Federal Court of Appeal | Cour d'appel fédérale

Date: 20240318

Docket: A-85-23

Citation: 2024 FCA 47

CORAM: **STRATAS J.A.**
LASKIN J.A.
ROUSSEL J.A.

BETWEEN:

EUODIA T-GIORGIS

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard at Vancouver, British Columbia, on October 4, 2023.

Judgment delivered at Ottawa, Ontario, on March 18, 2024.

REASONS FOR JUDGMENT BY: ROUSSEL J.A.

CONCURRED IN BY: STRATAS J.A.
LASKIN J.A.

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REASONS FOR JUDGMENT

ROUSSEL J.A.

I. Overview

[1] The applicant, Ms. T-Giorgis, seeks judicial review of a decision of the Appeal Division of the Social Security Tribunal dated February 24, 2023 (2023 SST 196).

[2] Ms. T-Giorgis filed an initial application for employment insurance benefits on March 20, 2020. In her application, she reported that she was taking a full-time course of study on her own initiative. She received the new Employment Insurance Emergency Response Benefit (EI-ERB) until September 27, 2020 and then transitioned to regular employment insurance benefits. Prior to the transition, she completed another training questionnaire detailing her academic program. She reported that she would be attending full-time, non-referred training from September 9, 2020 to December 8, 2020 and that she would spend between 15 and 24 hours a week on her studies. She also reported that her course obligations occurred outside her normal work hours and that she was obligated to attend her scheduled classes (Applicant's record at 259-262).

[3] On October 27, 2020, the Canada Employment Insurance Commission called Ms. T-Giorgis about her availability and confirmed that she was entitled to benefits while in her training course until December 15, 2020 (Applicant's record at 263). Ms. T-Giorgis continued to receive regular benefits until September 4, 2021. During this period, she continued to report in her biweekly reports that she was a full-time student and that she had worked part-time at various jobs during her studies.

[4] After Ms. T-Giorgis completed her biweekly reports for the period starting in September 2021, the Commission referred her claim for review (Applicant's record at 491-492). On January 11, 2022, an agent of the Commission called Ms. T-Giorgis to discuss her schooling. Ms. T-Giorgis stated that she was in a four-year university program that had started in September 2019 and expected to finish it in May 2023. She also informed the Commission that she was

spending over 30 hours a week on her studies, that she was working part-time while going to school, and that she would not leave her courses in order to accept full-time work (Applicant's record at 493).

[5] On January 19, 2022, the Commission sent Ms. T-Giorgis a letter informing her that she was not entitled to benefits from September 28, 2020 onward, because she had not proven her availability for work while attending non-referred training (Applicant's record at 496). The Commission's decision created an overpayment on Ms. T-Giorgis' account. Ms. T-Giorgis applied for reconsideration, but the Commission upheld its decision (Applicant's record at 505).

[6] Ms. T-Giorgis then appealed the decision to the General Division of the Social Security Tribunal. On July 5, 2022, the General Division found that the Commission had made initial decisions to allow Ms. T-Giorgis' training and pay her benefits until September 4, 2021 (2022 SST 1665). It also held that the Commission could verify her availability for work within her benefit period, even after benefits were paid, under section 153.161 of the *Employment Insurance Act,* S.C. 1996, c. 23 (EIA). However, the General Division determined that the Commission did not properly exercise its discretion to reconsider the claim retroactively, as it took into account an irrelevant factor and ignored others that were relevant.

[7] The General Division then proceeded to make the decision the Commission should have made. It found that the Commission should not have reviewed the decision entitling Ms. T-Giorgis to benefits until September 4, 2021 since nothing had changed in her situation to trigger a review of the initial decision. As for the period after that, the General Division found

that the Commission had not made an initial entitlement decision. In reviewing the claimant's availability for work, the General Division determined that Ms. T-Giorgis was not available for work and upheld the disentitlement.

[8] The Commission appealed the decision to the Appeal Division. It submitted that the General Division erred in determining that Ms. T-Giorgis was not disentitled to regular benefits for the period of September 2020 to September 2021. In particular, the Commission disagreed with the General Division's interpretation of section 153.161 of the EIA, arguing that decisions made under that provision constituted initial entitlement decisions. The Commission argued that the only decision it made on entitlement was on October 27, 2020, when it approved Ms. T-Giorgis' benefits up to December 15, 2020. As for the period from December 16, 2020 to September 2021, the Commission asserted that it had not made a decision on entitlement until January 2022 when it verified Ms. T-Giorgis' entitlement under section 153.161 of the EIA. The Commission also challenged the General Division's finding that it had not exercised its discretion judicially in reconsidering the claim.

