



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *S. R. v. Canada Employment Insurance Commission*, 2018 SST 307

Tribunal File Number: GE-17-1499

BETWEEN:

**S. R.**

Appellant

and

**Canada Employment Insurance Commission**

Respondent

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**SOCIAL SECURITY TRIBUNAL DECISION**  
**General Division – Employment Insurance Section**

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DECISION BY: Linda Bell

HEARD ON: November 15, 2017; January 10, 2018; and  
February 14, 2018

DATE OF DECISION: March 1, 2018

METHOD OF PROCEEDINGS: Teleconference

APPEARANCES: S. R., Appellant

Sashka Koprindzhiyska, Representative

## **REASONS AND DECISION**

### **DECISION**

[1] The appeal is allowed. The Tribunal finds that the Respondent did not exercise their discretion judicially and the Tribunal grants the Appellant an extension of time to request reconsideration. The reasons for this decision follow.

### **OVERVIEW**

[2] The Appellant was working as a front desk agent at a hotel and was dismissed after items went missing from a hotel room. The Respondent determined they were unable to pay the Appellant employment insurance benefits because he was dismissed due to misconduct. The Appellant waited over a year before requesting reconsideration of this decision and the Respondent denied the request.

### **PRELIMINARY ISSUES**

[3] The Tribunal recognizes that the Appellant and his representative attended the hearing prepared to submit oral evidence relating to the issue of misconduct and other unrelated sections of the *Employment Insurance Act* (Act). As explained during the hearing, matters relating to the Appellant's dismissal, procedures for processing claims and arguments regarding unrelated sections of the Act will not be referred to in this decision because they are not relevant to the issues currently under appeal.

### **ISSUES**

[4] The Tribunal must determine the following issues:

- a) Was the Appellant's reconsideration request submitted late?
- b) Was the Respondent's decision to deny an extension of time to request reconsideration exercised judicially?
- c) If not, what decision should the Respondent have given?

## **ANALYSIS**

[5] In deciding these matters the Tribunal considered the relevant legislative provisions which are reproduced in the Annex to this decision.

### **Was the Request for Reconsideration submitted late?**

[6] The Appellant may make a request for reconsideration to the Respondent within: (a) 30 days after the day on which a decision is communicated to the Appellant; or (b) within any further time that the Respondent may allow, as provided by subsection 112(1) of the Act. The Appellant conceded that he did not submit his reconsideration request within 30 days of the Respondent communicating the decision to him. Accordingly, the Tribunal finds the Appellant submitted his reconsideration request late, after the 30-day timeframe.

[7] The Appellant conceded that he was told of the Respondent's initial decision verbally on February 17, 2016. The Appellant confirmed he received the Respondent's February 24, 2016, written decision shortly after it was mailed. The Appellant did not submit his reconsideration request until February 27, 2017, which is over the 30-day timeframe as provided by paragraph 112(1)(a) of the Act and over the 365-day period referred to in paragraph 1(2)(a) of the *Reconsideration Request Regulations* (Regulations).

[8] When a request for reconsideration is submitted after the 30-day timeframe, the Respondent has the discretion to decide whether to grant an extension of time to request reconsideration. The Tribunal will now determine whether the Respondent's decision to deny the Appellant an extension of time to request reconsideration was exercised judicially.

### **Did the Respondent exercise their discretion judicially?**

[9] The Respondent may allow a longer period of time if they are satisfied with the following. (1) There is a reasonable explanation for requesting a longer period; and (2) the Appellant has shown a continuing intention to request reconsideration, as stated in subsection 1(1) of the Regulations.

[10] In cases when the reconsideration request is made after 365 days after the day on which the decision was communicated to the Appellant, the following additional criteria apply, as set

out in subsection 1(2) of the Regulations. In these cases, the Respondent must also be satisfied the request for reconsideration has a reasonable chance of success and that no prejudice would be caused by allowing a longer period.

[11] As stated above, the Appellant submitted his reconsideration request on February 27, 2017, which the Tribunal finds is over the 365-day period referred to in paragraph 1(2)(a) of the Regulations. As such, the additional criteria set out in subsection 1(2) of the Regulations are relevant in this matter.

[12] At the conclusion of the 30-day period prescribed by paragraph 112(1)(a) of the Act, the Respondent has the discretion to allow the Appellant further time to request reconsideration. A discretionary power can only be varied if the Respondent did not exercise that power judicially (*Daley v. Canada (Attorney General)*, 2017 FC 297; *Canada (Attorney General) Knowler A-445-95*; *Canada (Attorney General) v. Plourde*, A-80-90).

[13] Neither the Act, *Employment Insurance Regulations* (Regulations), nor the Regulations define how a discretionary power is exercised judicially. Therefore, the Tribunal considered that a discretionary power is not exercised judicially if it can be established that the decision maker (1) acted in bad faith; (2) acted for an improper purpose or motive; (3) took into account an irrelevant factor; (4) ignored a relevant factor; or (5) acted in a discriminatory manner (*Canada (Attorney General) v. Purcell*, A-694-94).

