Citation: *YG v Canada Employment Insurance Commission*, 2023 SST 1866

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	Y. G.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (575090) dated March 15, 2023 (issued by Service Canada)

Tribunal member:	Elyse Rosen
Type of hearing:	In person
Hearing date:	June 6, 2023
Hearing participant:	Appellant
Decision date:	June 7, 2023
File number:	GE-23-1046

Decision

[1] The appeal is allowed.

[2] The Commission didn't exercise its discretion judicially when it reconsidered the Appellant's claim. I've decided that the claim shouldn't have been reconsidered.

[3] This means the Appellant isn't disqualified from receiving Employment Insurance (EI) benefits for the weeks of May 22 to December 11, 2022.

[4] As a result, I don't need to decide if the Appellant has shown just cause (in other words, a reason the law accepts) for leaving his part-time restaurant job when he did.

Overview

[5] The Appellant has a Ph.D in immunology. He has worked in research for the last 13 years.

[6] On February 25, 2022, he completed a fixed term research contract. He applied for, and was approved to receive, Employment Insurance (EI) benefits.

[7] While looking for another research position, the Appellant took a part-time job working in a restaurant. This job paid less than half the hourly wage he made working in research. However, the Appellant has a strong work ethic and didn't want to remain completely inactive while looking for another full-time research position.

[8] The Appellant found that the restaurant job interfered with his ability to look for full time work in his field. He had to commute over three hours a day just to work a three-hour shift. So, on May 22, 2022, he left the restaurant job to focus on his job search.

[9] On May 31, 2022, the Appellant was hired to lead a research study. The position start date was September 1, 2022. Unfortunately, shortly after he started that job, the doctor in charge of the study decided he didn't have the right skills and terminated his employment. So, the Appellant renewed his claim for benefits.

[10] The Canada Employment Insurance Commission (Commission) reconsidered his claim. It decided that the Appellant voluntarily left his job at the restaurant without just cause. It said he was disqualified from receiving benefits as a result. It issued an overpayment notice directing the Appellant to repay the $11,910 in benefits he had received since leaving his job at the restaurant.

[11] The Appellant disputes the reconsideration of his claim, as well as the Commission's conclusion that he didn't have just cause to leave his job at the restaurant. He argues that he shouldn't have to give back the benefits he received.

Matter I have to consider first

An additional document was added to the record

[12] During the hearing the Appellant provided me with a copy of an email he received from the doctor in charge of the study he was hired for. He also provided an excerpt from the *Digest of Benefit Entitlement Principles* (Digest) relating to voluntary leaving, along with an explanation as to why it applies to his case. I asked him to forward the documents to the Tribunal after the hearing so that they could be labelled and sent to the Commission. The documents have been labelled GD8.

[13] I have accepted the documents without giving the Commission an opportunity to respond to them. This is because:

- the Commission chose not to attend the hearing
- the documents are not late evidence
- the documents would not take the Commission by surprise

[14] So, GD8 will form part of the record.

[15] The Appellant also sent the Tribunal documents on June 7, 2023, which he was not given permission to file at the hearing. They have been labelled GD9.

[16] I had explained to the Appellant at the hearing that it was important that he tell me about any documents he wanted me to see during the hearing. He was told that if he didn't mention a document during the hearing, and I didn't give him permission to send it, I would probably not take it into consideration if it was sent after the hearing.

[17] The documents that have been labelled GD9 relate to matters that were discussed during the hearing and for which I have the Appellant's testimonial evidence. I don't consider that they add anything to the evidence I already have. And, the Appellant should have mentioned his intention to send these documents at the hearing.

[18] I am not giving the Appellant permission to submit this late evidence. So, GD9 will not form part of the record.

Issues

[19] To decide the appeal, first I have to decide if the Commission exercised its discretion judicially when it reconsidered the Appellant's claim.