[9] The Appeal Division allowed the appeal in part. It agreed with the General Division that section 153.161 of the EIA does not permit a delayed entitlement decision (AD Decision at para. 55). Section 153.161 of the EIA allows the Commission to make an initial entitlement decision based on the statements made by a claimant in their application for benefits and their claimant reports, and to postpone its verification of the claimant's entitlement to a later date. If the Commission seeks verification after the benefits were paid and the Commission finds that the claimant has not proven their availability for work, then the Commission has the discretion to

decide under section 52 of the EIA whether it is going to reconsider the claim. It further held that, in doing so, the Commission is required to exercise its discretion judicially (AD Decision at paras. 67, 75-76).

[10] Nonetheless, the Appeal Division found that the General Division erred in law when it assessed the Commission's exercise of discretion. It found that the General Division should have considered the relevance of section 153.161 of the EIA to that decision, instead of focusing solely on the absence of new facts justifying the Commission changing its initial entitlement decisions.

[11] The Appeal Division determined that the appropriate remedy was to substitute its decision on the issue of whether the Commission had exercised its discretion judicially. The Appeal Division divided the claim into two periods.

[12] First, it decided that the Commission did not exercise its discretion judicially for the period between September 28, 2020 and December 15, 2020. The Commission had already verified Ms. T-Giorgis' entitlement to benefits when it had a conversation with her about her training on October 27, 2020. When the Commission decided that she was entitled to benefits, it was satisfied that Ms. T-Giorgis had proven her availability. The Appeal Division found that the factors in the Commission's reconsideration policy applied and the claim should not be reconsidered for that period (AD Decision at paras. 146-165).

[13] The Appeal Division then considered the period between December 16, 2020 and September 4, 2021. It found that the Commission had exercised its discretion in a judicial manner since it did not verify entitlement until January 11, 2022 (AD Decision at paras. 129, 166-167). Despite substituting its decision on the issue of discretion, the Appeal Division found that it could not make a final decision on whether Ms. T-Giorgis was available for work during this period and decided to return the issue to the General Division.

[14] Before this Court, Ms. T-Giorgis raises four grounds on which she asserts that the decision of the Appeal Division is unreasonable. Albeit in a different order, she argues first that the Appeal Division unreasonably concluded that the Commission's decision to reconsider her claim engages section 153.161 of the EIA. Second, she argues that the Appeal Division misconstrued the term "verify" in subsection 153.161(2) of the EIA as allowing the Commission to retroactively change a decision even if the verification reveals no new information. Third, she submits that the Appeal Division should have applied the Commission's policy to the reconsideration of the claim from December 16, 2020 and September 4, 2021. Finally, Ms. T-Giorgis challenges the Appeal Division's conclusion that the Commission exercised its discretion judicially for the weeks between December 16, 2020 and September 4, 2021. She does not take issue with the Commission's decision to stop benefits after September 4, 2021.

II. Analysis

A. *Standard of Review*

[15] The parties agree that the Appeal Division's decision is reviewable on the deferential standard of reasonableness (*Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65; *Page v. Canada (Attorney General)*, 2023 FCA 169 at para. 48; *Canada (Attorney General) v. Hull*, 2022 FCA 82 at paras. 12-13; *Hillier v. Canada (Attorney General)*, 2019 FCA 44 at para. 12).

[16] When the standard of reasonableness applies, the Court's focus is on "whether the decision bears the hallmarks of reasonableness — justification, transparency and intelligibility — and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov* at para. 99). It must be internally coherent, and display a rational chain of analysis (*Vavilov* at para. 85). The burden is on the party challenging the decision to show that it is unreasonable and the Court "must be satisfied that any shortcomings or flaws relied on … are sufficiently central or significant to render the decision unreasonable" (*Vavilov* at para. 100).

[17] One of the relevant constraints is subsection 58(1) of the *Department of Employment and Social Development Act*, S.C. 2005, c. 34 (DESDA). It specifies that the Appeal Division can only intervene if the General Division (a) failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction; (b) erred in law in making its decision, whether or not the error appears on the face of the record; or (c) based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for

the material before it. Paragraph 58(1)(*c*) of the DESDA does not allow the Appeal Division to overturn a decision of the General Division on the basis that it would have weighed the evidence differently (*Sibbald v. Canada (Attorney General)*, 2022 FCA 157 at para. 27; *Uvaliyev v. Canada (Attorney General)*, 2021 FCA 222 at para. 7).

