Citation: *KD v Canada Employment Insurance Commission*, 2024 SST 1399

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	K. D.
Representative:	A. D.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (441085) dated December 7, 2021 (issued by Service Canada)

Tribunal member:	Catherine Shaw
Type of hearing:	Videoconference
Hearing date:	June 5, 2024
Hearing participant:	Appellant Appellant's representative
Decision date:	July 3, 2024
File number:	GE-22-105

Decision

[1] The appeal is allowed. I agree with the Appellant.

[2] The Canada Employment Insurance Commission (Commission) didn't properly exercise its discretion when it decided to review the Appellant's entitlement to benefits.

[3] Her benefits should not be reviewed. The overpayment on the Appellant's claim must be removed.

Overview

[4] The Appellant was paid EI benefits starting in November 2020. Then, in October 2021, the Commission decided she was not available for work because she was attending school during this time. The Commission asked her to repay the benefits she had already received.

[5] The Appellant says the Commission didn't act properly when it decided to review her entitlement to benefits. She had told the Commission that she was attending school throughout her claim. And the Commission used information about her school attendance **after** she was paid benefits when it decided she wasn't available.

[6] The Commission says it did act properly when it decided to retroactively disentitle the Appellant. It paid the Appellant benefits because she declared she was available for work on her bi-weekly reports. Then it decided she couldn't work full-time hours while attending school so she hadn't proven her availability.

Matters I have to consider first

The Appellant's Charter appeal was dismissed

[7] The Appellant appealed the Commission's decision that she wasn't available for work to the Tribunal in January 2022. She argued that the law violated her rights under the *Canadian Charter of Rights and Freedoms*.

[8] The Appellant's Charter appeal was heard in a special process. This is different than the typical appeal process and involves filing additional documents and meeting certain criteria related to raising a constitutional issue.

[9] In December 2023, the Tribunal Member hearing the Charter appeal dismissed the constitutional challenge. It found the Appellant had not shown that the law violated the Charter.

[10] The Appellant appealed this decision to the Tribunal's Appeal Division. The Appeal Division decided not to hear the appeal because the Appellant had not received a final decision on the merits of her case. In other words, the Tribunal had not yet decided on the decision the Commission made about whether the Appellant was available for work. The Appeal Division said that the Appellant's appeal was premature until a final decision had been reached in her appeal. This meant a decision on all the aspects of the appeal that were within the jurisdiction of the General Division to decide.

[11] The General Division scheduled a hearing to be held on the merits of the Appellant's appeal. This decision is a result of that hearing.

I will accept documents sent in after the hearing

– The Appellant sent in documents

[12] At the hearing, the Appellant's representative said she may not have received all of the documents on file. We agreed that she could have some time following the hearing to review the documents and provide any further information in response to them in writing.

[13] The Tribunal re-sent her all the documents for the appeal file after the hearing. On June 14, 2024, she provided a written response, which was taken into consideration in the writing of this decision.

– The Commission sent in documents

[14] On June 5, 2024, I asked the Commission to provide submissions on its discretionary decision to review the Appellant's benefits retroactively. I asked for its

response by June 14th, but it asked for an extension of time to June 21st. I granted this request, and the Commission provided its submissions on June 20, 2024.

[15] The Commission's submissions were sent to the Appellant and she was given an opportunity to respond. I asked her to respond by June 28, 2024. Nothing further was received from the Appellant, so I proceeded with the decision.

Issues

[16] Before I can decide on whether the Appellant was available for work, I have to look at whether the Commission had the power to review the Appellant's benefits.

[17] To do this, I must consider whether the Commission properly exercised its discretion when it decided to review the Appellant's availability. If it did not, then I will look at whether benefits should be reconsidered in this case.

[18] If the Commission did properly exercise its discretion, then I will decide whether the Appellant has proven she was available from work as of November 29, 2020.

