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

Citation: *C. B. v. Canada Employment Insurance Commission,* 2017 SSTGDEI 86

Tribunal File Number: GE-16-3843

BETWEEN:

C. B.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Employment Insurance Section

DECISION BY: Lilian Klein

HEARD ON: May 5, 2017

DATE OF DECISION: June 15, 2017

Canada

REASONS AND DECISION

PERSONS IN ATTENDANCE

The Appellant – C. B.

Her husband – R. B. (Representative**)**

INTRODUCTION

[1] The Appellant is appealing the decision by the Canada Employment Insurance Commission (Respondent) to deny her an extension of the 30-day period to make a request for reconsideration, under section 112 of the *Employment Insurance Act* (Act), and section 1 of the *Reconsideration Request Regulations* (Reconsideration Regulations).

[2] The Appellant applied for benefits on July 23, 2011, and payments of benefits began. Recalculation of her rate of benefits led to an overpayment. Following a late reconsideration request, the Respondent refused her an extension of time to make her request. Her appeal of this decision was filed with the Tribunal on October 26, 2016.

[3] The hearing was held by teleconference due to the following factors: the complexity of the issue under appeal; the fact that the Appellant would be the only party in attendance; and the information in the file, including the need for additional information. The 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.

[4] The Tribunal adjourned the first hearing, held on March 28, 2017, because the Appellant became distraught, and wanted to arrange for her husband to speak for her. She submitted an Authorization to Disclose on April 3, 2017, and a new hearing was scheduled for May 5, 2017.

ISSUE

[5] The Tribunal must determine whether the Respondent was justified in refusing to extend the 30-day period for the Appellant to make a request for reconsideration, as per the Act and the Reconsideration Regulations.

EVIDENCE

[6] On July 19, 2011, while on sick leave for a work-related injury, the Appellant was dismissed from her job based on an allegation of misconduct (GD3-9).

[7] The Employer issued a Record of Employment (ROE), dated July 19, 2011, which stated that she was a kennel worker, who had 993 insurable hours in her qualifying period (QP), and insurable earnings of $25,224.97 (GD3-17 to GD3-18).

[8] She applied for benefits on July 23, 2011(GD3-3 to GD3-16), a benefit period was established, and she began receiving benefits. Her rate of benefits was calculated according to the information provided on her ROE.

[9] On February 10, 2012, the employer issued an amended ROE, repeating that she was a kennel worker, but documenting a higher number of insurable hours—1,645—with lower insurable earnings of $15,487.13 (GD3-19).

[10] On February 15, 2012, the Appellant contacted the Respondent to report this change, in case her benefits had been miscalculated, noting that she would be filing her last bi-weekly report on February 17, 2012 (GD3-21).

[11] An attestation on file, dated October 26, 2016, shows that a Notice of Debt was sent to the Appellant on April 6, 2012 (GD3-22). There is no decision letter from the Respondent on the docket, explaining the decision that resulted in the Notice. The Notice itself summarizes the details of the debt as follows: earnings of $433 that were not deducted, and two overpayments, of $1,162 and $2,988 respectively, for a total of $4,583 in benefit overpayment.

[12] The Respondent documented that the Appellant called on May 11, 2012, to “review the agreed deductions” for her overpayment (Recovery Note at GD3-23). According to the Appellant’s reconsideration request dated July 27, 2016, she had made the call because the amended ROE “didn’t add up so I phoned and asked [the Respondent] to check the anomalies” (GD3-26).

[13] The Respondent received a letter from her on October 6, 2014, in which she stated that her employer had put false information on her ROE. She also noted that she is a disabled senior, who cannot manage repayments on her limited income (Recovery Note at GD3-24).

[14] On July 27, 2016, the Respondent contacted the Appellant, who stated that she did not believe she owes the money, since the overpayment was due to an error by her former employer on her ROE. She stated that she is a low-income senior, subsisting solely on CPP and OAS, and cannot afford to repay the overpayment. She was advised by the Respondent to request a reconsideration (Recovery Note at GD3-25).

[15] On that same day, July 27, 2016, she submitted a reconsideration request of the decision on the overpayment, on which she reported that it was communicated to her verbally in April 2012 (GD3-26 to GD3-27). This request was marked as received by the Respondent on August 9, 2016 (GD3-26).