[20] If I find that it did, I have to consider if the Appellant is disqualified from receiving benefits because he voluntarily left his restaurant job without just cause. If I find that it didn't, I have to make the decision the Commission should have made regarding reconsideration of the claim.

[21] In the event I decide that the claim shouldn't be reconsidered, there is nothing further for me to decide. However, if I decide the claim should be reconsidered, then I must decide if the Appellant is disqualified from receiving benefits because he voluntarily left the job at the restaurant without just cause.

Analysis

Did the Commission act judicially when it decided to reconsider the Appellant's claim for benefits?

[22] I find that the Commission didn't act judicially when it reconsidered the Appellant's claim for benefits.

[23] The law allows the Commission to reconsider a claim for benefits on its own initiative.[1] It has the discretion to decide whether or not it should do so. In other words, it has the freedom to apply its own judgement as to whether or not it should revisit the claim. When it does this, the Tribunal must be respectful of the Commission's discretion.

[24] However, when the Commission makes a discretionary decision, it must act judicially.[2] This means it has to act in good faith and in a consistent and fair manner. It must consider all of the relevant facts, but only the relevant facts, to arrive at its decision. If it doesn't, then the Tribunal can substitute its own decision for the decision the Commission made.

[25] The Commission has a policy about when it will exercise its discretion to reconsider a claim (the reconsideration policy).[3] The Appeal Division of the Tribunal recently decided that the factors set out in the reconsideration policy are relevant to the Commission's exercise of its discretion to reconsider a claim.[4] I agree with this conclusion.

[26] The reconsideration policy was developed to ensure a consistent and fair application of the law regarding discretionary reconsideration decisions, and to prevent creating debt when a claimant is overpaid through no fault of their own.

[27] The policy says that a claim will only be reconsidered when:

- benefits have been underpaid
- benefits were paid contrary to the structure of the EI Act[5]
- benefits were paid as a result of a false or misleading statement

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[1] See section 52 of the Employment Insurance Act (EI Act).
[2] See *Canada (Attorney General) v Purcell*, 1995 CanLII 3558 (FCA).
[3] See the *Digest of Benefit Entitlement Principles* (Digest), at section 17.3.3.
[4] See *MS v Canada Employment Insurance Commission*, 2022 SST 933. Although I am not bound by that decision, I find it helpful in this case. I agree with its finding that the reconsideration policy is relevant to determining if a decision to reconsider a claim was made judicially.
[5] **Structure of the act** is defined as the basic elements to set up a claim and pay benefits.

- the claimant ought to have known there was no entitlement to the benefits received

[28] I find that the Commission didn't act judicially when it decided to reconsider the Appellant's claim. This is because it failed to consider the factors in the reconsideration policy. And, it made a retroactive decision that resulted in an overpayment in circumstances it shouldn't have.[6]

[29] By failing to apply its policy, it didn't act in a consistent and fair manner. It also failed to consider factors that were relevant to the exercise of its discretion.

[30] These are the relevant factors the Commission failed to consider:

1) The reconsideration policy says that matters relating to the reason for separation from employment (in other words, why the claimant is no longer working) are not matters relating to the structure of the EI Act. However, the Commission reconsidered the Appellant's claim because it found that the reason he was no longer working after May 22, 2022, was the result of voluntarily leaving his job without just cause. This is not a matter relating to the structure of the EI Act.

2) There is no evidence that the Appellant made any false or misleading statements giving rise to the decision to reconsider the claim.

3) There is no evidence that the Appellant ought to have known that he was not entitled to benefits.

4) The Appellant is clearly an industrious person who wanted to work, and was willing to try work that would not be considered suitable employment despite having no obligation to do so, rather than simply sit back and collect benefits. He is clearly not someone who was trying to take advantage of the EI system.

[6] See section 17.3.2.1 of the Digest where it says: "(T)he Commission will only impose a retroactive decision which results in an overpayment if one of the situations described in the Reconsideration Policy exists."