Analysis

[19] The law gives the Commission broad powers to review any of its decisions about EI benefits.[1] But, the Commission has to follow the time limits set out by the law. Usually, the Commission has three years to review its decisions.[2] If the Commission paid you EI benefits that you weren't really entitled to receive, it can ask you to repay those EI benefits.[3]

[20] The law specifically gives the Commission the power to review students' availability for work. The law gives the Commission this review power even if it already paid EI benefits.[4]

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[1] See section 52 of the *Employment Insurance Act* (EI Act). The Federal Court of Appeal sets out the Commission's broad power under this section in *Briere v Canada Employment and Immigration Commission*, A-637-86.
[2] See section 52(1) of the EI Act and *Canada (Attorney General) v Laforest*, A-607-87.
[3] See section 52(3) of the EI Act.
[4] See section 153.161(2) of the EI Act.

[21] Even though the law gives the Commission this power, it doesn't say that the Commission **must** use this power. The Commission has the choice to use its review power or not. In other words, the power to review is a discretionary power.

[22] When the Commission decides to use its discretion to review your entitlement to EI benefits, it has to show that it used this power properly. This is called using its discretion judicially.

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

- Acted in good faith
- Didn't ignore relevant factors
- Didn't consider irrelevant factors
- Didn't act for an improper purpose
- Didn't act in a discriminatory way[5]

The Commission had the power to review the Appellant's availability

[24] I find the Commission respected the law about time limits when it reviewed the Appellant's entitlement to benefits. This is because the Commission paid EI benefits to the Appellant starting in November 2020. The Commission finished its review and notified the Appellant of its decision on October 22, 2021, less than a year later.

The Commission didn't act properly when it reviewed her availability

[25] I find the Commission didn't use its discretion judicially when it decided to review the Appellant's entitlement to benefits. This is because it ignored relevant information about her availability and acted in bad faith when it did not give the Appellant clear instructions about whether to submit her job search records.

[5] The Federal Court of Appeal sets out what it means for the Commission to exercise its discretion judicially in *Canada (Attorney General) v Purcell,* A-694-94.

[26] The Commission says that it acted judicially, because it considered the factors relevant to the Appellant's availability.

[27] The Commission provided copies of the Appellant's training questionnaires, as well as notes of its conversations with the Appellant and her mother.[6] This information shows that:

- the Appellant reported that she was in a training program while claiming benefits on training questionnaires she submitted on February 21, 2021, as well as May 1, 2021. She also attested that she was available for work.
- The Commission first contacted the Appellant in October 2021. It was reviewing whether the Appellant was payable benefits while she was outside of Canada for a few days in August 2021. At that time, the Appellant reiterated that she was in school. The Commission officer asked her if she would give up school if an employer asked and the Appellant answered no. The Commission officer replied: "Not available."[7]
- The Appellant's mother then contacted the Commission officer for information.[8] She said her daughter was confused by the call and didn't understand what the questions were about, as her daughter had already been approved for benefits. The Commission officer said that her claim for benefits "was approved and now it is being reviewed."[9]
- Following this call, the Commission retroactively reviewed the Appellant's claim and decided she was not available for work from November 29, 2020.[10]

[28] The Appellant confirmed that she had reported that she was in school on her bi-weekly claim reports and in several training questionnaires. She repeatedly reported that she was in a full-time school program.

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[6] The Appellant's mother also acted as her representative with the Tribunal.
[7] See GD3-25 and GD3-26.
[8] See GD3-27 and GD3-28.
[9] See GD3-30.
[10] See the Commission's decision letter dated October 22, 2021, at GD3-31.

[29] The Appellant was working when she started school. She had two jobs; one was a temporary contract and the other she lost when the restaurant shut down due to COVID-19 restrictions.

[30] She started her claim for EI benefits during her last year of high school, after she lost her restaurant job. She later returned to this job when the restaurant re-opened.. She then attended her first year of university starting in September 2021.

[31] The Commission contacted her on December 3, 2021, and asked her about her availability. The officer asked her questions about her course schedule and if she attended classes during the day. The Appellant answered honestly that she did. The Commission also asked her about her work history while in school, and the Appellant reported that she had worked several jobs while in school.

[32] After the Commission decided she wasn't available for work, the Appellant asked for a reconsideration of that decision. Her mother wrote a letter clarifying that the Appellant had been attending online classes while in school. She was actively looking for work and returned to her job as soon as the restaurant re-opened after COVID-19 restrictions lifted. However, the Commission officer maintained its decision because the Appellant couldn't work certain hours of the day because she was in school.

