Social Security Tribunal of Canada | Tribunal de la sécurité sociale du Canada

Citation: *S. M. v. Canada Employment Insurance Commission,* 2016 SSTGDEI 67

Tribunal File Number: GE-15-3399

BETWEEN:

S. M.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Employment Insurance Section

DECISION BY: Teresa Day

HEARD ON: April 21, 2016

DATE OF DECISION: May 17, 2016

REASONS AND DECISION

PERSONS IN ATTENDANCE

The Appellant attended the hearing of his appeal via teleconference.

INTRODUCTION

[1] The Appellant applied for employment insurance benefits (EI benefits) and was paid EI benefits starting on March 15, 2009. After re-examining the Appellant's claim, the Respondent, the Canada Employment Insurance Commission (Commission) determined the Appellant had lost his employment due to his own misconduct. On March 3, 2010, the Commission issued decision letters regarding the post-claim disqualification and the penalty and notice of subsequent violation imposed upon the Appellant.

[2] On August 27, 2015, more than 30-days beyond the period to request a reconsideration, the Appellant requested the Commission reconsider the March 3, 2010 decisions.

[3] On October 7, 2015, the Commission denied the Appellant's request to extend the 30-day period to request a reconsideration and, on October 26, 2015, the Appellant appealed to the General Division of the Social Security Tribunal (Tribunal).

[4] The appeal was heard by teleconference because that form of hearing respects the requirement under the *Social Security Tribunal Regulations* to proceed as informally and quickly as circumstances, fairness and natural justice permit.

ISSUE

[5] Whether the Appellant's request to extend the 30-day period for reconsideration of the Commission's March 3, 2010 decision should be denied.

THE LAW

[6] Subsection 112 (1) of the *Employment Insurance Act* (EI Act) states that a claimant or other person who is the subject of a decision of the Commission, or the employer of the claimant,

may make a request to the Commission in the prescribed form and manner for a reconsideration of that decision at any time within:

(a) 30 days after the day on which a decision is communicated to them; or

(b) any further time that the Commission may allow.

[7] Subsection 112(2) states that the Commission must reconsider its decision if a request is made under subsection (1).

[8] Subsection 1(1) of the *Reconsideration Request Regulations* states that for the purposes of paragraph 112(1)(b) of the EI Act, and subject to subsection 1(2) (set out below), the Commission may allow a longer period to make a request for reconsideration of a decision if the Commission is satisfied that there is a reasonable explanation for requesting a longer period and the person has demonstrated a continuing intention to request a reconsideration.

[9] Subsection 1(2) of the Reconsideration Request Regulations states that the Commission must also be satisfied that the request for reconsideration has a reasonable chance of success, and that no prejudice would be caused to the Commission or a party by allowing a longer period to make the request, if the request for reconsideration:

(a) is made after the 365-day period after the day on which the decision was communicated to the person;

(b) is made by a person who submitted another application for benefits after the decision was communicated to the person; or

(c) is made by a person who has requested the Commission to rescind or amend the decision under section 111 of the EI Act.

EVIDENCE

[10] On April 29, 2009, the Appellant made an initial application for EI benefits (GD3-3 to GD3-12). A benefit period was established effective March 15, 2009 and he was paid EI benefits on this claim.

[11] On March 3, 2010, the Commission issued two (2) letters to the Appellant:

(a) A letter dated March 3, 2010 advising that, after re-examining the Appellant's Claim, the Commission determined he should not have been paid EI benefits from March 15, 2009 because he lost his employment with Canelson Drilling Inc. (Canelson) on February 18, 2009 by reason of his own misconduct (GD3- 13 to GD3-14); and

(b) A letter dated March 3, 2010 advising that the Commission had determined the Appellant knowingly made a false representation to support his claim for EI benefits, and that a penalty in the amount of $8,000 for 26 false representations was imposed upon the Appellant as a result, along with a violation classified as a "subsequent violation" because of a previous violation imposed on July 9, 2005 (GD3-15 to GD3-17).

