Citation: *Canada Employment Insurance Commission v KD*, 2025 SST 131

Social Security Tribunal of Canada
Appeal Division

Decision

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

Decision under appeal:	General Division decision dated July 4, 2024 (GE-22-105)

Tribunal member:	Solange Losier
Type of hearing:	Videoconference
Hearing date:	October 9, 2024
Hearing participants:	Appellant's representative Respondent's representative
Decision date:	February 18, 2025
File number:	AD-24-474

Decision

[1] The Canada Employment Insurance Commission (Commission) appeal is allowed. The General Division made an error of law in its substituted decision. It also failed to follow a fair process.

[2] I have substituted with my own decision, but only on the issue of the Commission's discretion. I find that the Commission exercised its discretion in a judicial manner when it verified K. D.'s entitlement and reconsidered her claim.

[3] The matter will now go back to the General Division to decide the Claimant's availability for work from November 29, 2020.

Overview

[4] K. D. is the Claimant in this case. Her benefit period was established effective November 29, 2020. She was a student at the time.

[5] The Commission verified her entitlement starting from the beginning of her benefit period, and then reconsidered her claim. It retroactively disentitled her from being paid benefits because she had not proven her availability for work.[1] This resulted in an overpayment of benefits.

[6] The General Division allowed the Claimant's appeal.[2] It found the Commission hadn't properly exercised its discretion when it decided to "review" the claim because it had ignored relevant information about her availability for work. It also found that the Commission had acted in bad faith when it proceeded with its decision to disentitle her from benefits without her job search record.[3]

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[1] See Commission's initial and reconsideration decision at pages GD3-31 and GD3-42 to GD3-43.
[2] See General Division decision at pages AD1-10 to AD1-18.
[3] See paragraph 25 of the General Division decision.

[7] The General Division then substituted with its own decision and determined that the claim should not be "reviewed."[4]

[8] The Commission appealed to the Appeal Division of the Tribunal.[5] It argues that the General Division made an error of law when it found that they had ignored a relevant factor and acted in bad faith when exercising its discretionary authority to verify entitlement and reconsider the claim.

[9] I have found that the General Division made an error of law in its substituted decision because it relied on the Commission's reconsideration policy. Based on recent case law, the reconsideration policy doesn't apply. I have also found that the General Division failed to follow a fair process by failing to give the Claimant a clear opportunity to submit her job search record.

Preliminary matters

[10] The Claimant didn't attend the Appeal Division hearing, but was represented by her mother. When I refer to the Claimant's arguments in this decision, I am referring to the arguments her mother, as representative, made on her behalf.

[11] When the Claimant appealed to the General Division, she argued that the requirement to be available for full time employment under section 18(1) and section 25(1)(a) of the *Employment Insurance Act* (EI Act) created a distinction based on age for secondary school students.

[12] The constitutional issue was heard first, and the General Division decided that the Claimant had not shown that sections 18(1) and 25(1)(a) of the EI Act violated section 15 of the *Canadian Charter of Rights and Freedoms*.[6] The appeal was then assigned to a different member of the General Division to make a final decision in the

[4] See paragraph 40 of the General Division decision.
[5] See Application to the Appeal Division at pages AD1-1 to AD1-18.
[6] See interlocutory decision issued on November 24, 2023, at pages GD34-1 to GD34-21. Also, see section 15 of the *Canadian Charter of Rights and Freedoms*, s 7, Part 1 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

appeal (i.e., to decide the disentitlement and the Commission's related exercises of discretion).

[13] The Claimant had initially filed an application for leave to appeal of the General Division's decision on the constitutional issue. She decided to withdraw that appeal and wait for the General Division to issue the final decision.

[14] The General Division's final decision was in the Claimant's favour so she decided not to pursue an appeal to the Appeal Division. However, the Commission did apply for leave to appeal, and leave was granted. The Claimant was under the impression that she could dispute the constitutional decision as part of the Commission's appeal, without having to file her own application for leave to appeal.

[15] At the Appeal Division hearing, I clarified that the current appeal related only to the General Division's final decision and that the constitutional issue was not under appeal. I gave the Claimant information on how she could apply for leave to appeal.[7]

[16] The Claimant and Commission agreed that they wished to proceed with the Appeal Division hearing with the understanding that I would not be hearing any arguments related to the constitutional decision.[8] I agreed with the parties, so the hearing went ahead.

