Citation: *AB v Canada Employment Insurance Commission*, 2024 SST 610

Social Security Tribunal of Canada
Appeal Division

Decision

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

Decision under appeal:	General Division decision dated September 21, 2023 (GE-23-1008)

Tribunal member:	Solange Losier
Type of hearing:	Videoconference
Hearing date:	February 14, 2024
Hearing participants:	Appellant's representative Respondent's representative
Decision date:	May 28, 2024
File number:	AD-23-972

Decision

[1] The appeal is dismissed. The General Division did not make any errors of law or error of fact.

Overview

[2] A. B. is the Claimant in this case. When he stopped working, he applied for Employment Insurance (EI) regular benefits. He collected EI benefits while he was in school full-time (non referred training).

[3] The Canada Employment Insurance Commission (Commission) retroactively decided that the Claimant wasn't allowed to get EI regular benefits from June 7, 2021.[1] It said that he was taking a training course on his own initiative and had not proven his availability for work. This resulted in an overpayment.[2] The Claimant appealed the Commission's decision to the General Division.

[4] The General Division dismissed the Claimant's appeal.[3] It decided that the Commission had the power to retroactively review his availability for work. It also found that the Commission had used its decision-making power fairly when it decided to verify his entitlement to EI benefits. Since the Claimant had not proven his availability for work, his overpayment remained in place. There has been some procedural history with this file.[4]

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[1] See Commission's initial decision at page GD3-59 and Commission's reconsideration decision at page GD3-70.
[2] See overpayment chart at page GD3-58.
[3] See General Division decision dated September 21, 2023 at pages ADN1-12 to ADN1-22.

[4] There has been some procedural history with this file. The General Division first dismissed the appeal and found the Claimant was not available for work (General Division file# GE-22-2186). That decision was appealed to the Appeal Division. The Appeal Division allowed the appeal and returned the matter to the General Division to decide whether the Commission had the power to retroactively disentitle the Claimant to EI benefits and if so, whether it acted judicially when it decided to reconsider the Claimant's claim (Appeal Division file# AD-22-943). The current file under appeal is the General Division's subsequent decision to dismiss the appeal finding that the Commission had the power to retroactively review the Claimant's availability for work and that it acted judicially when it exercised its discretion to do so (General Division file# GE-23-1008).

[5] At the Appeal Division, the Claimant argued that the General Division made several errors of law and an error of fact.[5]

[6] I have decided that the General Division did not make any errors of law or an important error of fact.

Matters I have to consider first

[7] This appeal was heard by the Appeal Division on February 14, 2024. A few weeks later, the Federal Court of Appeal (Court) released three concurrent decisions that dealt with the same issues under appeal in this file.[6]

[8] I wrote to the parties on March 25, 2024, and provided them with a copy of the three decisions from the Court.[7] I gave them an opportunity to provide submissions about the cases and asked them to reply by April 5, 2024.

[9] Neither party replied by the deadline, or as of the date of this decision. On April 15, 2024, I wrote them a letter advising that the Tribunal hadn't received submissions from either party and that I would proceed to render a decision.[8]

Issues

[10] The issues in this appeal are:

a) Did the General Division make an error of law when it decided that the Commission had the power to retroactively reconsider the Claimant's entitlement to EI benefits based on sections 52 and 153.161 of the *Employment Insurance Act* (EI Act)?

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[5] See Claimant's submissions at pages ADN4-1 to ADN4-8.
[6] See *Molchan v Canada (Attorney General),* 2024 FCA 46; *T-Giorgis v Canada (Attorney General),* 2024 FCA 47 and *Puig v Canada (Attorney General),* 2024 FCA 48.
[7] See pages ADN5-1 to ADN5-3.
[8] See pages ADN6-1 to ADN6-3.

b) Did the General Division make an error of law when it decided that the Commission's reconsideration policy wasn't law and should not inform their interpretation of the law?

c) Did the General Division make an important error of fact when it concluded that there wasn't any evidence that the Commission focused on irrelevant factors or failed to consider an important factor?

d) If the General Division did err, how should the errors or error be fixed?

Analysis

[11] Leave to appeal was already granted because the Claimant had an arguable case that the General Division made a reviewable error.[9] At this stage, the Claimant now has to prove that there was in fact an error made by the General Division.