[12] A Notice of Debt was issued to the Appellant on March 7, 2010 in the amount of $28,562.00 (GD3-18).

[13] On March 19, 2010, as a result of a Call Back request from the Appellant on March 17, 2010, an agent of the Commission spoke with the Appellant about the March 3, 2010 decisions and documented their call in Call Back notes (GD3-19 to GD3-20). The agent noted:

> "The claimant advised he was not aware of the policy of no smoking on the Rig at Canelson Drilling until he was dismissed for smoking on the Rig; the claimant has worked on many rigs and has always smoked on the other Rigs; the supervisor, driller, who worked at Canelson prior to the claimant going to work at Canelson, who happens to also be the claimant's friend witnessed the claimant smoking on the rig at Canelson Drilling and never said anything to the claimant to let the claimant know it was against this employer's policy and the claimant was fired the next morning. Confirmed with the claimant he did receive a company policy handbook from Canelson when he was hired. I advised the claimant he must provide this information in writing and submit this as soon as possible along with any other details he can provide. As well the claimant must tell us why he failed to mention this employment on his application as to date he has failed to give any explanation. The claimant advised he forgot to mention the employment, the employment was only 2 days and he was still employed at Stoneham Drilling, returned right after Canelson. I advised the claimant again this is new information he has failed to provide earlier and to provide this information in writing with his additional information regarding his reason for dismissal. The claimant advised he has

> difficulty putting his thoughts in writing, he has no problem writing he just feels he has difficulty getting all the information across."

The agent advised the Appellant to get someone to help him prior to submitting the information to his local EI office and noted: "I documented some of the conversation above to capture some of the details to be reviewed with the claimant's written response."

[14] A Request for Reconsideration was received from the Appellant on August 27, 2015 (GD3-21 to GD3-25), over five (5) years later. The Appellant included the following items with his Request:

(a) An undated letter (GD3-23) in which the Appellant stated that his dismissal was a wrongful dismissal and that Canelson had retracted the ROE from the time of the dismissal and issued an amended ROE; and explained that he was unaware of the true situation and had conceded to the penalty until he consulted a professional opinion who advised he should have been eligible for EI benefits all along.

(b) A letter dated August 17, 2015 from Canelson addressed To Whom It May Concern (GD3-24):

> "Further to an ROE for our former employee S. M., dated March 3, 2009, we have reviewed our files and determined that Mr. S. M. was not given a proper new hire orientation by his Supervisor at the time and therefore he should have received a warning rather than being dismissed. We have therefore updated his ROE to reflect this change, a copy of which is attached."

(c) An amended Record of Employment (ROE) issued by Canelson on August 17, 2015 (GD3-25), which indicated the Appellant worked for Canelson for 3 days (February 16, 2009 to February 18, 2009) and gave the reason for issuing the ROE as "Other".

[15] The Commission reviewed the debt recovery notes from Canada Revenue Agency (CRA) at GD3-29 to GD3-48). According to these notes:

(a) The Appellant was sent a Notice of Debt on March 7, 2010 and each month thereafter he was sent monthly statements of account, with the exception of the period from February 27, 2011 to August 24, 2012 (at which point a new address was obtained and the monthly statements of account resumed);

(b) The Appellant spoke with a CRA officer on the following dates:

(i) August 16, 2012: advised that he could not make payments and the overpayment was wrong, and that he was going to call EI to get it straightened up;

(ii) November 19, 2012: advised he was in a camp working and would contact recovery further to set up payment arrangements;

(iii) November 29, 2012: advised he was unable to pay due to hardship;

(iv) November 30, 2012: advised he spoke with EI earlier, was appealing the debt and they were mailing the necessary paperwork; stated he knows he didn't owe this debt;

(v) December 31, 2012: advised he needed a little more time to deal with his appeal;

(c) A garnishment was initiated on April 19, 2013 (to CIBC), and returned from Appellant's bank with note advising no funds to remit;

