asked for help completing their claims for benefits, that they had disclosed being in pre-retirement, and that the Commission employee had completed their claims for them and/or told them how to complete their claimant reports.

[42] The Appellant's representative argues that the Commission had known about the Appellant's situation for many years and that it overstepped its authority and was unreasonable in acting retroactively as it did.

[43] First, I note that, given the delays caused by the health measures in place during the COVID-19 pandemic, the in-person hearing was postponed. Because of this, three

[8] As indicated in *MS v Canada Employment Insurance Commission*, 2022 SST 933; and *Attorney General of Canada v Purcell*, 1995 CanLII 3558 (FCA), [1996] 1 FC 644.

pre-hearing conferences were held. A Commission employee attended two of them.[9] At the first pre-hearing conference, the employee said that a Commission representative might attend the hearing. This was ruled out at the second pre-hearing conference. The Commission's representative said that, given the issues, the Commission didn't need a representative at the hearing. As a result, it didn't have a representative at the hearing to make arguments about its discretion to reconsider.

[44] The Appellant's representative argues that the Commission is trying to cover up the fact that it was aware of the situation.

[45] Second, I would like to mention that it would be relevant for Commission employees who attend pre-hearing conferences to be familiar with the regional case in question so that they can participate properly. Before the hearing, the Commission knew that the Appellant's representative intended to challenge the Commission's discretion to reconsider in all the appellants' files, and even though the Commission didn't have a representative at the hearing, it had the chance to submit additional arguments in writing, which it didn't do.

[46] So, I have to make this decision based on the evidence and arguments before me and on a balance of probabilities. In other words, if it is more likely than not that the Commission didn't consider all relevant factors and ignore irrelevant ones when making these discretionary decisions, I will find that it didn't act judicially. Then I can intervene.

[47] With that in mind, I accept the oral evidence from the hearing that many X employees, including the Appellant, had asked a Commission employee for help completing their claims for benefits multiple times over the years. I also accept that a Commission employee visited the employer a few times to give the claimants

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[9] Service Canada acts on behalf of the Commission. When I say that a Commission employee attended the pre-hearing conference or that the Appellant met with a Commission employee for help completing his claims for benefits, it was actually a Service Canada employee acting on the Commission's behalf. See *MS v Canada Employment Insurance Commission*, 2022 SST 933. When an employee acts on the Commission's behalf at a pre-hearing conference or a hearing before the Tribunal, the employee represents the Commission.

information and answer their questions about how to complete their claims while in pre-retirement.

[48] The Appellant's representative argues that the GD3 documents that the Commission provided in each file are incomplete and that the absence of certain documents is another way in which the Commission is trying to cover up its knowledge of this situation.

[49] The union representative testified that his sister, who is also the partner of a X employee, was a Commission agent during those periods, that she had decision-making power, and that she never told her partner, the union representative, or even her employer that there were issues with the appellants' claims for benefits.

[50] Considering the testimony that the appellants weren't comfortable with technology and with completing their reports online, that they needed help completing their reports, and that they had gone to the Service Canada office multiple times to get help completing their claims for benefits or their claimant reports, and considering the fact that some files show that the claimant had help from a Commission employee with reporting, I find that the Commission did know about the situation and tolerated it.

[51] The Appellant didn't make any claims for benefits after being informed of the outcome of the investigation on December 17, 2019. Acting retroactively on this situation, which was tolerated and maybe even encouraged by a Commission employee, is unreasonable, and I believe the Appellant when he says he was surprised to have an overpayment to repay when he is now retired. If a Commission employee completes a claimant report or tells a claimant how to complete their claims for benefits, asks them about their situation, knows about the pre-retirement program, and repeatedly establishes a benefit period while being aware of the situation, it seems unreasonable to me to later act retroactively, saying all the Appellant had to do was provide the right information at the right time.

[52] The facts show that it is more likely than not that the Commission didn't consider these factors when making its decisions. Its decision to exercise its discretion and act

retroactively on benefits that had already been granted has resulted in a substantial overpayment of benefits for the Appellant, who now has to pay it back while in retirement.

[53] When the Commission says that it was the Appellant's responsibility to provide the right information at the right time, it is ignoring its own responsibility, when the evidence shows that Commission employees were aware of the Appellant's phased retirement when establishing his benefit periods. Given the evidence, I find that the Appellant could not have known there was no entitlement to the benefits received.

[54] On this point, I agree with the Appellant's representative about the history of the files. It seems likely that the Appellant's availability situation was also tolerated during that period because a line of cases from that time had confirmed that it was acceptable for a claimant to wait to be recalled by an employer for a short period after being laid off, especially when they had a return-to-work date.[10] Waiting to be recalled, at least for a reasonable period, was accepted as the most likely way to get back to work. So, there was no need to automatically require proof of job search efforts from the claimant, given the known return-to-work date.