The General Division did not make any errors of law

– The absence of new facts

[12] The Claimant says that the General Division made an error of law when it reviewed sections 52 and 111 of the EI Act and concluded that section 52 does not require new facts to reconsider an EI claim.[10]

[13] The Claimant argues that the law doesn't give the Commission the power to retroactively review his availability when there are no new facts especially since he was honest and told the Commission he was in school from the beginning.

[14] Meanwhile, the Commission argues that the General Division correctly decided that it had broad power under section 52 of the EI Act to reconsider any claim for benefits, even in the absence of new facts.

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[9] See grounds of appeal listed in section 58(1) of the *Department of Employment and Social Development Act* (DESD Act).
[10] See Claimant's submissions at pages ADN4-1 to ADN4-8.

[15] Here are the relevant provisions in the EI Act.

[16] Section 52(1) of the EI Act says:

> Despite section 111, but subject to subsection (5), the Commission may reconsider a claim for benefits within 36 months after the benefits have been paid or would have been payable.

[17] Section 111 of the EI Act says:

> The Commission may rescind or amend a decision given in any particular claim for benefits if new facts are presented or if it is satisfied that the decision was given without knowledge of, or was based on a mistake as to, some material fact.

[18] The General Division first reviewed sections 52 and 111 of the EI Act in its decision.[11] It decided that the Commission had the power to review the Claimant's availability for work. It found that section 52 of the EI Act gives the Commission broad power to reconsider any claim for EI benefits.[12] It said that the Commission didn't need new facts to use its power under this part of the law.

[19] I find that the General Division did not err in law when it decided that only section 111 of the EI Act needed new facts and that section 52 of the EI Act didn't require any new facts.[13] This is consistent with what the Court decided in *Molchan* where it confirms that the Commission has broad authority to reconsider a claim for EI benefits even without new facts under section 52 of the EI Act.[14]

– **Reconsideration of A. B.'s EI claim**

[20] As noted above, the Commission retroactively reviewed A. B.'s EI claim. It decided that he was not available for work while he was in school. This resulted in an overpayment.

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[11] See paragraph 24 of the General Division decision.
[12] See paragraphs 23-27 of the General Division decision.
[13] See paragraph 29 of the General Division decision.
[14] See *Molchan*, at paragraph 28 and *T-Giorgis*, at paragraph 50.

[21] The Claimant says that the General Division made an error of law when it concluded that sections 52 and 153.161 of the EI Act gives the Commission the power to retroactively reconsider his entitlement to EI benefits.

[22] The Claimant argues that the Commission does not have this power and relies on several Canadian Umpire Benefit (CUB) decisions to support its position.[15]

[23] The Commission says that the General Division did not make an error of law when it decided that they had the power to retroactively review the Claimant's entitlement to EI benefits based on sections 52 and 153.161 of the EI Act.[16]

[24] The Commission argues that the Claimant is relying on older CUB decisions which pre-date the Covid-19 pandemic and section 153.161 of the EI Act. Instead, it says that it is relying on several more recent Tribunal decisions to support its position.[17]

[25] Section 153.161(1) of the EI Act says:

> For the purposes of applying paragraph 18(1)(a), a claimant who attends a course, program of instruction or training to which the claimant is not referred under paragraphs 25(1)(a) or (b) is not entitled to be paid benefits for any working day in a benefit period for which the claimant is unable to prove that on that day they were capable of and available for work.

[26] Section 153.161(2) of the EI Act says:

> The Commission may, at any point after benefits are paid to a claimant, verify that the claimant referred to in subsection (1) is entitled to those benefits by requiring proof that they were capable of and available for work on any working day of their benefit period.

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[15] See pages ADN4-5 to ADN4-7. The Claimant relies on the following CUB decisions: CUB 5564, CUB 37680A, CUB 8839 and CUB 4262.
[16] See page ADN3-5.

[17] See page ADN3-5. The Commission relies on the following Tribunal decisions: *RV v Canada Employment Insurance Commission,* 2022 SST 1543 (CanLII); *WA v Canada Employment Insurance Commission, 2023 SST 17; SF v Canada Employment Insurance Commission, 2022 SST 1095*; *Canada Employment Insurance Commission v KT, 2022 SST 994; Canada Employment Insurance Commission v RJ, 2022 SST 212* and *GP v Canada Employment Insurance Commission, 2023 SST 192.*

[27] The General Division first decided that the Commission had made an initial decision and then revised that decision when it verified the Claimant's availability for work.[18]

[28] The General Division relied on an Appeal Division decision that it found persuasive.[19] In that decision, the Appeal Division said that section 153.161 of the EI Act implies a prior decision because it talks about "verifying" entitlement.[20]

[29] The General Division then reviewed sections 52 and 153.161 of the EI Act.[21] Reading them together, it decided that the law gives the Commission the power to retroactively review the Claimant's entitlement to EI benefits. It said that section 153.161 of the EI Act allows the Commission to verify entitlement any time after paying benefits.