[18] Once the Appeal Division finds there is a legitimate reason to intervene, it may proceed to decide questions of fact that are necessary for the disposition of the appeal (*Nelson v. Canada (Attorney General)*, 2019 FCA 222 at para. 17) and give the decision the General Division should have given or, as it did in this case, refer the matter back for reconsideration in accordance with any directions it considers appropriate (DESDA, subsection 59(1)).

B. *Relevant Framework*

[19] At the outset, it is useful to set out the statutory and policy framework relevant to this application.

[20] Employment insurance benefits are payable to claimants who meet the statutory requirements. To receive benefits, claimants must first qualify to receive benefits. They must demonstrate that they have suffered an interruption of earnings from employment and that they have had a minimum number of hours of insurable employment in a period preceding the claim (EIA, sections 7, 8).

[21] Claimants must also not be disentitled to receive benefits. Pursuant to paragraph 18(1)(*a*) of the EIA, a claimant is not entitled to benefits if the claimant fails to prove that they were capable of and available for work and unable to obtain suitable employment.

[22] Under paragraph 25(1)(*a*) of the EIA, as it now reads and as it read at the relevant time, a claimant is considered unemployed and capable of and available for work during a period when they are attending a course of instruction or training program to which they were referred by the Commission or a designated authority. In other words, a claimant who is referred by the Commission does not need to prove availability.

[23] Section 153.161 of the EIA was added to the EIA on September 27, 2020, by *Interim Order No. 10 Amending the Employment Insurance Act (Employment Insurance Emergency Response Benefit)*, Canada Gazette, Part II, Vol. 154, No. 21, S.O.R./2020-208. The *Explanatory Note to Interim Order No. 10* provides among other things that the interim order enables a modified operational approach to the assessment of availability to work for claimants in training. It also specifies that the provisions made under the interim order will cease to have effect on September 25, 2021.

[24] Section 153.161 of the EIA reads as follows:

Availability	**Disponibilité**
Course, program of instruction or non-referred training	**Cours ou programme d'instruction ou de formation non dirigé**
153.161 (1) 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	**153.161 (1)** Pour l'application de l'alinéa 18(1)a), le prestataire qui suit un cours ou programme d'instruction ou de formation pour lequel il n'a pas été dirigé conformément aux alinéas

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.	25(1)a) ou b) n'est pas admissible au versement des prestations pour tout jour ouvrable d'une période de prestations pour lequel il ne peut prouver qu'il était, ce jour-là, capable de travailler et disponible à cette fin.
Verification	**Vérification**
(2) 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.	**(2)** La Commission peut vérifier, à tout moment après le versement des prestations, que le prestataire visé au paragraphe (1) est admissible aux prestations en exigeant la preuve qu'il était capable de travailler et disponible à cette fin pour tout jour ouvrable de sa période de prestations.

[25] Subsection 52(1) of the EIA provides that the Commission may reconsider a claim for benefits within 36 months after benefits have been paid or would have been payable. If the Commission decides that a person has received money by way of benefits for which the person was not qualified or to which the person was not entitled, the Commission may seek repayment of the monies overpaid under subsections 52(2) and 52(3) of the EIA.

[26] The Commission's *Digest of Benefit Entitlement Principles* also contains a number of principles that the Commission applies, including when it makes decisions relating to availability and the reconsideration of claims. Sections 10.12.2, 17.3.2.2, 17.3.3 and 17.3.3.2 are relevant to this application.

[27] Section 10.12.2 of the *Digest*, found in Chapter 10 – Availability, is directed at persons attending courses on their own initiative. It provides that, before rendering a decision regarding the availability of a claimant who is attending a course on their own initiative, the agent of the

Commission will consider whether the claimant could be referred to a similar course, pursuant to subsection 25(1) of the EIA. If so, and a referral is made, the claimant will not be required to show that they were unemployed, capable of, and available for work. If not, the agent will document the file by indicating that the option was reviewed and the reasons it is not available. The agent will then make a determination as to the claimant's availability for work while taking the course.