[16] In section 5 of her reconsideration request, she explained that her request was late because she had never received a reply to her letter of October 6, 2014, and therefore thought that the matter had been resolved (GD3-27).

[17] Through correspondence dated September 27, 2016, the Respondent informed her that it did not accept her reason for applying late for a reconsideration of its decision of April 2, 2012, and it refused her an extension of time to make this request (GD3-28).

[18] Her Notice of Appeal was filed with the Tribunal on October 17, 2016 (GD2-1 to GD2-4). She stated that she was appealing because she was not responsible for the error on her ROE, and had relied on the government to establish the correct benefit rate.

[19] At the hearing, the Appellant expressed confusion about what had happened to her; she did not understand the position she had been placed in by the amended ROE. The information about her job on both ROEs was wrong. She had not been a kennel worker for the last four years of her employment; she had been running the office instead. She had received “bills” from the Respondent with the amount owing, but did not understand how the decision was made. She received no information about debt management.

SUBMISSIONS

[20] The Appellant made the following submissions:

a) The overpayment was caused by her former employer's mistakes on the ROE, and she should not be liable for the debt that resulted from those errors. When informed of the debt, she had asked the Respondent to look into the "anomalies" on the ROEs, and had presumed it was doing so.

b) She had written a letter of explanation in October 2014, but never received a reply, so she thought the problem had been resolved.

c) She applied for reconsideration as soon as she was advised to do so by the Respondent.

d) The appeal was her "first opportunity" to "really address the problem," since she "had no input at all" into the original decision.

e) She and her husband are living "on a knife's edge" due to extreme financial hardship and have no way of paying back the money. She is even prepared to give up her appeal if it will make the problem go away.

[21] The Respondent made the following submissions:

a) The Appellant did not offer sufficient reasons for her late reconsideration request.

b) She was aware of the decision dated April 2, 2012, but delayed until August 9, 2016, to request a reconsideration.

c) She submitted a letter, which was received on October 6, 2014, "and then there was no further [contact] from the claimant until July 27th 2016," when she was called about her overpayment.

d) The Respondent "was not satisfied that her request would have a reasonable chance of success due to the structure of the Act."

e) It “was not satisfied that no prejudice would be caused” by allowing an extension of time.

ANALYSIS

[22] The relevant legislative provisions are reproduced in the Annex to this decision.

[23] The issue before the Tribunal is solely the review of the Respondent’s decision to deny the Appellant’s request to extend the 30-day period allowed to make a reconsideration request. The Tribunal is not making a finding on the substantive issues of her claim.

[24] Under paragraph 112(1)(a) of the Act, a reconsideration request must be made within 30 days after the day on which a decision is communicated to the claimant, or, as per paragraph 112(1)(b), “any further time that the Commission may allow.”

[25] The criteria that must be considered when determining whether a longer period of time may be allowed are set out the Reconsideration Regulations. Subsection 1(1) stipulates that the Respondent may allow further time if it is “satisfied that there is a reasonable explanation for requesting a longer period” **and** the claimant has “demonstrated a continuing intention to request a reconsideration.”

[26] Where the request is made more than 365 days after the day on which the decision was communicated to the claimant, there are two additional requirements, under subsection 1(2) of the Reconsideration Regulations: the Respondent “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 other persons by allowing a longer period to make that request.”

[27] At the outset, the Tribunal must determine whether the Appellant’s reconsideration request was indeed filed late. She should have filed her request within 30 days after the decision was communicated to her; the Respondent dates the decision as April 2, 2012, and she agrees that it was communicated to her verbally sometime that month. Instead, she filed her request on July 27, 2016, more than four years later. It was therefore filed late.

[28] Because of the length of delay, the Tribunal finds that, as the Respondent correctly submitted, the requirements of both subsection 1(1) and 1(2) of the Reconsideration Regulations

had to be met in considering whether a longer period of time to make a request should be allowed.