[17] This decision only relates to the Commission's appeal of the General Division's final decision issued on July 3, 2024.

[18] I note that the Claimant did apply for leave to appeal of the constitutional decision on October 17, 2024; leave to appeal was denied on November 14, 2024.[9]

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[7] As a courtesy, I followed up with a letter to the Claimant after the hearing restating information about the procedural steps that are involved to appeal the previous constitutional decision. See Tribunal letter at pages AD5-1 to AD5-4.
[8] See audio recording of Appeal Division hearing at 18:00 to 58:06.
[9] See Tribunal file number AD-24-700.

Issues

[19] The issues are:

a) Did the General Division make an error of law when it relied on the Commission's reconsideration policy in its substituted decision?

b) Did the General Division fail to follow a fair process by not providing a clear opportunity for the Claimant to submit her job search record?

c) If so, how should the error or errors be fixed?

Analysis

[20] An error of law can happen when the General Division doesn't apply the correct law or when it uses the correct law but misunderstands what it means or how to apply it.[10] If the General Division made an error of law, then I am permitted to intervene.[11]

[21] Procedural fairness is about the fairness of the process. It includes the right of a party to be heard and to know the case against them and to be given an opportunity to respond. If the General Division proceeded in a manner that was unfair, then I can intervene.[12]

– The Commission may verify entitlement and reconsider a claim after benefits have been paid

[22] Under section 18(1)(a) of the EI Act, a claimant is disentitled from being paid benefits if they fail to prove that they were capable of and available for work and unable to obtain suitable employment.

[23] There were temporary amendments to the EI Act in response to the Covid pandemic, which included a modified operational approach to the assessment of availability for claimants who were in a course, program of instruction, or training.[13] The

[10] See section 58(1)(b) of the *Department of Employment and Social Development Act* (DESD Act).
[11] See section 59(1) of the DESD Act.
[12] See section 58(1)(a) of the DESD Act.
[13] See section 153.161 of the EI Act.

provision, section 153.161 of the EI Act, allowed the Commission, **at any point** after benefits were paid, to **verify** a claimant's entitlement by requiring proof that they were capable of and available for work on any working day of their benefit period.[14]

[24] Section 52 of the EI Act gives the Commission the power to **reconsider** a claim for benefits within 36 months after the benefits have been paid or would have been payable.[15] And if the Commission decides that a person received benefits they were not entitled to, they must calculate the amount, notify the claimant and the overpayment becomes repayable.[16]

[25] The Federal Court of Appeal (FCA) says that sections 153.161 and 52 of the EI Act have to be read together. Together, they give the Commission the discretionary authority to seek verification of entitlement after the payment of benefits and then to reconsider the claim and assess an overpayment, if appropriate.[17]

[26] More specifically, the Commission, under s. 153.161 of the EI Act, has the discretionary authority to seek verification of entitlement to benefits after benefits were paid by requiring proof of a claimant's availability. If the Commission seeks that verification and is of the view that a claimant cannot prove their availability for work, then the Commission has the discretion to decide under section 52 of the EI Act whether to reconsider the claim.

[27] The Commission must always exercise its discretion judicially.[18] This means that when the Commission decides to verify entitlement or reconsider a claim, it cannot act in bad faith or for an improper purpose or motive; take into account an irrelevant factor; ignore a relevant factor; or act in a discriminatory manner.[19]

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[14] See *T-Giorgis v Canada (Attorney General)*, 2024 FCA 47, at paragraph 49.
[15] See section 52(1) of the *Employment Insurance Act* (EI Act).
[16] See sections 52(2) and 52(3) of the EI Act.
[17] See *T-Giorgis,* at paragraph 54.
[18] See *GP v Canada Employment Insurance Commission*, 2023 SST 192, at paragraphs 88–89. This Appeal Division decision was upheld as reasonable by the Federal Court of Appeal in *Puig v Canada (Attorney General)*, 2024 FCA 48.
[19] See *Canada Employment Insurance Commission v ET*, 2023 SST 196, at paragraph 114 and *Canada (Attorney General) v Purcell* (C.A.), 1995 CanLII 3558 (FCA), [1996] 1 FC 644.