(d) The Appellant spoke with a CRA officer on November 13, 2013 and advised he was not working anywhere, didn't agree with the debt and would be taking HSRCD to court;

(e) A garnishment was initiated on May 29, 2014 (to Ensign Drilling Partnership);

(f) The Appellant spoke with a CRA officer regarding the garnishment as follows:

(i) June 11 and 12, 2014: advised he disagreed with the garnishee rate;

(ii) June 18, 2014: requested the garnishee be withdrawn and advised he had filed an appeal of the full amount of the debt and was waiting for a hearing date;

(iii) June 27, 2014: garnishment was amended at Appellant's request;

(iv) February 16, 2015: advised he was "on Employment Insurance now" and couldn't live off 50% recoupment; garnishment amended at Appellant's request;

[16] The Commission also reviewed the Appellant's employment history (GD3-47 to GD3-48) and noted the Appellant worked for numerous employers between the March 3, 2010 (the date of the decisions) and August 27, 2015 (the date his Request for Reconsideration was received). The Commission prepared a table summarizing the Appellant's employment history during this period (GD8-1 to GD8-2).

[17] The Appellant made eight (8) payments through the garnishee, and EI benefits from a subsequent claim (effective January 4, 2015) were also recouped and applied against the debt (GD4-2).

[18] An agent of the Commission contacted the Appellant on October 7, 2015 regarding his request for reconsideration and documented their telephone conversation in a Supplementary Record of Claim (GD3-26). When asked about his delay of 1,957 days to request a reconsideration of the March 3, 2010 decisions, the Appellant stated that he did not know about the decision until he applied for a new claim, did not get notice of the decision as it was not sent to his correct address, and that he works out of town, was busy and could not take care of business.

[19] The agent prepared a Record of Decision (GD3-27) and noted that the Appellant was aware of the March 3, 2010 decisions by March 19, 2010, and had not provided a reasonable explanation for the delay, nor demonstrated a continuing intention to request a reconsideration. The agent also noted the Appellant had appealed a separate decision and "so is aware of the process", and that he was aware of the decisions because he had several conversations with CRA's debt recovery officers between 2012 and 2015.

[20] By letter dated October 7, 2015, the Commission advised the Appellant that it had decided not to extend the 30-day period to request a reconsideration of the March 3, 2010 decisions communicated to him on March 19, 2010 because his explanation for the delay in

requesting reconsideration did not meet the requirements set out in the *Reconsideration Request Regulations* (GD3-28).

[21] In his Notice of Appeal October 26, 2015 (GD2), the Appellant referred to having suffered from "emotional health issues (depression) for several years", during which time he could not hold a steady job, and stated that it was not until he got some advice about the potential wrongful dismissal that he was able to contact Canelson and have them investigate the case, retract the original ROE and issue an amended ROE. The Appellant wrote: "I made application for reconsideration as soon as I was aware of the true facts." The Appellant also wrote that the Commission's agent had contacted him at work on October 7, 2015 about his request for reconsideration and he was not comfortable discussing his health issues around co-workers.

[22] Prior to the hearing of his appeal, the Appellant submitted a doctor's note (GD7) which is dated April 13, 2016 and states:

> "Above mentioned patient is under our care. He has been suffering from depression. At present he is taking medications and having counselling provided by us."

At the Hearing

[23] The Appellant testified as follows:

(a) In late 2008, his girlfriend died of cancer and he was devastated. He tried to go back to work in the winter of 2009, but began to sink into a deep depression, ultimately "bouncing from job to job" and "really struggling" until his sister visited him on Vancouver Island and, upon finding him seriously debilitated, staged an intervention. With her help, he relocated back to Alberta and moved in with his elderly parents in 2014. His parents managed to get him into treatment for what were by then serious mental health issues. About two (2) years ago, the Appellant began taking medication for his "severe depression".