[55] However, as the representative rightly pointed out at the hearing, more recent cases have determined that a claimant can't just wait to be recalled and has to look for work to be entitled to benefits. As the Tribunal's Appeal Division has held on several occasions: **Availability must be assessed for each working day in a benefit period. This requirement doesn't go away if the unemployment period is short-term.**[11] **The Act is designed so that only those who are genuinely unemployed and actively looking for work will receive benefits**.[12]

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[10] This principle is discussed in the following decisions: CUB 1804; CUB 14685; CUB 23283; and *Carpentier*, A-474-97.
[11] See *DB v Canada Employment Insurance Commission*, 2019 SST 1277.
[12] The Tribunal's Appeal Division consistently applies the principle that a claimant can't just wait for their employer to call them back to show that they made efforts to find a job. See *DB v Canada Employment Insurance Commission*, 2019 SST 127; *JP v Canada Employment Insurance Commission*, 2021 SST 319; and *MP v Canada Employment Insurance Commission*, 2022 SST 802. See also *MacDonald*, A-672-93, which applies this principle.

[56] The case law provided by the Appellant's representative shows that the first line of cases was accepted by the Tribunal's Appeal Division during the periods in question, while the more recent decisions require that a claimant show that they made efforts to find a job, even when they have a return-to-work date after a short layoff period.

[57] In support of the documentation submitted, I also agree that Parliament's intention is to keep seniors in the workforce, not to make it overly difficult for them to get benefits.

[58] For many years, the Commission accepted the situation of X workers in phased retirement. Not only did it accept the Appellant's situation when establishing his benefit periods, but Commission employees also helped him complete his claimant reports and gave him information about how to make his claim for benefits.

[59] The Appellant's representative argues that the Commission made an error and was unreasonable in acting retroactively as it did. I find that it is more likely than not that it was aware of the Appellant's situation when establishing his benefit periods, and especially of his participation in a phased retirement program. In this particular case, the Appellant could not have known there was no entitlement to the benefits received. The Commission didn't consider this factor relevant when it made its decisions asking the Appellant to pay back the benefits he had already received. In this case, it was unreasonable for the Commission to reconsider his benefit periods when it knew about his situation when establishing them.

[60] As the Federal Court of Appeal has previously stated:

> I do not believe that the Commission has ever had […] the power to act retroactively to the detriement [*sic*] of the claimant on a decision based on a judgment of a discretionary nature made by a competent officer, except when a new fact is presented, which he cannot be faulted for not having known at the time he made the decision, it having been brought to his attention only later.[13]

[13] See *Boucher v Attorney General of Canada*, A-580-79.

[61] I am satisfied from the testimony that the Appellant disclosed his situation to a Commission employee when he asked for help completing his claims for benefits. The testimony has also satisfied me that the Commission was aware of this situation and tolerated it for a time. By making retroactive decisions in the Appellant's files, the Commission didn't properly exercise its discretion to reconsider. It didn't consider the fact that the Appellant could not have known he wasn't entitled to benefits when he disclosed being in pre-retirement to a Commission employee.

[62] As for the Commission, it hasn't made any arguments indicating what circumstances it considered when making its decisions. Its power to reconsider is discretionary, whether it makes its decisions within 36 months or 72 months. Because it hasn't shown that it considered all the relevant circumstances when exercising its discretion, I can't find that it acted judicially when it made its decisions.

[63] I understand from the Commission's arguments that, in its view, it was justified in reconsidering the Appellant's benefit periods, since the Act allows it to do so. As noted above, the Act says that the Commission may do this. The fact that benefits were paid when they should not have been isn't the only relevant factor that the Commission must consider when exercising its discretion. It has a responsibility to consider all relevant factors to justify its exercise of discretion so that it isn't exercised in a perverse or capricious manner.

[64] I can intervene and interfere with the Commission's discretionary decisions because it didn't properly exercise its discretion to reconsider by not taking into account all the material before it.[14] The facts show that it failed to consider relevant factors. And, after assessing the factors relevant to the Appellant's situation, I find that his benefit periods must not be reconsidered. This means that there is no overpayment, and the overpayment imposed in each file has to be written off.

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[14] This principle is explained in *Attorney General of Canada v Uppal*, 2008 FCA 388; and *Attorney General of Canada v Tong*, 2003 FCA 281.

[65] Because the Commission didn't judicially exercise its power to reconsider, I don't need to decide the other reconsideration issues or the issues relating to the Appellant's availability.

Conclusion

[66] The Commission didn't properly exercise its discretion when it decided to reconsider the Appellant's benefit periods. The benefit periods won't be reconsidered, and the overpayments imposed have to be written off.

[67] This means that the appeal is allowed.

Josée Langlois
Member, General Division – Employment Insurance Section