[28] The decision under s. 153.161 of the EI Act to seek verification by asking for proof of a claimant's entitlement is discretionary, as is the decision to reconsider a claim under s. 52 of the EI Act. The Commission doesn't need to have new facts or information in order to exercise its discretionary authority to verify entitlement or reconsider a claim.[20]

[29] If the Commission decides to reconsider the claim, its decision of whether a claimant is disentitled under s. 18(1)(a) of the EI Act is not discretionary. Rather, the Commission must determine a claimant's availability based on the law. If a claimant appeals the Commission's availability decision to the Tribunal, the General Division decides whether a claimant satisfies the legal test for availability afresh (or "*de novo*").

– **The General Division made an error of law when it relied on the Commission's reconsideration policy in its substituted exercise of discretion**

[30] As set out above, where s. 153.161 and s. 52 of the EI Act are both engaged, they are read together. The first discretionary decision is whether to verify that the Claimant is entitled to benefits by requiring proof of her availability (s. 153.161 of the EI Act). The second is whether to then reconsider the claim (s. 52 of the EI Act).[21]

[31] There is a reconsideration policy that guides the Commission's exercise of discretion under s. 52 of the EI Act. The policy is not binding; it is an administrative document that outlines scenarios in which the Commission should reconsider a claim, to ensure consistency and avoid arbitrary decisions.[22]

[32] When s. 153.161 and s. 52 of the EI Act are jointly engaged, the reconsideration policy does not apply.[23] The reconsideration policy was developed prior to the addition

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[20] See *Molchan v Canada (Attorney General),* 2024 FCA 46, at paragraphs 24 and 28. The absence of new facts is not required for the Commission to exercise its reconsideration authority under section 52 of the EI Act. The Court agreed that it was a "relevant factor" for them to consider because it goes to the finality of a decision.
[21] See *T-Giorgis,* at paragraph 46.
[22] See *T-Giorgis*, at paragraph 59.
[23] See *T-Giorgis*, at paragraph 58.

of s. 153.161 of the EI Act. It doesn't provide guidance on the Commission's exercise of discretion under s. 52 of the EI Act when s. 153.161 of the EI Act is engaged. [24]

[33] I find that the General Division made an error of law in its substituted decision[25] because it relied on the reconsideration policy, which does not apply because the Claimant's entitlement was verified under s. 153.161 of the EI Act.[26]

– **The General Division didn't provide a fair process when it failed to provide the Claimant with a clear opportunity to submit her job search record**

[34] One of the Claimant's main arguments was that the Commission had acted in bad faith when it didn't allow her an opportunity to submit her job search record before concluding that she wasn't available for work. The General Division found as fact that the Commission had acted in bad faith by failing to do so.[27]

[35] The General Division also failed to provide a clear opportunity for the Claimant to submit her job search record. This amounts to a breach of procedural fairness in the context of this particular appeal.

[36] Examples from the General Division hearing where the job search record and/or submitting documents were raised included the following:

- At the beginning of the hearing, the General Division explained the legal test for availability and identified the various factors and job search efforts that it would consider. The Claimant explained that she wasn't aware she had to prepare "that documentation" for the hearing, but could look into it later. The General Division member noted that it could give the Claimant time after the hearing to submit anything she wanted. But, the General Division also explained that the Claimant didn't have to submit anything in writing because they could just talk about it and

[24] See *T-Giorgis,* at paragraph 55.
[25] See section 58(1)(b) of the DESD Act and paragraphs 40–51 of the General Division decision.
[26] See *T-Giorgis,* at paragraph 55.
[27] See paragraphs 25, 34 and 37 of the General Division decision.

if the Claimant was satisfied that she was able to present her case adequately, then she doesn't have to submit anything.[28]

- The General Division asked the Claimant about her job search efforts. The Claimant mentioned that she had interviewed at Foot Locker, but said she didn't think her job search efforts were in question. The General Division noted that there was reference to a job search record and that it might ask for it in case "it is part of my jurisdiction" but then also said the Claimant had been very thorough about her efforts and it didn't have any questions about that. The General Division member then stated that it was "very convinced that what you have shown me meet the reasonable and customary efforts."[29]

- The General Division referred to the Commission's written argument that the Claimant had made a conscious decision to not comply with the job search record. The Claimant disagreed because she had intended to prepare the "document" (seemingly referring to the job search record) but the Commission agent called two days later and told her that she was "disqualified from the beginning."[30]

- Shortly after, the General Division concluded by telling the Claimant that the Tribunal would send her a full copy of the Tribunal's appeal record (the Claimant said at the outset of the hearing that she didn't have a copy) and that she could send in anything else.[31]