[28] Chapter 17 of the *Digest* addresses among other things, error correction and reconsideration. Section 17.3.2.2 states that a Commission error will occur when the Commission has all the relevant information needed to make a decision, but the information does not support the final decision. If the benefits were incorrectly paid, the Commission will correct the error currently and no overpayment will be created. However, if the error resulted in a decision that is contrary to the structure of the EIA, the Commission will correct the error retroactively and an overpayment will occur.

[29] Additionally, section 17.3.3, entitled "Reconsideration policy", provides that 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 a claimant was overpaid through no fault of their own. It further states that a claim will only be reconsidered when (1) benefits have been underpaid, (2) benefits were paid contrary to the structure of the EIA, (3) benefits were paid as a result of a false or misleading statement, and (4) the claimant ought to have known there was no entitlement to the benefits received. Section 17.3.3.2 specifies that decisions on availability are not decisions that run contrary to the structure of the EIA.

C. *Application of Section 153.161 of the EIA*

[30] Ms. T-Giorgis submits that the Appeal Division unreasonably concluded that the Commission's decision to reconsider her claim engages section 153.161 of the EIA. In her view, subsection 153.161(2) does not apply to her claim because the Commission had approved her training. As a result, under section 10.12.2 of the *Digest*, she did not have to prove her availability.

[31] This argument cannot succeed because the record does not establish that the Commission, or a delegated authority, either referred her for training under subsection 25(1) of the EIA or made a referral under section 10.12.2 of the *Digest*.

[32] The supplementary record of claim relating to the October 27, 2020 telephone conversation demonstrates that, while Ms. T-Giorgis discussed her training with the agent for the period between September 9, 2020 and December 15, 2020, the agent identified availability as the main issue for discussion. There is no indication that the agent approved her training and made a referral as articulated in section 10.12.2 of the *Digest*. To the contrary, the supplementary record of claim reports that the Commission advised Ms. T-Giorgis of a decision, of its impact on the claim and of her right to file a formal request for reconsideration and of the applicable time frame. Although the nature of the decision is not explicitly stated, I fail to see why the Commission would have informed Ms. T-Giorgis of her right to file a request for reconsideration if it had referred her for training. I find it is more likely that the Commission found Ms. T-Giorgis to be available for work despite her training, but only for the period until December 15,

2020 (Applicant's record at 263). This is supported by the fact that decisions regarding referral are not reviewable, as per subsection 25(2) of the EIA, while decisions regarding availability are reviewable.

[33] Ms. T-Giorgis also claims the automated messages she received after submitting her biweekly reports demonstrate that her training was approved. She relies in particular on the automated messages from her February and May 2021 biweekly reports, in which the Commission mentions that it has "allowed" her training period (Applicant's record at 334, 402).

[34] Ms. T-Giorgis is misconstruing the automated messages. They do not say that her training has been approved such that it is captured by subsection 25(1) of the EIA or section 10.12.2 of the *Digest*. On the contrary, they include a warning that proof of her availability may later be requested and could impact her entitlement to benefits for the training period. This statement, in my view, is inconsistent with the presumption of status found in both subsection 25(1) of the EIA and section 10.12.2 of the *Digest*. If the Commission had indeed made a referral under the section 10.12.2 of the *Digest*, Ms. T-Giorgis would not have been required to prove her availability.

[35] I also find that Ms. T-Giorgis is misconstruing paragraph 33 of the General Division's decision. The General Division's statement that the Commission allowed the training must be read in the proper context. The General Division was examining the issue of whether the Commission had made initial entitlement decisions to allow the payment of benefits regardless of her training. The General Division found that the Commission had made initial entitlement

decisions. However, it also found that the Commission had the authority to go back and verify if Ms. T-Giorgis was available for work within her benefit period.

[36] To conclude on this point, Ms. T-Giorgis has failed to persuade me that she was referred for training under either subsection 25(1) of the EIA or section 10.12.2 of the *Digest*. Accordingly, I am satisfied that it was reasonable for the Appeal Division to find that section 153.161 of the EIA applies to Ms. T-Giorgis' circumstances.

D. *Verification of Entitlement After Benefits Paid*

[37] Ms. T-Giorgis submits that, even if section 153.161 of the EIA is relevant, it does not give the Commission the power to retroactively reconsider her availability absent new information. In her view, the purpose of verification is to confirm or supplement the facts and information upon which the original decision was based. It is not to give the Commission an opportunity to render a second decision based on the same information.