[30] I find that the General Division did not make an error of law. It did not err when it decided that the Commission had the authority under sections 52 and 153.161(2) of the EI Act to retroactively review his entitlement to EI benefits.

[31] The General Division stated the relevant law and its interpretation of the above provisions is consistent with what the Court has recently decided in the *Molchan*, *T-Giorgis and Puig* decisions.

[32] Like the Claimant in this case, Ms. T-Giorgis was a student who was in school full-time (non-referred training). She was honest and told the Commission about her school. The Commission retroactively reviewed her EI claim and decided that she was not entitled to get EI benefits because she had not proven her availability for work. It resulted in an overpayment.

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[18] See paragraphs 13 and 40 of the General Division decision. Also, see section 52(1) of the *Employment Insurance Act* (EI Act).
[19] See paragraphs 16-17 of the General Division decision.
[20] See *RV v Canada Employment Insurance Commission*, 2022 SST 1543, at paragraphs 64 to 72.
[21] See paragraphs 28 and 29 of the General Division decision.

[33] In *T-Giorgis*, the Court confirmed that section 52 along with section 153.161(2) of the EI Act empowers the Commission to verify entitlement to benefits paid to students in non-referred training and to assess an overpayment.[22]

[34] The Court's decision in *T-Giorgis* means that the Commission had the discretionary authority to retroactively verify her entitlement to EI benefits after they were paid. And, it was allowed to assess an overpayment for benefits she was not entitled to receive.

[35] The facts in the *Puig* decision are also similar.[23] Mr. Puig was a full-time student while he collected EI regular benefits. He told the Commission he was a student and provided details about his program in his application. A few months later, the Commission contacted him to discuss his school and entitlement to EI benefits. The Commission then retroactively decided that Mr. Puig was not available for work which resulted in an overpayment.

[36] The Court in *Puig* referred to its decision and rationale in *T-Giorgis.*[24] It confirmed that the section 153.161 of the EI Act is clear. It means that the Commission may, at any point after benefits are paid to a claimant, verify that the claimant is entitled to those benefits by requiring proof they were capable of and available for work on any working day of their benefit period.[25] And, verification of entitlement may occur after benefits have been paid.

[37] The General Division did not err in law when it concluded that the Commission had the power to retroactively reconsider and verify the Claimant's availability for work after EI benefits were already paid.[26]

[38] The General Division is not required to follow CUB decisions or even Appeal Division decisions. However, in this case the General Division was persuaded by an

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[22] See *T-Giorgis,* at paragraphs 48-49.
[23] See *Puig*, at paragraphs 2-4. Some facts were a bit different because Mr. Puig was an international student and had a work permit.
[24] See *Puig*, at paragraph 26 and *T-Giorgis*, at paragraph 49.
[25] See *T-Giorgis*, at paragraph 37-52.
[26] See section 58(1)(b) of the DESD Act.

Appeal Division's reasoning, which has been upheld by the Court in *T-Giorgis* and *Puig* decisions. I also have to follow what the Court says about sections 52 and 153.161 of the EI Act.

– The Commission's "reconsideration policy"

[39] The Claimant argues that the General Division erred in law when it concluded that the reconsideration policy in the *Digest of the Benefit Entitlement Principles* (Digest) wasn't law and should not inform the Commission's interpretation of the law. He says that the Commission ignored its own reconsideration policy which confirms that a claim should not be reconsidered when a claimant was overpaid through no fault of their own.

[40] The Commission argues that the reconsideration policy in the Digest was developed prior to the addition of section 153.161 of the EI Act. It says there is no guidance on how section 153.161 should inform the Commission's exercise of discretion under section 52. Because of that, it submits that the reconsideration policy is not applicable where section 153.161 of the EI Act is being relied on to verify availability for work.