[37] After the hearing, the Tribunal on behalf of the General Division sent the Claimant an entire copy of her appeal file and asked if she wanted to submit anything

[28] See audio recording from 25:45 to 28:20 of the General Division hearing.
[29] See audio recording from 1:18 to 1:22 of the General Division hearing.
[30] See audio recording from 1:26 to 1:28 of the General Division hearing. The Claimant may have been told she was disqualified from getting benefits, but section 18(1)(a) of the EI Act results in a disentitlement to benefits.
[31] See audio recording from 1:28 to 1:37 of the General Division hearing.

else, identifying a deadline.[32] The Claimant replied but only to the Commission's written arguments about the *Page* decision, and did not submit a job search record.[33]

[38] There is no job search record in the appeal file.

[39] The audio recording shows that while the General Division gave general opportunities to submit documents, it failed to address the job search record specifically and give the Claimant the opportunity to provide it.

[40] I acknowledge that the General Division doesn't always need to give an opportunity to provide a specific form of evidence (i.e., job search record) but, in this particular case, the Claimant argued that she was not given an opportunity to submit a job search record to the Commission before it made its decision. And the General Division found the Commission acted in bad faith for that reason.

[41] I find that the General Division didn't follow a fair process because it didn't give the Claimant an explicit and clear opportunity to submit her written job search record.[34]

Fixing the error

[42] There are two main options for fixing an error made by the General Division.[35] I can either send the file back to the General Division for reconsideration or give the decision that the General Division should have given. If I make a decision, I can make necessary findings of fact.[36]

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[32] See pages GD39-1 to GD39-3.
[33] See *Page v Canada (Attorney General),* 2023 FCA 169. Also, see Commission's arguments about the *Page* decision at pages GD38-1 to GD38-5 and Claimant's response to GD38 at pages GD43-1 to GD43-4.

[34] See section 58(1)(a) of the DESD Act. Also, see *Sibbald v Canada (Attorney General),* FCA 157, at paragraphs 56–57. The *Sibbald* case dealt with the Canada Pension Plan (disabled contributor's child's benefit) and it involved a relevant document that was not submitted to the General Division, but ended up being submitted to the Appeal Division and accepted as new evidence. In its decision, the Federal Court of Appeal outlined the exceptions to new evidence and noted that it may be useful for the General Division, as the administrative decision-maker, to request additional documents from a claimant. It explained that while the documents may not be determinative on their own, they should form part of the evidentiary record before the decision-maker.
[35] See section 59(1) of the DESD Act.
[36] See section 64 of the DESD Act.

[43] The Commission first submitted that the matter should be returned to the General Division to be reconsidered. It suggested that the matter return with instructions to accept that it exercised its discretion in a judicial manner. The General Division could then proceed by rendering a decision on the Claimant's availability for work.[37]

[44] At the Appeal Division hearing, the Commission modified its position slightly and suggested that the Appeal Division could possibly substitute with a decision on the availability issue as well.

[45] The Claimant submitted that the General Division's decision (in her favour) should be maintained. She explained that the process has taken a toll and she would like it to end as soon as possible.

– I will substitute with my own decision on the Commission's exercises of discretion

[46] I will substitute with my own decision on the issue of the Commission's exercises of discretion to verify entitlement and to reconsider the claim. I am satisfied that the Claimant got a full and fair opportunity on this issue at the General Division.

[47] The General Division does not consistently clearly explain what it is considering or deciding when reviewing the Commission's exercises of discretion. As noted above, three provisions are engaged. Verification of entitlement (a discretionary decision) happens under s. 153.161 of the EI Act. The claim may then be reconsidered under s. 52 of the EI Act (this is also discretionary). However, the disentitlement for not being available for work (s. 18(1)(a) of the EI Act) is not a discretionary decision. That means that the General Division does not review the Commission's decision-making process as it relates to the disentitlement under this section (it decides the availability issue "*de novo*").

[48] The General Division repeatedly refers to the Commission having a "review power" and seems to use this interchangeably to refer to the discretion to verify entitlement under s. 153.161 of the EI Act and to reconsider a claim under s. 52 of the

[37] See page AD3-6.