(b) He “really struggled” with his depression and described the related symptoms, including suicidal thoughts, social and emotional withdrawal and an inability to focus on or get started on “things that needed to get done”. This continued until he had been on the prescribed medication “for a while” and the doctors had finally got his dosage correct.

(c) It took over a year for the medication to work to the point where he was feeling well enough to try to understand how he came to owe such a large amount to EI. As the symptoms of his depression eased, he was able to speak with his uncle, who is a lawyer, about the situation and, from there, contact Canelson directly. This took time. There were many phone calls to Canelson before the Appellant was finally put in touch with the Human Resources department and the individual at Canelson who investigated and eventually issued the letter about his wrongful dismissal and the amended ROE. “A lot of effort, hours and phone calls” were required and the Appellant spent months making follow-up calls and asking for the documents he knew he needed for a reconsideration.

(d) When he spoke to the Commission’s agent in March 2010, he was well into suffering from severe depression. He did not understand the March 3, 2010 decisions, and that is why he telephoned the Commission for an explanation. He told the agent it was wrong, and that he needed more information about why there was a penalty. The call with the Commission’s agent on March 19, 2010 was the first discussion about “misconduct” at Canelson and he guessed it might have had to do with the incident involving where he could smoke. That is why he explained that he had not been advised the employer’s smoking policy. He had applied for EI in April 2009 because he had been laid off by his regular employer, Stoneham Drilling. He put “Laid off” as the reason for separation on his application for EI benefits. It wasn’t until he was in contact with Canelson in 2015 that he started to put the pieces together about why he was disqualified.

(e) The Appellant admitted that he forgot to mention the Canelson employment on his application for EI benefits, but stated he had every reason to believe his ROE from Canelson would have been issued on the basis of a lay off. When he was told he was "finished" at Canelson back in February 2009, the Canelson rig was the last rig in the area that was still in operation before "the spring break up" (when the frost comes out of the ground and the road bans come on – between March and June every year) and, in fact, it was winding down and there was less than a week left for that rig before it too was shut fully down. The Appellant knew he was only going to be at Canelson for a few days "to help out before spring break up". He was, in fact, still employed by his regular, full-time employer when he agreed to "help out" and, thereby, pick up some extra hours at Canelson. He continued working for his regular employer after being told he was no longer needed at Canelson and, in due course, was laid off by his regular employer upon spring break up in March 2009.

(f) The Appellant has worked on many different rigs over the years and each drilling site has different smoking areas. He was only at the Canelson rig for three (3) days when there was "a misunderstanding" over where he could smoke. He hadn't even had a proper site orientation. He was never told by Canelson that he had been fired. When they told him he was "finished", there was no mention that it was because of the smoking incident and he, in fact, assumed it was because he was being laid off in advance of the spring breakup, as he had been told would happen. No one ever told him that Canelson had, in fact, issued an ROE that said he was dismissed. He guessed at this when speaking with the Commission's agent in March 2009.

(g) Canelson has now admitted in writing (GD3-24) that he should never have been dismissed for the smoking incident when he wasn't given a proper new hire site orientation. Canelson has further admitted that he should have been given a warning instead and has amended his ROE accordingly (GD3-25).

(h) He did tell the CRA's agents at various times that he intended to appeal and it was always his intention to do so, but his depression prevented him from taking any steps until had been properly medicated for a significant period of time. As soon as he started feeling better, he conducted his own investigation into what happened at Canelson and filed his request for reconsideration as soon as he had the supporting documentation.

(i) Depression will be a lifelong struggle for him now. He continues to live with his elderly parents "even though I am an older man" (aged 46), and he is still treatment (in the form of medication and counselling) for his depression (GD7).

[24] The copy of the Appellant's initial application for EI benefits included in the Commission's reconsideration file (GD3-3 to GD3-12) was incomplete and, in particular, was missing the page entitled "Reason for Separation". At the conclusion of the hearing, the Tribunal made a request pursuant to section 32 of the *Social Security Tribunal Regulations* for the Commission to provide a complete copy of the Appellant's application for EI benefits, including the portion of the application pertaining to the Appellant's Reason for Separation.

