



[TRANSLATION]

Citation: *BB v Canada Employment Insurance Commission*, 2023 SST 1908

**Social Security Tribunal of Canada
General Division – Employment Insurance Section**

Decision

Appellant: B. B.
Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (533454) dated December 12, 2022 (issued by Service Canada)

Tribunal member: Manon Sauvé
Type of hearing: Teleconference
Hearing date: July 13, 2023
Hearing participant: Appellant
Decision date: August 2, 2023
File number: GE-22-4216

Decision

[1] The appeal is allowed.

[2] The Canada Employment Insurance Commission (Commission) didn't properly exercise its discretion when it decided to reconsider its own reconsideration decision. Compassionate care benefits won't be reconsidered. As a result, the Commission's reconsideration decision to pay compassionate care benefits remains in effect.

Overview

[3] The Appellant works for a telecommunications company. He stopped working from June 6, 2021, to February 19, 2022, because he was on parental leave. During that period, he received Quebec Parental Insurance Plan benefits.

[4] The Appellant then applied for Employment Insurance (EI) family caregiver benefits to support his mother. The Commission granted him 15 weeks of EI benefits, from February 20, 2022, to June 4, 2022.

[5] On June 5, 2022, the Appellant applied for compassionate care benefits to be with his mother.

[6] The Commission refused to pay him compassionate care benefits because it found that the Appellant didn't have enough hours of insurable employment in the qualifying period, between June 6, 2021, and June 4, 2022.

[7] The Appellant is asking the Commission to reconsider the decision. He argues that the benefit period should start on February 20, 2022, which is the start of his family caregiver benefit period, and that he could apply for another type of special benefit.

[8] After reconsideration, on October 13, 2023, the Commission granted him compassionate care benefits. He could receive up to 26 weeks of compassionate care benefits as of June 5, 2022, at a rate of \$595 per week.

[9] On December 12, 2022, the Commission contacted the Appellant to tell him that it had to reverse its decision because of an error on its part. So, the Appellant has to repay all the compassionate care benefits.

[10] The Commission says that, even though it made an error, the Appellant must repay, according to its reconsideration policy.

[11] The Appellant disagrees with the Commission. He is entitled to receive EI compassionate care benefits or extend his family caregiver benefits. Before that, he was on parental leave, so the Commission has to consider his situation.

Issues

1. Did the Commission exercise its discretion properly when it reconsidered its reconsideration decision?
2. Is the Appellant entitled to compassionate care benefits?

Analysis

[12] Before I decide whether the Appellant was entitled to compassionate care benefits, I have to determine whether the Commission exercised its discretion properly when it reconsidered its own reconsideration decision.

1. Did the Commission exercise its discretion properly when it reconsidered its reconsideration decision?

[13] Section 52(1) of the *Employment Insurance Act* (Act) allows the Commission to reconsider a claim for benefits within 36 months after the benefits have been paid or would have been payable.

[14] Section 52(2) of the Act says that, if a person has received benefits to which they aren't entitled, the Commission must calculate the amount and notify the person of its decision.

[15] When the Commission exercises its discretion under the Act, it must do so properly. It can't:¹

- act in bad faith
- act for an improper purpose or motive
- take into account an irrelevant factor
- ignore a relevant factor
- act in a discriminatory manner

[16] The Commission has a policy to govern the exercise of its discretion to reconsider.²

[17] Administrative policies can't limit a decision-maker's discretion and they can't replace the Act. They aren't binding.³ Administrative policies are intended to ensure consistency at the national level and to avoid arbitrariness.⁴

[18] However, there is an exception to this rule. If the Commission's error is contrary to the structure of the Act,⁵ it must correct the error retroactively, even if it results in an overpayment. The structure of the Act consists of the essential elements that establish a benefit period:

- an interruption of earnings
- the date of the interruption of earnings and the start date of the claim

¹ See *Canada (Attorney General) v Purcell*, 1996 CanLII 3558 (FCA).

² See Digest of Benefit Entitlement Principles, Chapter 17: Reconsideration, amendment and return of benefit.

³ See *Maple Lodge Farms v Government of Canada*, 1982 CanLII 24 (SCC); and *Stemijon Investment Ltd. v Canada (Attorney General)*, 2011 FCA 299.

⁴ See *Canada (Attorney General) v Gagnon*, 2004 FCA 351; and *Baker v Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC).

⁵ See Digest of Benefit Entitlement Principles, Chapter 17 – Section 17.3.3.2: Reconsideration, amendment and return of benefit.