[29] Recent case law has confirmed that the Commission's decision whether to allow an extension of time to request a reconsideration is discretionary (*Daley v. Attorney General of Canada*, 2017 FC 297). The courts have found that discretionary decisions of the Respondent should not be disturbed unless it can be shown that it failed to exercise its discretion in a judicial manner, that is, acting in good faith, having regard to all the relevant factors and ignoring any irrelevant factors (*Attorney General of Canada v. Uppal*, 2008 FCA 388; *Attorney General of Canada v. Tong*, 2003 FCA 281; *Attorney General of Canada v. Dunham*, A-708-9).

Did the Respondent exercise its discretion judicially?

[30] The first step for the Tribunal is to determine whether the Respondent exercised its discretion in a judicial manner when it refused the Appellant's request to extend the 30-day period in which to request a reconsideration, pursuant to the Act and the Reconsideration Regulations. The Tribunal notes that while the onus is on the Appellant to show that she meets the criteria set out in the Reconsideration Regulations, the Respondent bears the burden of demonstrating that it acted in a judicial manner in exercising its discretion, by considering all her relevant circumstances (*Attorney General of Canada v. Gagnon*, 2004 FCA 351; *Attorney General of Canada v. Schembri*, 2003 FCA 463; *Attorney General of Canada v. Purcell* A-694-94).

[31] The Tribunal finds that the Respondent did not meet that burden. There is scant evidence that the Respondent gave any significant consideration to the Appellant's reason for her late request before dismissing it. She had relied on the fact that she had written a letter of explanation—which the Respondent confirms it received on October 6, 2014—and had never received a reply. Based on the limited information before it, the Tribunal cannot assess how the Respondent weighed this reason before coming to the conclusion that it was not a "reasonable explanation." The Tribunal cannot, therefore, establish with any certainty that the Respondent considered all her circumstances.

[32] Moreover, the Tribunal cannot conclude that the Respondent properly evaluated whether the Appellant had a "continuing intention" to appeal, when there is no evidence that the right of appeal was explained to her.

[33] Similarly, the Tribunal finds that the Respondent's evidence does not show how it concluded that the Appellant failed to demonstrate that her reconsideration request had a "reasonable chance of success," so the Tribunal cannot assess whether the Respondent exercised its discretion judicially in determining this factor either. The Tribunal also finds that the Respondent shed no light on this issue with its brief submission that it had not been "satisfied that the request… has a reasonable chance of success due to the structure of the Act (GD4-2)."

[34] Finally, the Tribunal finds that there is no evidence on the docket of how the Respondent made its finding on the issue of whether there would be "prejudice to the Commission or any other party." It submitted no arguments to support this conclusion, such as how granting an extension of time to the Appellant might adversely impact the administration of benefits.

[35] Based on these observations, the Tribunal finds that the Respondent did not exercise its discretion judicially when it refused the Appellant further time to request a reconsideration. The Tribunal must therefore consider whether she met her burden of demonstrating that she complied with the criteria set out in the Reconsideration Requirements, in order to determine whether she should be allowed an extension of the 30-day deadline.

Reasonable Explanation for the Delay and Continuing Intention to Appeal

[36] The Tribunal finds that the issues of whether the Appellant had a reasonable explanation for the delay, and a continuing intention to appeal, are intertwined. At the hearing it was apparent that she was confused about the process and what recourse she had. To her mind, she responded appropriately, and indeed the Tribunal finds that she acted with integrity from the outset. As soon as she knew about the amended ROE, she took the initiative to report it to the Respondent, in case she had received more benefits than she was entitled to; this is confirmed in the evidence of her letter of February 15, 2012 (GD3-21).

[37] At the hearing, the Appellant agreed that the original decision was communicated to her verbally in April 2012. She does not recall receiving a decision letter, which would have informed her of her right to make a reconsideration request, as well as the 30-day deadline. Nor is there any evidence that the Respondent sent her such a letter. At the hearing, when the issue of debt management came up, it was apparent that the Appellant was completely unaware of the advice on this issue that appears in decision letters involving an overpayment. There is also no record of the conversation by which she was informed of the decision on the overpayment. This means that the Tribunal cannot be confident that her right to a reconsideration was explained to her, and that she understood a decision had been made which she could contest.