[38] She argues that subsection 153.161(2) of the EIA was never intended to address some general difficulty in making timely decisions on benefit entitlement during the COVID-19 pandemic, as it only applies to students, a small subset of total claimants. She contends that it was meant to address the fact that most claimants who were automatically transitioned from the EI-ERB were not required to complete an initial application for benefits, which would typically have required them to provide detailed information about their training programs. Without an initial application for benefits, the Commission would not have had the information it would usually have at the start of the claim. Subsection 153.161(2) of the EIA gave the Commission the

power to pay benefits and then later obtain any missing information to verify the claim. If new information was uncovered, the Commission could then retroactively reconsider the claim under section 52 of the EIA.

[39] These arguments do not persuade me that the Appeal Division's interpretation of section 153.161 is unreasonable.

[40] The Appeal Division concluded that, together, subsection 153.161(2) and section 52 of the EIA empower the Commission to verify entitlement to benefits paid to students in non-referred training and to assess an overpayment.

[41] In coming to this conclusion, the Appeal Division first considered the text of subsection 153.161(2) of the EIA. It found that the text of the provision is clear that verification of entitlement can happen after benefits were paid. In its view, verifying entitlement also implies that the Commission has already made a decision (AD Decision at para. 60).

[42] The Appeal Division further noted that the use of the word "may" in subsection 153.161(2) of the EIA means that the authority to verify is discretionary. It found that this discretion is inconsistent with the Commission's position that this provision allows the making of a delayed entitlement decision. The Appeal Division observed that, if the Commission were to not exercise its discretion to verify the claim under subsection 153.161(2), this would mean the Commission would never make any decision regarding benefit entitlement (AD Decision at para. 61).

[43] The Appeal Division then considered section 153.161 in the context of section 52 of the EIA. It noted that subsection 52(2) gives the Commission the discretion to reconsider a claim after benefits have been paid and to assess an overpayment when a person has received benefits for which they were not qualified or to which they were not entitled. The Appeal Division found that, if section 153.161 was interpreted as permitting a delayed entitlement decision, there would be no corresponding mechanism allowing the Commission to assess and recover the overpayment.

[44] Given the text of section 153.161 and the context of section 52, the Appeal Division found that section 153.161 allows the Commission to make an initial entitlement decision based on the statements made by a claimant in their application for benefits and their biweekly reports, but to delay its verification of their availability for work to a later date (AD Decision at paras. 66-67).

[45] The Appeal Division next considered the purpose of section 153.161 of the EIA. It found that its interpretation is consistent with the modified operational approach mentioned in the *Explanatory Note to Interim Order 10*. Given the extraordinary circumstances of the pandemic, the legislature recognized that it was not always possible for the Commission to verify entitlement at the time of initial application.

[46] The Appeal Division concluded that the Commission has the discretionary authority to seek verification of entitlement after benefits were paid under subsection 153.161(2) of the EIA. If that verification is sought and the Commission decides a claimant has not proven their

availability for work, the Commission then has the discretion to decide under section 52 whether it is going to reconsider the claim. In both cases, the Commission must exercise its discretion judicially (AD Decision at para. 75).

[47] The Appeal Division rejected Ms. T-Giorgis' argument that new facts were needed for the Commission to change its initial entitlement decisions. The Appeal Division accepted that it was relevant that Ms. T-Giorgis was honest in her declaration. However, it noted that section 153.161 of the EIA does not refer to verification of the accuracy of the information provided by the claimant, but to verification of entitlement. The provision specifically contemplates the possibility that the Commission would reconsider claims for students in non-referred training after the payment of benefits, even if they had provided accurate information (AD Decision at paras. 169-170).

[48] I am satisfied that the Appeal Division's interpretation of section 153.161 is reasonable in light of the text, context and purpose of the provision.

[49] Section 153.161 of the EIA was in effect during the period in which Ms. T-Giorgis received benefits and is therefore relevant to her claim. The text of section 153.161 is clear. A claimant who attends non-referred training is not entitled to be paid benefits for any working day of their benefit period if they are unable to prove that on that day they were capable of and available for work. Also, 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. In other words, verification of entitlement may occur after benefits have been paid.

[50] Moreover, unlike section 111 of the EIA, which grants the Commission the authority to rescind or amend a decision given in any particular claim if new facts are presented or the decision was given in the absence of or based on a mistake as to a material fact, neither subsection 153.161(2) nor section 52 of the EIA require the existence of new information for the Commission to exercise its discretionary authority. Where new facts are required for a tribunal to reconsider, rescind or amend a previous decision, Parliament usually says so (see, e.g., EIA, sections 41, 65.1(4)).