5) The decision to reconsider was triggered by the Commission learning the Appellant had left the restaurant job. However, the restaurant job involved shift work, and a very long commute. It was interfering in the Appellant's ability to find a suitable job in his field and at a rate of earnings he would normally expect.

[31] Because I have found that the Commission didn't act judicially, I can make the decision that it should have made in its place.

Should the Appellant's claim be reconsidered?

[32] I find that the Appellant's claim shouldn't be reconsidered.

[33] The Tribunal's Appeal Division has explained that the discretionary decision to reconsider a claim involves the tension between claimants being able to rely on the finality of decisions and the Commission's interest in accuracy. In other words, mistakes and misrepresentations should be corrected, but only when doing so isn't unfair to the claimant.

[34] In my view, it would be unfair to reconsider the claim in this case.

[35] As I mentioned above, the reconsideration policy is meant to prevent creating debt when a claimant is overpaid through no fault of their own.

[36] There is no evidence that the Appellant made misrepresentations or ought to have known he wasn't entitled to benefits. Rather, from his testimony and from the documentation produced by the Commission, I conclude that he reported to the Commission regularly, declared his part-time income, answered all questions about why he left the restaurant honestly, and believed he was under no obligation to continue working at the restaurant while he looked for full-time work in his field. So, I find that the overpayment of benefits didn't result from the Appellant's fault.

[37] Moreover, the reason the Appellant stopped working at the restaurant is not something that relates to the structure of the EI Act. So, the determination as to whether the Appellant voluntarily left his employment without just cause is not a matter where accuracy should trump finality.

[38] Bearing in mind the factors in the Commission's policy, I find that the tension between accuracy and finality should be resolved in favor of the Appellant. He shouldn't be saddled with a significant debt to repay, due to no fault of his own, based on a retroactive decision. This is particularly true given that the underlying reason to reconsider—namely, whether the Appellant left his job without just cause— is not a matter where the accuracy of the decision is fundamental to the purpose of the EI scheme. It is not a matter that relates to the structure of the EI Act.

[39] I must also consider that the Appellant is clearly hard working and was by no means trying to take advantage of the EI system. The restaurant job he left wasn't suitable employment, and was interfering in the Appellant's search for suitable employment.[7]

[40] Having decided that the Commission shouldn't have reconsidered the Appellant's claim, the Appellant isn't retroactively disqualified from receiving benefits for the weeks of May 22 to December 11, 2022. As a result, he shouldn't have to repay the benefits he received during those weeks.

[41] However, my decision that the Appellant's claim shouldn't be reconsidered doesn't resolve whether the Appellant is disqualified from receiving benefits after benefits were last paid to him. This is because reconsideration decisions under this part of the law only apply retroactively. They apply to weeks of benefits already paid or which should have been paid and weren't. They don't apply to benefits that could become payable in the future, where no decision has yet been made.

[42] Yet, because the Appellant has been working full-time since December 19, 2022, and because the benefit period to which any possible disqualification might relate ended February 25, 2023,[8] determining if the Appellant voluntarily left his job at the restaurant without just cause is moot (in other words, of no practical relevance). This is because the Appellant was working full-time and isn't entitled to benefits during the weeks he

[7] I recognize that the Federal Court of Appeal has said that these factors aren't relevant to determining if a claimant voluntary left their job without just cause. However, I do think they are relevant to the exercise of discretion in deciding if a claim should be reconsidered.
[8] See section 30(2) of the EI Act.

was working. So, I won't bother to analyse whether or not the Appellant left his job at the restaurant without just cause. Such an analysis serves no purpose.

Conclusion

[43] I find that the Commission shouldn't have reconsidered the Appellant's claim. As a result, he isn't disqualified from receiving benefits for the weeks of May 22 to December 11, 2022. So, he doesn't have to repay the benefits he received during those weeks.

[44] This means the appeal is allowed.

Elyse Rosen
Member, General Division – Employment Insurance Section