[25] On April 25, 2016, the Commission provided a copy of the complete application (GD10-1 to GD10-16). The Tribunal notes the following:

(a) At the time of his application (April 25, 2009), the Appellant was living at an address on Vancouver Island (GD10-1);

(b) The Appellant stated his last employer was "stoneham drilling" (Stoneham), where he worked from June 17, 2008 to March 11, 2009 (GD10-3);

(c) When asked "Will you be returning to work with this employer?" the Appellant answered: "Yes", but indicated that his return date was unknown at that time (GD10-3).

(d) He explained the delay in making an application for EI benefits as "Looking for work, or waiting to return to my previous employment" (GD10-4).

(e) He gave the reason for separation from employment at Stoneham as "Shortage of Work" (GD10-5).

(f) When asked "Did you have any other employment in the last 52 weeks including all previous periods of employment for your current employer or other employers as well as part-time or casual employment?" the Appellant answered: "No."

SUBMISSIONS

[26] The Appellant submitted that his depression precluded him from taking any steps until he began treatment ***and*** started to feel relief from the debilitating effects of his depression. Once that occurred, he took the steps required to make a request for reconsideration, namely he began what was a lengthy process of obtaining the relevant information and documentation from Canelson about his wrongful dismissal. On this basis, the Appellant submits he has provided a reasonable explanation for his delay and has demonstrated a continuing intention to request a reconsideration from the time he was mentally able to do so. The Appellant further submits that the amended ROE submitted by Canelson is a "complete answer" on the questions of whether he was dismissed for misconduct and whether he knowingly made misrepresentations to the Commission, and that this evidence was obtained from currently available sources. Finally, the Appellant submitted that it would be unfair to make him "pay for the rest of his life" for Canelson's mistake.

[27] The Commission submitted that:

(a) The Appellant has not provided a reasonable explanation for the delay, nor demonstrated a continuing intention to request a reconsideration for the entire period of the delay, some 1,957 days.

(b) The Appellant was aware of the overpayment and aware that the overpayment was the result of an employment insurance decision. He had numerous calls with CRA in which he advised he was going to take steps to have the issue "straightened up" or to appeal, yet did nothing.

(c) The facts on file do not support that the Appellant was incapable of dealing with his affairs for the entire period of the delay, or that he was prevented from submitting an appeal for a period of time in excess of five (5) years. Rather, the evidence shows he was capable of working and of contacting CRA regarding the overpayment and penalty, and

suggests he would also have been capable of filing a timely appeal or request for reconsideration.

(d) It is not satisfied that the request for reconsideration has a reasonable chance of success, and that no prejudice would be caused to the Commission or other persons by allowing a longer period to make the request. Allowing a longer period to make the request would be contrary to the intent of the legislation and too much time has elapsed to allow the Commission to obtain accurate facts surrounding the claimant's dismissal.

ANALYSIS

[28] The Tribunal notes that the Commission's two (2) decisions of March 3, 2010 regarding the disqualification from EI benefits for losing his employment at Canelson due to his own misconduct, and the imposition of a penalty and notice of violation in connection with his claim, are not the issues before the Tribunal on this appeal. Rather, the Tribunal must decide whether the Appellant's request to extend the 30-day periods for reconsideration of these decisions should be granted.

[29] Section 112 of the EI Act provides that a claimant may request the Commission reconsider its initial decision, but he or she must do so within 30 days of that decision being communicated to them. Section 1 of the *Reconsideration Request Regulations* sets out the requirements that must be met in order to obtain an extension of time to seek reconsideration under paragraph 112(1)(b) of the EI Act.