[51] I acknowledge the wording in the *Explanatory Note to Interim Order No. 10,* which specifies that the interim order provides authorities related to the transition from the EI-ERB to regular benefits. However, section 153.161 of the EIA was added to Part VIII.5 of the EIA. This part is entitled “Temporary Measures to Facilitate Access to Benefits”. It is reasonable to conclude that the purpose of section 153.161 of the EIA was to expedite benefit delivery to claimants who were students or receiving training by postponing verification of entitlement until after the payment of benefits, regardless of their transition to regular benefits. Prior to the implementation of section 153.161, applications for benefits would have normally involved assessing entitlement prior to the payment of benefits.

[52] While there may be other available interpretations, including the one advanced by Ms. T-Giorgis, I find that the Appeal Division's interpretation is reasonable and does not warrant intervention by this Court.

E. *Application of the Commission's Reconsideration Policy*

[53] Ms. T-Giorgis submits that it was unreasonable for the Appeal Division to conclude that reconsideration of the claim occurred under section 52, but then to also conclude that the very policy governing reconsiderations under section 52 does not apply. She submits that the reconsideration policy should apply to all weeks and not just to the period before December 16, 2020.

[54] I find that Ms. T-Giorgis is unduly isolating a portion of the Appeal Division's conclusion regarding the application of section 52 of the EIA. As noted earlier, the Appeal Division found that sections l53.161 and 52 of the EIA have to be read together. Together, they give the Commission the discretionary authority to seek verification of entitlement after the payment of benefits and to assess an overpayment, if appropriate.

[55] The Appeal Division concluded that the reconsideration provisions in the *Digest* are not applicable to the verification of entitlement under subsection 153.161(2) of the EIA. It noted that the Commission's policy was developed prior to the addition of section 153.161 to the EIA and does not provide guidance on how section 153.161 should inform the Commission's exercise of discretion under section 52 of the EIA (AD Decision at para. 118). It also considered the extraordinary circumstances under which section 153.161 was added to the EIA. The Appeal

Division reasoned that Parliament therefore specifically contemplated the possibility of the Commission reconsidering claims for students in non-referred training where verification is sought and the student cannot prove their entitlement (AD Decision at paras. 118-121, 160-161). The Appeal Division determined that the policy was relevant for the period from September 28, 2020 to December 15, 2020 because the Commission had verified Ms. T-Giorgis' entitlement. It was not relevant for the following period because verification of entitlement did not occur until January 2022.

[56] I have not been persuaded that the Appeal Division made a reviewable error in finding that the Commission's reconsideration policy does not apply to Ms. T-Giorgis' circumstances after December 15, 2020. When the Commission verified her entitlement in January 2022, it did so pursuant to subsection 153.161(2) of the EIA. The Commission determined that she was not entitled to benefits because she had not proven her availability for work while attending non-referred training. The Commission then exercised its discretion to reconsider the claim under section 52 of the EIA and assessed the overpayment. The Commission's authority was exercised under the joint application of subsection 153.161(2) and section 52 of the EIA.

[57] This is different from the Commission's decision to reconsider entitlement for the period before December 16, 2020. The Commission had already verified Ms. T-Giorgis' availability and decided that she was entitled to receive benefits. When it decided to assess an overpayment for this period, the Commission derived its authority to reconsider the claim from section 52 only, as it had already verified Ms. T-Giorgis' entitlement to the benefits.

[58] Given the Appeal Division's finding that the Commission was exercising its authority to verify entitlement and reconsider the claim under the joint application of subsection 153.161(2) and section 52 of the EIA, I am satisfied that it was reasonable for the Appeal Division to conclude that the reconsideration policy does not apply. In giving the Commission the authority to verify entitlement after the payment of benefits, Parliament had to have in mind the possibility of assessing and recovering overpayments where claimants were not entitled to receive benefits. If the reconsideration policy applied, I fail to see under what circumstances the Commission would exercise its discretion to verify entitlement since decisions on non-availability do not run contrary to the structure of the EIA and argue against reconsideration.

[59] Moreover, 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 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.