EI Act. It sometimes notes which exercise of discretion it is referring to but not consistently.[38]

[49] The General Division may have also considered the Commission's decision to disentitle the Claimant under s. 18(1)(a) of the EI Act as though it was a discretionary decision.[39]

[50] Having already determined that the General Division erred in law and didn't follow a fair process, it isn't necessary for me to decide whether the lack of clarity in the General Division's decision amounts to an error of law. Because of the lack of clarity, I am substituting the General Division's decision on the Commission's exercise of discretion under s. 153.161 and s. 52 of the EI Act with my own decision.

[51] The FCA is clear when it says that s.153.161 of the EI Act is a discretionary provision.[40] It gives the Commission the discretion to verify a claimant's entitlement to benefits by requiring proof that they were capable of and available for work on any working day of their benefit period.

[52] The FCA has said that the Commission's view of whether the claimant's proof demonstrates availability is relevant to deciding whether to reconsider the claim under s. 52 of the EI Act.[41] So, there is some sort of assessment of a claimant's availability that may happen when the Commission seeks verification and requires proof of availability under s. 153.161. However, it does not appear as though it is a full and complete assessment of a claimant's availability to the point where the legal test for availability (i.e., the *Faucher* factors) is applied.[42]

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[38] See paragraphs 16, 17, 21, and 38 of the General Division decision as examples. At some points in the decision the General Division footnotes which provision it is referring to, but not consistently.

[39] For example, paragraph 33 of the General Division's decision states that the Claimant's history of working while in school is relevant to "determining whether she was available for work," which suggests that the General Division may have been looking at how the Commission decided the disentitlement under s.18(1)(a) of the EI Act, which is not a discretionary decision.

[40] See *T-Giorgis*, at paragraphs 54 and 64.
[41] See *T-Giorgis,* at paragraphs 62 and 63.
[42] See *Faucher* v *Canada Employment and Immigration Commission*, A-56-96 and A-57-96. The Faucher decision sets out the factors for assessing a claimant's availability for work.

[53] I don't accept that the legal test for availability is applied to verify entitlement under s. 153.161 because that would mean that the legal test (i.e., the *Faucher* factors) would be applied before deciding whether to reconsider the claim under s.52 of the EI Act. There is some sort of assessment of the proof a claimant provides that is allowed under s. 153.161. And the outcome of that (i.e., pointing to the claimant not being entitled) is relevant when deciding whether to reconsider under s. 52.

[54] Also, the disentitlement itself isn't part of s. 153.161, and the provision says it is "for the purposes of" s.18(1)(a), so that suggests that s.18(1)(a) still had to be applied. The FCA doesn't discuss the kind of assessment that may or should happen under s.153.161, but if they had intended for *Faucher* factors to be applied, then it would have said so.

– **The Commission exercised its discretion in a judicial manner when it verified the Claimant's entitlement to benefits under section 153.161 of the EI Act**

[55] The Claimant was outside of Canada for a short period in August 2021 and discussions about that issue with the Commission raised a question about her availability for work for the entire benefit period. The Commission requested proof of a job search during their initial discussion.[43]

[56] At this verification step, the Commission found that the Claimant's availability overall would have to be further reviewed, and that she would not get further benefits as of September 7, 2021, because she was a full-time student. The Commission told the Claimant to start gathering her job searches and explained what type of information would be needed, but then said that it would follow up shortly as "you may not need it."[44]

[57] I have to decide whether the Commission exercised its discretion in a judicial manner when it decided to verify the Claimant's availability for work under s.153.161 of the EI Act.

[43] See pages GD3-25 to GD3-26.
[44] See pages GD3-29 and GD3-30.

[58] To exercise discretion in a judicial manner means that when the Commission decides to verify entitlement it cannot act in bad faith or for an improper purpose or motive; take into account an irrelevant factor; ignore a relevant factor; or act in a discriminatory manner. This is the legal test.[45]

[59] The evidence shows that the Commission sought to verify the Claimant's availability after having discussions with her about being outside of Canada.[46] It was brought to their attention that her availability for work for the entire period might be in question. She told the Commission that she was a full time student.

[60] I see no indication that the Commission considered any factors that were irrelevant, ignored any relevant factors or acted in a discriminatory manner at this verification step. All of the factors above were relevant to deciding whether to verify her entitlement.

[61] At the Appeal Division hearing, the parties disagreed on whether the Commission's decision to verify her entitlement was made in bad faith. Many of their arguments were focused on this point.

[62] The Claimant argues that a short absence from Canada doesn't warrant a verification of her availability. She says that the Commission's decision was made in bad faith because she doesn't understand what it was based on. She also argues that they acted in bad faith by choosing not to provide copies of recorded telephone calls between them.