[30] In the present case, since the Appellant submitted his request for reconsideration more than 365 days after the March 3, 2010 decisions were rendered and communicated to him, the Commission may allow a longer period to request reconsideration only if it is satisfied that all four (4) factors in section 1 of the *Reconsideration Request Regulations* are met. Specifically, the Commission must be satisfied that:

(a) there is a reasonable explanation for requesting the longer period; ***and***

(b) the Appellant has demonstrated a continuing intention to request a reconsideration; ***and***

(c) the request for reconsideration has a reasonable chance of success; ***and***

(d) no prejudice would be caused to the Commission or other parties by allowing the longer period to make the request.

[31] The Tribunal recognizes that a decision by the Commission pursuant to the *Reconsideration Request Regulations* is a discretionary one. The Tribunal notes the permissive language in subsection 1(1) of the *Reconsideration Request Regulations* (in reference to paragraph 112(1)(b) of the EI Act), which provides that the Commission "may" allow a longer period to make a request for reconsideration.

[32] The Tribunal also considered case law that examined the former provisions relating to extension of time to appeal to the Board of Referees (section 114 of the EI Act as it read prior to April 1, 2013). The wording in the earlier provisions was similar to that found in section 112(1)(b) of the current EI Act and section 1 of the *Reconsideration Request Regulations*. In these cases, it had been held that (a) the Commission's power to extend the deadline within which to appeal its decision was discretionary and (b) its decision to allow or refuse an extension could only be reversed if it exercised its discretion in a non-judicial manner (*Knowler A-445-93; Chartier A-42-90; Plourde A-80-90*).

[33] The Tribunal must, therefore, decide if the Commission exercised its discretion in a judicial manner when it denied the Appellant's request to extend the 30-day periods for reconsideration of the March 3, 2010 decisions. In other words, the Tribunal must decide whether the Commission acted in good faith, for proper purpose and motive, took into account any relevant factors, ignored any irrelevant factors and acted in a non-discriminating manner (*Dunham A-708-95, Purcell A-694-94*).

[34] In the present case, the Tribunal finds that the Commission did not exercise its discretion in a judicial manner in its consideration of the factors in subsection 1(1) and (2) of the *Reconsideration Request Regulations*.

[35] With respect to the first two factors in subsection 1(1) of the *Reconsideration Request Regulations,* the Tribunal finds that the Commission did not adequately consider whether the Appellant was actually capable of responding to the March 3, 2010 decisions when it considered

whether the Appellant had provided a reasonable explanation for the delay; and further finds that the Commission failed to take into account the fact that the Appellant undertook his own investigation into the basis for the decisions and made a request for reconsideration within ten (10) days of obtaining the amending documents from Canelson. The Tribunal will, therefore, undertake a judicial consideration of these factors.

[36] The Tribunal accepts the Appellant's testimony as credible that he was not given any indication that he had been dismissed from his employment when he left Canelson on February 18, 2009 and that he thought he had been laid off in advance of the spring break up. The Tribunal also accepts the Appellant's testimony as credible that he was surprised and confused by the March 3, 2010 decisions, and that by the time he called the Commission on March 17, 2010 and asked to speak with "the adjudicator" (GD3-19), he was suffering from a serious depression and was unable to submit anything in writing, which was why he called in and asked to speak with someone instead. The Tribunal notes that the Appellant's stated difficulty with putting anything in writing was documented by the agent who returned his call (GD3-20).

[37] The Tribunal agrees with the Appellant that the March 3, 2010 decision regarding the imposition of a penalty and violation (GD3-15 to GD3-17) is particularly confusing. This decision opens with the statement "contrary to what you told us, we have learned that you lost your employment with Canelson Drilling Inc." It goes on to say "We have concluded that you made ***this*** false representation knowingly" (emphasis added) but then advises that an $8,000 penalty has been imposed for some 26 false representations.