- the claimant must have worked in insurable employment
- the claimant must have enough hours of insurable employment to establish a benefit period
- the claimant must meet the specific criteria to establish a benefit period with fewer than 910 hours of insured employment in the qualifying period
- **the claimant must meet the specific conditions to receive special benefits**
- **the claimant must meet the specific conditions to extend the benefit or qualifying period**
- the claimant must have insured earnings with which to calculate a benefit rate
- the benefit rate must be calculated in accordance with the specific protocol set out in the legislation, including the provisions to extend the calculation period
- there are errors on a Record of Employment that directly affect the above listed issues
- the determination of a family supplement rate

[19] In the Appellant's case, he had to meet the conditions to extend the special benefit period. So, these are provisions related to the structure of the Act.

[20] I note that the Appellant's situation is unique. This is because the Commission made an initial decision on July 6, 2022, that was unfavourable to the Appellant. According to the Commission, he wasn't entitled to EI compassionate care benefits because he didn't have enough hours of insurable employment between June 6, 2021, and June 4, 2022.

[21] The Appellant disagrees and asks the Commission to reconsider the decision based on the provisions of the Act. When a claimant disagrees with a Commission decision, they can ask it to reconsider.⁶ The Commission is required to do so.

[22] The Appellant claims that he can receive EI family caregiver and compassionate care benefits after receiving Quebec parental insurance benefits.

[23] On October 13, 2022, after reconsideration, the Commission reversed its July 6, 2022, decision and paid the Appellant compassionate care benefits. It reconsidered its decision as requested by the Appellant and agreed with him.⁷

[24] On December 12, 2022, the Commission made a new decision on the reconsideration decision. It can't grant compassionate care benefits. It made an error.

[25] The Commission argues that it was entitled to do so under section 52 of the Act. It found that it had made an error when it agreed to pay the Appellant benefits after its reconsideration request. Since the error is contrary to the structure of the law, it is entitled to ask him to pay back the overpayment.

[26] That said, I am of the view that I must first decide whether the Commission could reconsider a decision based on section 52 of the Act, when it reconsidered its decision under section 112.

[27] I find that it didn't exercise its discretion judicially when it decided to reconsider the reconsideration decision. First, the Commission simply told the Appellant that it had made an error in its reconsideration decision. It didn't inform the Appellant of its process or its reasons for making a mistake.

⁶ 112 (1) A claimant or other person who is the subject of a decision of the Commission, or the employer of the claimant, may make a request to the Commission in the prescribed form and manner for a reconsideration of that decision at any time within (a) 30 days after the day on which a decision is communicated to them; or (b) any further time that the Commission may allow.

Reconsideration

(2) The Commission must reconsider its decision if a request is made under subsection (1).

⁷ See section 112 of the *Employment Insurance Act*.

[28] Second, I find that the Commission used its discretion improperly to correct an error it says it made when it made the reconsideration decision at the Appellant's request under section 112 of the Act.

[29] Also, the Commission didn't consider the relevance of the finality of its decisions, especially after a reconsideration process. The courts have approved consideration of the "sound policy" of finality when exercising an implicit reconsideration power.⁸ It follows that the importance of finality is also relevant when the discretionary power is explicit.

[30] So, I have considered the importance of consistency and predictability. The tribunals agree with the use of internal administrative guidelines to ensure consistency at the national level and to avoid arbitrariness.⁹

[31] In my view, the Commission didn't follow its own policy set out in the Digest of Benefit Entitlement Principles.¹⁰ The Commission may reconsider under section 52 if an error that is unrelated to the decision being reviewed can be discovered. That is exactly what the Commission failed to do in this case. The Commission reconsidered a previous decision it made under section 112 of the Act.

[32] After considering the relevant factors, the importance of consistency, I decided that the Commission's decision on benefit reconsideration should not be reconsidered. So, the reconsideration decision granting benefits to the Appellant remains in effect. As a result, no overpayment is created.

[33] I don't have to decide whether the Appellant was entitled to EI compassionate care benefits, since the Commission granted him benefits after reconsidering its initial decision and it didn't follow its own rules.

⁸ See *Zutter v British Columbia (Council of Human Rights)*, 1995 CanLII 1234 (BC CA), cited by the Federal Court in *Merham v Royal Bank of Canada*, 2009 FC 1127 at paragraph 23: see Tribunal decision in *MS v Canada Employment Insurance Commission*, 2022 SST 933.

⁹ See *Canada (Attorney General) v Gagnon*, 2004 FCA 351; and *Baker v Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC).

¹⁰ See Digest of Benefit Entitlement Principles, Chapter 17 – Section 617.6.1.1 [sic]: Identification of (unrelated) error during formal reconsideration process.

Conclusion

[34] The Commission didn't properly exercise its discretion when it decided to reconsider its own reconsideration decision. The benefits won't be reconsidered, so the reconsideration decision to pay compassionate care benefits remains in effect.

[35] The appeal is allowed.

Manon Sauvé

Member, General Division – Employment Insurance Section