[38] The evidence shows that after the Appellant had been informed of the overpayment, she called the Respondent to discuss it on May 11, 2012, which is little more than a month after the Notice of Debt was issued on April 6, 2016. Here the evidence diverges. According to the evidence from the Respondent, the conversation was simply to "review the agreed deductions" for her overpayment (GD3-23). According to the Appellant, the changes to her ROE "didn't add up so I phoned and asked [the Respondent] to check the anomalies (GD3-26)." In her mind, therefore, she had asked for an investigation of the differences between the initial ROE and the amended one, and she presumed the Respondent would investigate.

[39] The Tribunal gives more weight here to Appellant's testimony on this conversation, than to the abbreviated Recovery Notes and single explanatory sentence in the evidence of the Respondent. The differences between her two ROEs were marked; even her occupation had been incorrectly recorded. The Tribunal therefore finds it highly probable that she would have asked the Respondent to investigate, which is akin to requesting a reconsideration, albeit informally. So far, therefore, the Tribunal does not find any significant delay in her actions to challenge the decision on the overpayment, nor a break in her continuing intention to appeal the decision as best she could.

[40] On balance, the Tribunal considers that it was reasonable for her to consider that the matter had been put in hand by the phone call she initiated on May 11, 2012. This provides an explanation for the delay until she took the next step, more than two years later, when the debt statements continued to arrive: writing the letter received by the Respondent on October 6, 2014

(GD3-24). In this letter, she argued that her employer had put false information on her ROE, and that she thought the matter must have been taken care of when she received no reply to her correspondence. The Tribunal considers her letter as evidence of a continuing intention to challenge the decision on the overpayment.

[41] The Tribunal has noted the Respondent's comment that after the letter, "there was no further [contact] from the claimant until July 27th 2016," when the Respondent called her about her outstanding debt (GD4-1). However, while it appears from the hearing that the Appellant had given up hope, and she was even willing to drop this appeal, when she was advised by the Respondent on July 27, 2017, that she could request a reconsideration, she immediately signed and dated her request that same day. The Tribunal sees this as evidence of a continuing intention to pursue whatever challenge she could.

[42] In this respect, the Tribunal gives little weight to the Respondent's submission that she had further "delayed" filing her request until August 9, 2016, on the basis that her request was stamped as received on the later date. There is no information available to the Tribunal that the final two-week delay in the filing of the request can be attributed solely to the Appellant; a delay of this duration would not be unusual to allow for mail delivery and document processing.

Reasonable chance of success

[43] The Tribunal is aware of the Respondent's brief submission that the Appellant's request did not have a reasonable chance of success "due to the structure of the Act (GD4-2)." However, there were the stark differences between her two ROEs, an anomaly that she brought to the Respondent's attention more than once, and there is no evidence that she had the opportunity to explain her case fully. It is possible that if her case were reconsidered, information might be shared, and findings made, that could directly impact decision-making on her rate of benefits. The Tribunal is therefore satisfied that her case has a reasonable chance of success.

Prejudice to the Commission or any other party

[44] On the issue of whether any prejudice would be caused by allowing the Appellant a longer period to make her reconsideration request, the Tribunal considers the Respondent's sole

comment, that it “was not satisfied… that no prejudice would be caused,” to be equivocal. There is, therefore, no evidence before the Tribunal that granting the Appellant an extension of time might adversely impact the Respondent.

[45] In conclusion, the Tribunal finds that the Respondent did not demonstrate that it exercised its discretion in a judicial manner when it refused the Appellant extra time to request a reconsideration. The Tribunal, exercising its own discretion, finds that the Appellant met the provisions of section 112 of the Act, and section 1 of the Reconsideration Regulations, and is therefore entitled to an extension of time.

CONCLUSION

[46] The appeal is allowed.

Lilian Klein
Member, General Division - Employment Insurance Section

ANNEX

THE LAW

Employment Insurance Act

112 (1) 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.

(2) The Commission must reconsider its decision if a request is made under subsection (1).

(3) The Governor in Council may make regulations setting out the circumstances in which the Commission may allow a longer period to make a request under subsection (1).

Reconsideration Request Regulations

1 (1) For the purposes of subsection 112(1)(b) of the *Employment Insurance Act* and subject to subsection (2), 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

(2) 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 other persons 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 *Employment Insurance Act*.