[38] The Tribunal finds the Appellant's testimony that he did not understand this decision to be credible, and points out that even in the Commission's representations on this appeal, the Commission identified only that the Appellant submitted false information at the time of filing his application for benefits when he failed to report that he was employed with Canelson and was dismissed from this employment (GD4-1). The March 3, 2010 decision, in fact, gives no indication whatsoever as to how the Commission determined the Appellant had made 26 false representations. In his very brief discussion with the agent on March 19, 2010, the Appellant was advised only that he needed to explain why he failed to mention the Canelson employment on his application. When the Appellant told the agent that the omission was inadvertent because

he was still employed with Stoneham Drilling while he was at Canelson, the agent advised him to put this "new information" in writing, but the Appellant again expressed a concern over his inability to do so. The Tribunal finds the Appellant's testimony that he was overwhelmed at the thought of trying to get to the bottom of something as complex and confusing as this, while struggling from severe depression, bouncing from job to job and contemplating suicide, to be credible and made sense in the circumstances.

[39] In its submissions at GD8-1, the Commission recognizes that "depression and other mental health issues can be debilitating, making it difficult to deal with major issues, and perhaps even day-to-day issues". While the Tribunal acknowledges that the Appellant has not provided any medical evidence to support his incapacity over the past five (5) years, the Tribunal finds that his testimony at the hearing established that he was, in fact, experiencing such debilitating health issues between the date of the decisions (March 3, 2010) and the date of his request for reconsideration (August 27, 2015). The Tribunal finds that his testimony about his depression was sincere and compelling, as was his testimony about his sister's intervention, his move back to Alberta to live with his elderly parents, the care that has been undertaken by his parents and the stability he has found over the past 1-2 years as his medication and counselling has taken effect.

[40] The Tribunal acknowledges the stigma attached to depression and mental illness, and accepts as credible the Appellant's testimony that he was at work when the Commission's agent telephoned him to ask why he had delayed in making the requests for reconsideration, and that he did not feel able to discuss his depression and everything he has gone through around his co-workers. The Tribunal, therefore, gives more weight to the Appellant's testimony at the hearing than to the answers given to the agent during the telephone call on October 7, 2015.

[41] For these reasons, the Tribunal finds that the Appellant has provided a reasonable explanation for the delay in requesting a reconsideration of the March 3, 2010 decisions.

[42] As for a continuing intention to pursue an appeal, the Appellant's periodic discussions with CRA's agents do not establish that he had resigned himself to accepting the decisions. The Tribunal gives more weight to the Appellant's testimony at the hearing than to his various statements to the CRA's debt recovery agents about his intention to "appeal", finding the latter to

be consistent with an individual who was suffering from depression and incapable of turning his intentions into action.

[43] The Tribunal also notes that the Appellant made a request for reconsideration within ten (10) days of obtaining the documents from Canelson. The letter from Canelson advising that the Appellant was not given a proper new hire orientation by his Supervisor and, therefore, should have received a warning rather than being dismissed, is dated August 17, 2015. The amended ROE from Canelson was also issued on August 17, 2015. The Appellant's Request for Reconsideration was received at the Commission ten (10) days later, on August 27, 2015. The Tribunal finds that the Appellant's testimony about the investigation undertaken by him once the treatment for his depression had begun to provide him with relief, and the sustained and diligent effort required to obtain the documentation from Canelson, is credible and is evidence of the Appellant's continuing intention to request a reconsideration. Having found the Appellant's testimony about the devastating effects of his depression and his inability to take any steps until such time as his medication had begun to work to be credible, the Tribunal further finds that the Appellant's consultation with his lawyer uncle, and his persistent contact and communications with Canelson, demonstrate a continuing intention to pursue a reconsideration from the point in time that he was, in fact, capable of doing so.

[44] With respect to the third and fourth factors in subsection 1(2) of the *Reconsideration Request Regulations,* the Tribunal notes that the Record of Decision prepared for the decision to deny the Appellant's request to extend the time for reconsideration (GD3-27) ***doesn't mention or even allude to the third and fourth factors***. Despite the Commission's bald statement at GD4-2 of its representations on this appeal (that it was not satisfied that the request for reconsideration has a reasonable chance of success and that no prejudice would be caused to the Commission or other persons by allowing a longer period to make the request), ***there is no evidence whatsoever that these two factors were considered <u>at all</u> in connection with the October 7, 2015 decision to deny the extension.*** Therefore, it cannot be said that the Commission considered all relevant factors or did not consider irrelevant factors, nor can it be said that the Commission's consideration of the third and fourth factors was done in good faith. The Tribunal will, therefore, undertake a judicial consideration of these factors.