[63] The Commission argues that it didn't act in bad faith when it verified her entitlement. It submits that bad faith doesn't have a specific legal definition for a government body exercising its discretionary authority. However, it says there have

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[45] See *Canada Employment Insurance Commission v ET*, 2023 SST 196, at paragraph 114 and *Canada (Attorney General) v Purcell* (C.A.), 1995 CanLII 3558 (FCA), [1996] 1 FC 644.
[46] There were several conversations between the Claimant and Commission in October 2021 and December 2021, see pages GD3-25 to GD3-30 and GD3-40 to GD3-41.

been other decisions from the Supreme Court of Canada (SCC) and the Federal Court (FC) dealing with bad faith conduct that broadly apply to government programs.

[64] The Commission relies on the following SCC and FC decisions to support its position that it didn't act in bad faith when it verified the Claimant's entitlement.

[65] The SCC in *Entreprises Sibeca Inc* has described, "the concept of bad faith can encompass not only acts committed deliberately with intent to harm, which corresponds to the classical concept of bad faith, but also acts that are so markedly inconsistent with the relevant legislative context that a court cannot reasonably conclude that they were performed in good faith."[47]

[66] The FC in *Freeman* has accepted the above definition for bad faith when reviewing decisions made by the government (although not in the context of EI benefits because it dealt with an immigration matter).[48]

[67] To summarize, the Commission restates that just because they decided to verify the Claimant's entitlement, they did so because the law gives them that power and discretion, which itself does not constitute bad faith. They submit that they didn't do anything deliberate, or an act of harm, or for an improper purpose, or dishonest intent—but rather, the Commission agents were keeping in line with their roles which allow them to make decisions about the Claimant's availability.

[68] I find that the Commission's exercise of their discretion to verify and request proof of her availability was not made in bad faith. There is no evidence that would indicate that the Commission decided to seek verification for an improper purpose or motive, or acted in bad faith.

[69] When I consider how the SCC and FC in the above cases have described bad faith, I don't see how the Commission's conduct amounted to bad faith in this case. The Commission sought to verify her entitlement, it wasn't acting for an improper purpose, or

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[47] See *Entreprises Sibeca Inc. v Flemingsburg (Municipality)*, 2004 SCC 61, at paragraph 26.
[48] See *Freeman v Canada (Citizenship and Immigration),* 2013 FC 1065, at paragraph 27.

deliberately with an intent to harm, or dishonest intent. And it didn't act in a way that was inconsistent with the relevant legislative context.

[70] The Claimant says she doesn't understand why the Commission sought to verify, but it happened because she was outside of Canada for a short period and discussions about that issue raised a question about her availability for work for the entire benefit period.

[71] I find that the Commission acted in a judicial manner when it exercised its discretion to verify the Claimant's entitlement to benefits under s. 153.161 of the EI Act after having discussions with the Claimant in October 2021 and December 2021.[49] I cannot intervene in that decision.

[72] Finally, I want to briefly address the Claimant's specific argument about bad faith and the telephone audio recordings. She says that the Commission acted in bad faith by failing to disclose evidence (audio recordings of their telephone discussions). In my view, this argument doesn't relate to the Commission's exercise of discretion to verify her entitlement.

[73] At the Appeal Division hearing, the Commission's representative explained that the telephone conversations between the Claimant and Commission agents were not recorded. So, there are no audio recordings.

[74] I accept the Commission's explanation about the audio recordings. The Claimant hasn't provided any evidence to show that the telephone conversations were recorded. The Commission did not act in bad faith by not providing the Claimant with audio recordings because they do not exist.

– **The Commission exercised its discretion in a judicial manner to reconsider the claim under section 52 of the EI Act**

[75] I now have to decide whether the Commission exercised its discretion in a judicial manner when it decided to reconsider the claim under s. 52 of the EI Act.

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[49] See pages GD3-25 to GD3-30 and GD3-40 to GD3-41.

[76] The legal test for exercising discretion in a judicial manner remains the same under s. 52 of the EI Act (see paragraph 58 above).[50]

[77] The FCA accepted that the result of a potential reconsideration is relevant. It said that "reconsideration of a claim when entitlement is in question is a proper purpose, provided it is done within the time frame imposed under the EIA."[51]

[78] The Commission in this case reconsidered the claim within the 36-month period permitted by law.[52] The Claimant got benefits starting in November 2020 and it reconsidered her claim, then notified her of the decision in December 2021.[53]

[79] At the Appeal Division hearing, the Claimant agreed that the Commission has the power to reconsider the claim under s. 52 of the EI Act, but says she doesn't understand what that decision was based on.