[41] Chapter 17 and section 17.3.3 of the Digest says:

> The Commission has developed a policy to ensure a consistent and fair application of section 52 of the EIA and to prevent creating debt when the claimant was overpaid through no fault of their own. A claim will only be reconsidered when:
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> - benefits have been underpaid
> - benefits were paid contrary to the structure of the *Employment Insurance Act*
> - benefits were paid as a result of a false or misleading statement
> - the claimant ought to have known there was no entitlement to the benefits received

[42] The General Division considered the Claimant's argument that the Commission didn't follow its own reconsideration policy. Even so, it found that the reconsideration policy wasn't part of the law.[27]

[43] In *T-Giorgis*, the Court said that "the *Digest* is an administrative document that outlines different scenarios in which the Commission should reconsider a claim and is meant to ensure consistency in decisions and to avoid arbitrary decisions. While the *Digest* is an important tool to the Commission, it is not binding. Given the unique context in which section 153.161 of the EI Act was adopted, its purpose and the period during which it was in effect, the Appeal Division could reasonably find that the reconsideration policy does not apply."[28]

[44] I find that the General Division did not make an error of law when it decided that the reconsideration policy wasn't law.[29] It is an important tool, but it is not binding. The Commission still has to exercise its discretion judicially, but it is not guided by the factors set out in the reconsideration policy when section 153.161 of the EI Act is involved.

The General Division did not make an error of fact

[45] The Claimant argues that the General Division erred in finding that there wasn't any evidence that the Commission focused on irrelevant factors or failed to consider an important factor.[30] Specifically, he says that the Commission failed to consider two important factors: that he had acted honestly and incurred a large overpayment debt through no fault of his own.

[46] The Commission argues that the General Division considered that the overpayment was created through no fault of the Claimant and that he had always been honest with the Commission.[31]

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[27] See paragraph 30 of the General Division decision.
[28] See *T-Giorgis,* at paragraph 59.
[29] See section 58(1)(b) of the DESD Act.
[30] See pages ADN4-5 and ADN4-8.
[31] See page ADN3-6.

[47] The Court says that to exercise discretion in a "judicial manner" means that the Commission must not have acted in bad faith, or for an improper purpose or motive, or taken into account an irrelevant factor, or ignored a relevant factor, or acted in a discriminatory manner.[32]

[48] This means that if the Commission decides to review a claimant's entitlement to EI benefits, it has to show that it exercised its discretion to do so in a judicial manner. In other words, the Commission has to show that it used its power fairly.

[49] The General Division found that the Claimant was honest in all of his communications with the Commission about his school. It stated that nothing in the appeal file made it doubt his credibility.[33] And, it agreed that there were no false statements made by the Claimant.

[50] The General Division then considered whether the Commission had exercised its discretion in a judicial manner (or, used its power fairly).

[51] The General Division decided that the Commission used its power fairly.[34] It explained that the Claimant had not shown that the Commission had acted in bad faith, or in a discriminatory manner.[35] It noted that there was nothing in the appeal file that suggested the Claimant was targeted by the Commission more than any other student in a similar situation. Lastly, it found there wasn't any evidence that the Commission focused on irrelevant factors or failed to consider an important fact when it decided to review the Claimant's entitlement to benefits.

[52] I find that the General Division did not make an error of fact when it concluded that the Commission had exercised its discretion in a judicial manner.[36] The General Division conducted its own review and assessed the evidence. It explained with reasons and concluded that the Commission had used its power fairly.

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[32] See *Canada (Attorney General)* v *Purcell*, 1995 CanLII 3558 (FCA).
[33] See paragraph 43 of the General Division decision.
[34] See paragraphs 36, 41, 43, 45, 46 52-55 of the General Division decision,.
[35] See paragraph 53 of the General Division decision.
[36] See paragraph 58(1)(c) of the DESD Act.

[53] The Claimant may not agree with the General Division's findings or conclusions, but that isn't enough for me to intervene. The Appeal Division has a limited role, so I cannot intervene in order to reweigh the evidence about the application of settled legal principles to the facts of the case.[37]

– **Overpayment write-off**

[54] I acknowledge that the Claimant has an overpayment debt that he is liable to repay. However, he can still ask the Commission to write off his overpayment debt.

[55] The Court in *Puig* says that section 56(1)(f)(ii) of the *Employment Insurance Regulations* gives the Commission broad powers to write off an amount payable under section 43 of the EI Act if the repayment of the amount due would result in undue hardship to the Claimant.[38]

Conclusion

[56] The appeal is dismissed. The General Division didn't make any errors of law or an important error of fact.

Solange Losier
Member, Appeal Division

[37] See *Garvey* v *Canada (Attorney General)*, 2018 FCA 118.
[38] See *Puig, at* paragraph 34.