[45] For a consideration of whether the Appellant's request for reconsideration has a reasonable chance of success, the Tribunal notes that the question to be determined is not whether the request for reconsideration must fail after a full airing of the facts, jurisprudence and submissions. Rather, the correct question is whether, assuming the facts pleaded to be true, the request for reconsideration has no reasonable chance of success. On this question, the Tribunal cannot ignore the direct evidence from Canelson that the Appellant should not have been dismissed on February 18, 2009. The admissions by the employer of its errors in failing to provide a new hire orientation to the Appellant and in its handling of the incident involving the Appellant's alleged violation of the no smoking policy, are compelling evidence that there was, in fact, no basis for the Commission's finding of misconduct (and resulting disqualification from EI benefits) in the Appellant's case. Furthermore, for a penalty to be imposed under section 38 of the EI Act, the false statement(s) in issue must be made "knowingly". If the Appellant's various statements about the inadvertence of his omission with respect to listing Canelson as a prior employer on his application for EI benefits are accepted as true, and the admissions by the employer are taken into account, it cannot be said that he "knowingly" made a representation that he knew was false or misleading in relation to his claim for EI benefits. The Tribunal therefore finds that the Appellant's request for reconsideration of the March 3, 2010 decisions does have a reasonable chance of success.

[46] For a consideration of whether prejudice would be caused by allowing a longer period to make a request for reconsideration, the Tribunal acknowledges that the Appellant delayed some 1,957 days beyond the 30-day timeframe for requesting a reconsideration of the March 3, 2010 decisions. On the basis of length alone, this is a very long delay (in excess of 5 years) that could be assumed would cause prejudice to the Commission or other party. However, the length of the delay is not determinative of the issue of prejudice. In the present case, the Appellant obtained fresh documentary evidence directly from Canelson that is contemporaneous with his August 27, 2015 request for reconsideration. Indeed, Canelson has even taken the step of issuing an amended ROE to correct for the employer's error on the ROE issued in February 2009. This is not a situation where the Commission will be unable to locate an individual at the employer to verify the Appellant's allegations , nor is it a situation where the employer is refusing to participate in the process or respond. The Tribunal therefore finds that there would be no prejudice to the Commission by allowing the extension of time to request a reconsideration.

[47] All four factors in section 1 of the *Reconsideration Request Regulations* must be met in order for the Appellant to be granted an extension of time to request a reconsideration of the March 3, 2010 decisions. The Tribunal finds that the Appellant has satisfied all four factors and, therefore, may be granted an extension of time. The Tribunal further finds that an extension of time to request a reconsideration of the March 3, 2010 decisions is appropriate and warranted in the Appellant's case.

CONCLUSION

[48] The Tribunal finds that the Commission did not consider all of the relevant factors, nor did it act in good faith, when it denied the Appellant's request to extend the 30-day period for reconsideration of its March 3, 2010 decisions. The Tribunal therefore finds that the Commission did not exercise its discretion in a judicial manner in coming to its decision to deny the Appellant's request to extend the 30-day period for reconsideration.

[49] The Tribunal further finds that the Appellant has met the test for an extension of the 30-day periods for reconsideration of the March 3, 2010 decisions pursuant to sections 112 of the EI Act and section 1 of the *Reconsideration Request Regulations*, and allows the extension of time for the Appellant to request reconsideration of those decisions.

[50] It is now up to the Commission to reconsider its decisions of March 3, 2010 pursuant to section 112 of the EI Act.

[51] The appeal is allowed.

Teresa M. Day

Member, General Division - Employment Insurance Section