F. *Judicial Exercise of Discretion*

[60] Ms. T-Giorgis challenges the Appeal Division's conclusion that the Commission exercised its discretion judicially for the weeks between December 16, 2020 and September 4, 2021. First, she argues that the Appeal Division's reasoning is circular, because a decision about whether to exercise discretion to retroactively reconsider a claim cannot be dictated by what the result would be if the claim was reconsidered. Second, she claims that it was inconsistent for the

Appeal Division to conclude that the Commission had judicially exercised a discretion when it did not know it was exercising a discretion. Third, she argues that it was unreasonable for the Commission to approve her schooling for the fall 2020 semester and then revoke approval for subsequent semesters when there was no change in circumstances.

[61] These arguments do not persuade me that the Appeal Division's conclusion on the Commission's exercise of discretion is unreasonable.

[62] The Appeal Division found that the Commission exercised its discretion judicially when it verified Ms. T-Giorgis' entitlement in January 2022 and decided that Ms. T-Giorgis had not proven her availability for work. The Appeal Division also found that the Commission had considered all relevant information in deciding whether to reconsider the claim, including that Ms. T-Giorgis had been honest in her declarations, and that there was no evidence that the Commission had considered irrelevant information, acted in bad faith, or acted in a discriminatory manner (AD Decision at paras. 168, 173).

[63] There is no basis for Ms. T-Giorgis' argument that the result of a potential reconsideration cannot be part of deciding whether to exercise discretion to retroactively reconsider a claim. 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.

[64] Likewise, the fact that the Commission does not expressly designate its analysis as an exercise of discretion does not change the fact that the analysis addresses what a discretionary analysis would address.

[65] Finally, it is not unreasonable for the Commission to approve only one semester of a multi-semester degree since the determination of a claimant's availability for work requires a contextualized consideration of a claimant's circumstances (*Page* at paras. 69, 74).

[66] I am satisfied that the Appeal Division's approach in determining whether the Commission exercised its discretion in a judicial manner is reasonable. Ms. T-Giorgis has failed to establish any reviewable error in the Appeal Division's conclusion on this issue.

[67] At the hearing, Ms. T-Giorgis argued that the Commission overlooked certain relevant factors in the exercise of its discretion to reconsider the claim, including that the Commission's delay in addressing the situation had put her in a difficult situation and had created a large debt causing her hardship in having to repay the overpayment. This argument was not raised by Ms. T-Giorgis in her memorandum of fact and law and does not appear to have been raised before the Appeal Division. As a result, it would be inappropriate for this Court to entertain this argument (*Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61 at para. 23).

[68] That said, in *Molchan v. Canada (Attorney General)*, 2024 FCA 46, rendered concurrently with this decision, I discuss the relevance of a similar argument. I find that the

Appeal Division could reasonably find that financial hardship is meant to be considered in the context of a write-off under subparagraph 56(1)(*f*)(ii) of the *Employment Insurance Regulations*, which explicitly provides the Commission with the authority to write off an amount payable under section 43 of the EIA if repayment of the amount due would result in undue hardship to the claimant (*Molchan* at paras. 40-55). Section 43 of the EIA provides that a claimant is liable to repay an amount paid by the Commission to the claimant as benefits to which the claimant is not entitled. Therefore, Ms. T-Giorgis may ask the Commission for a write-off on the basis of financial hardship and it will be for the Commission to decide if relief is appropriate.

III. Conclusion

[69] To conclude, despite her counsel's able submissions, Ms. T-Giorgis has failed to persuade me that the Appeal Division's decision is unreasonable. While she may not agree with the outcome, the Appeal Division's decision is based on an internally coherent and rational chain of analysis and is justified in relation to the facts and the law it was required to apply in the circumstances (*Vavilov* at para. 85). Although I am sympathetic to Ms. T-Giorgis' unfortunate situation, I am unable to find any basis upon which to intervene.

[70] The Appeal Division's disposition was to send the matter back to the General Division. The General Division will reassess its findings on availability for the period between December 16, 2020 and September 4, 2021, and in doing so, should consider this Court's recent decision in *Page*.

[71] For these reasons, I would dismiss the application for judicial review. The respondent did not seek costs and none will be awarded.

"Sylvie E. Roussel"
J.A.

“I agree.
David Stratas J.A.”

“I agree.
John B. Laskin J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-85-23
STYLE OF CAUSE:	EUODIA T-GIORGIS v. ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	OCTOBER 4, 2023
REASONS FOR JUDGMENT BY:	ROUSSEL J.A.
CONCURRED IN BY:	STRATAS J.A. LASKIN J.A.
DATED:	MARCH 18, 2024

APPEARANCES:

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