[33] I find the Commission failed to consider relevant information that was before it. Namely, that the Appellant had a history of working while in school. Her jobs had regular hours outside of daytime or "business" hours. This was relevant to determining whether she was available for work.

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[35] The Commission also acted in bad faith. In its initial conversations with the Appellant and her mother, the Commission officer told them to "put together" their job search record but the officer said they would follow up shortly, as the Appellant "may not

need it."[11] This conversation occurred on October 22, 2021. The Commission issued its decision about the Appellant's availability the same day.

[36] The Commission told the Appellant and her mother that this information may be required to assess the Appellant's availability but did not give them a chance to submit the information.

[37] Further, in the Commission's submissions it stated that the Appellant "made a conscious decision" not to submit a job search record when requested.[12] This statement is plainly false on the evidence, and calls into question whether the Commission made an adverse inference of the Appellant's lack of a job search record when she had never been instructed to submit one.

[38] Even if that weren't the case, I can only conclude that the Commission proceeding with the decision after telling the Appellant and her mother that they would follow up shortly and to gather information of the Appellant's job search efforts was made in bad faith.

[39] For these reasons, I find the Commission didn't exercise its discretion judicially when it reviewed the Appellant's entitlement to benefits.

[40] Because I have found the Commission didn't exercise its discretion judicially, I am able to make the decision the Commission should have made. I will now look at whether the Appellant's entitlement to benefits should be reviewed.

Should the Appellant's entitlement to benefits be reviewed?

[41] No. I find the Appellant's entitlement to benefits should not be reviewed.

[42] The Commission has a policy to help guide how it exercises its discretion to review its decisions about EI benefits. It says this policy ensures "a consistent and fair

[11] See GD3-29.
[12] See GD38-2.

application" of the law and prevents "creating debt when the claimant was overpaid through not fault of their own."[13]

[43] The Commission's policy states that a claim will only be reviewed when:

- Benefits have been underpaid
- Benefits were paid contrary to the structure of the law
- Benefits were paid as a result of a false or misleading statement
- The claimant ought to have known they weren't entitled to the benefits they received.

[44] The Commission's policy is not the law. It is not binding. But, the courts have repeatedly supported the use of such guidelines to guarantee some consistency and avoid arbitrary decision-making.[14]

[45] I think the four factors set out in the policy are relevant to the decision to review a claim and should be considered when deciding whether to revisit a claimant's EI benefits.[15]

[46] The Appellant's circumstances do not meet any of these factors.

[47] First, she was not underpaid benefits from November 29, 2021.

[48] Second, the payment of benefits to the Appellant was not contrary to the structure of the law. The *Employment Insurance Act* doesn't preclude payment of benefits to claimants who are attending school.

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[13] See section 17.3.3 of the *Digest of Benefit Entitlement Principles* (Chapter 17).
[14] See *Canada (Attorney General) v Gagnon,* 2004 FCA 351 and *Baker v Canada (Minister of Citizenship and Immigration),* 1999 CanLii 699 (SCC).
[15] While also not binding, I am guided by other Tribunal decisions on this matter. For example, *SL v Canada Employment Insurance Commission,* 2021 SST 889 and *JP v Canada Employment Insurance Commission,* 2021 SST 109.

[49] Third, she didn't receive EI benefits because of a false or misleading statement. As set out above, she reported that she was attending school several times and stated that she was available for work while she was in school.

[50] And fourth, there is no evidence that she should have known she wasn't entitled to the EI benefits she received. Rather, the Appellant and her mother testified that she was initially approved for EI benefits. And several of her classmates in high school were being paid EI benefits at the same time. They had no reason to doubt that the Appellant was entitled to the EI benefits she was receiving.

[51] I recognize that these four factors are not a complete list of information that might be relevant to deciding whether to review a claimant's entitlement to benefits. But, I don't see any other information that recommends reconsidering the Appellant's entitlement to benefits.

[52] Based on the circumstances of the Appellant's case, I find her entitlement to benefits should not be reviewed.

So, does the Appellant have an overpayment?

[53] No. The Appellant's benefits should not have been reviewed. So, the previous decision to pay her EI benefits from November 29, 2021, remains in place. As a such, the overpayment is removed.

Conclusion

[54] The appeal is allowed.

Catherine Shaw

Member, General Division – Employment Insurance Section