[80] The Commission argues that they exercised their discretion in a judicial manner when they reconsidered the claim under s. 52 of the EI Act.

[81] The file shows that the Commission was aware that the Claimant was honest about the fact that she was in school because she had completed a few training questionnaires reporting that information.[54]

[82] The Claimant wrote to the Commission and explained that the situation has affected her financially.[55] The Commission notes indicate that it was sympathetic to the Claimant's situation, but found that it could not ignore the law and make a decision on that basis.[56] And importantly, the FCA has confirmed that financial hardship isn't a relevant factor.[57]

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[50] See *Canada Employment Insurance Commission v ET*, 2023 SST 196, at paragraph 114 and *Canada (Attorney General) v Purcell* (C.A.), 1995 CanLII 3558 (FCA), [1996] 1 FC 644.
[51] See *T-Giorgis*, at paragraph 63.
[52] See section 52(1) of the EI Act.
[53] See Commission's decision dated December 7, 2021, at pages GD3-42 to GD3-43.
[54] See training questionnaires at pages GD3-13 to GD3-24 and page AD3-40.
[55] See pages GD3-34 to GD3-35.
[56] See pages GD3-40 to GD3-41.
[57] See *Molchan*, at paragraphs 40, 44 and 53. Also, see *T-Giorgis*, at paragraph 68.

[83] As noted above, when s. 153.161 and s. 52 of the EI Act are jointly engaged, the reconsideration policy does not apply.[58] So, I cannot consider it in this case.

[84] The Commission ultimately decided to reconsider the claim, imposed a retroactive disentitlement to benefits from November 29, 2020, and notified the Claimant. That resulted in a notice of debt for the overpayment of benefits.[59]

[85] As noted above, the Claimant was out of Canada for a short period and discussions about that issue raised a question about her availability for work for the entire period. The Commission's decision to reconsider the claim was a proper purpose and it was done within the 36-month time frame set out in the law.

[86] I see no indication that the Commission ignored any relevant factors, considered irrelevant factors or acted in a discriminatory manner. For the same reasons set out above dealing with bad faith (see paragraphs 61–74 above), there is no evidence that the Commission acted in bad faith when it decided to reconsider the claim.

[87] I find that the Commission exercised its discretion in a judicial manner when it decided to reconsider the claim under s. 52 of the EI Act after having discussions with the Claimant in October 2021 and December 2021.[60] I cannot intervene in that decision.

– **The matter has to go back to the General Division to decide the issue of availability for work**

[88] At the Appeal Division hearing, the Commission requested to modify its initial reconsideration decision. The Commission first decided that the Claimant was disentitled to benefits from November 29, 2020.[61]

[89] The Commission made a new submission. It submits that the Claimant should only be disentitled to benefits from November 29, 2020, to June 29, 2021, because that was the period of time the Claimant was in high school. It explained that the subsequent

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[58] See *T-Giorgis*, at paragraph 58.
[59] See sections 52(2) and 52(3) of the EI Act.
[60] See pages GD3-25 to GD3-30 and GD3-40 to GD3-41.
[61] See Commission's initial and reconsideration decision at pages GD3-31 and GD3-42 to GD3-43.

period of time she was in university was not before the Tribunal, so it should not be considered.

[90] The General Division may wish to consider the Commission's new submission—that the indefinite disentitlement to benefits should be removed and instead a disentitlement for a shorter defined period should be applied. It could ask the Commission to provide an update on their position on the period of disentitlement.[62]

[91] I am returning the file back to the General Division to decide whether the Claimant was available for work from November 29, 2020.

Conclusion

[92] The Commission's appeal is allowed. The General Division made an error of law and didn't follow a fair process. I have substituted with my own decision and found that the Commission exercised its discretion in a judicial manner in s. 153.161 and s. 52 of the EI Act.

[93] The matter will return to the General Division to decide whether the Claimant is available for work from November 29, 2020.

Solange Losier
Member, Appeal Division

[62] See section 53 of the *Social Security Tribunal Rules of Procedure* allows the Tribunal to ask the Commission to investigate and report on any question related to a claim for benefits.