[14] On March 31, 2017, the Respondent documented their reasoning and rationale for denying the Appellant an extension of time to submit his reconsideration request, as provided in evidence. This reasoning and rationale is summarized below.

- a) The Appellant had 30 days, after the day on which the decision was communicated to him, to submit his reconsideration request.
- b) The Appellant was aware of their decision on February 17, 2016, and he “delayed 348 days” until “March 1, 2017”, to make his request for reconsideration.
- c) The Respondent considered the Appellant’s reasons for delay and determined nothing prevented the Appellant from enquiring about the policy and procedures.

- d) The Appellant could have applied for reconsideration in October 2016 when his court proceedings were concluded.
- e) The Appellant cited “working” as a reason for his delay in submitting his reconsideration request.
- f) The Appellant has not provided a reasonable explanation for the delay in requesting reconsideration nor has he demonstrated a continuing intention to request said reconsideration.

[15] The Appellant argued that the Respondent did not exercise their discretion judicially because the Respondent ignored the following relevant factors.

- a) When dealing with his initial claim, the Respondent only provided the Appellant with one option and that was he had to request reconsideration within 30 days.
- b) The Respondent told the Appellant not to bother requesting reconsideration because he did not have evidence to support his position while his litigation process was ongoing.
- c) The Appellant had no previous experience with employment insurance so he followed the information provided to him by the Respondent.
- d) When the Appellant attended the Service Canada office a year later for an unrelated matter he was told then that the Respondent has the ability to grant a longer period of time to request reconsideration. He did not delay and submitted his reconsideration request the same day.

[16] When making their decision to deny further time to request reconsideration, the Tribunal finds that the Respondent ignored a relevant factor. Specifically, the Respondent failed to consider that the Appellant had no prior experience with employment insurance, that he was told by the Respondent that he must file his reconsideration request within 30 days of receiving the initial decision, and that he should not bother submitting a request for reconsideration at that time because he did not have evidence to prove his case because the matters relating to his dismissal were still involved in litigation.

[17] The Tribunal does not accept the Respondent's submission that there is no evidence that the Appellant failed to or was prevented from enquiring about the policy and procedures. Rather, the Tribunal favours the Appellant's testimony that he did make enquiries about how he could proceed in his situation, given that the litigation process would exceed the 30-day period in which he could request reconsideration. The Appellant stated that this conversation occurred during his discussions with the Respondent regarding misconduct and that they were within the 30-day period. The Appellant argued that he was never told that the Respondent could extend the 30-day period to request reconsideration.

[18] As indicated by the Respondent in their submissions, they have only submitted documents, such as sections of the application which the Respondent determined to be relevant to the issues at hand. The Respondent did not submit copies of all the Supplementary Record of Claims which document every conversation between the Respondent and the Appellant in relation to this initial claim. The Tribunal finds that by failing to submit all Supplementary Record of Claims the Respondent has on file creates a negative inference. Furthermore, as the Respondent failed to attend the hearing the Appellant was prevented from cross-examining them regarding what was stated during these discussions.

[19] The Tribunal accepts the Appellant's argument that he asked questions to clarify his rights and obligations during the conversation when the Respondent advised him that they had determined he was dismissed due to misconduct. The Tribunal further accepts that during this conversation the Respondent told the Appellant he had 30 days to request reconsideration at which time the Appellant began to question how he could proceed. The Tribunal favours the Appellant's evidence that despite his questions to the Respondent he was not told that an extension of time to request reconsideration could be granted and he was told not to bother to submit a request for reconsideration at that time because he would not have evidence until the litigation process was completed.

[20] Although the Respondent has no legal obligation to inform the Appellant of their ability to extend the time to request reconsideration, the Tribunal finds that the failure to disclose this information caused the Appellant to believe he had no options for reconsideration once the 30-day timeframe had expired. Based on the Appellant's circumstances the Tribunal finds that it is

not unreasonable for the Appellant to follow the guidance provided by the Respondent in this situation when considering that the Appellant has no prior experience with employment insurance.

[21] While it is true that the Appellant could have applied for reconsideration in October 2016 when his court proceedings were concluded; the Tribunal accepts the Appellant's argument that his failure to submit his request for reconsideration at this time was based on the previous information he was provided by the Respondent. That information clearly states he had 30 days to request reconsideration.

[22] Based on the above, the Tribunal finds that the Respondent's discretion was not exercised judicially when they denied the Appellant more time to submit his reconsideration request. This is because the Respondent ignored the following relevant factors: (1) the Respondent told the Appellant he only had 30 days to request reconsideration and despite being questioned about how he could proceed they did not tell the Appellant this period could be extended; (2) the Respondent told the Appellant not to bother submitting his reconsideration request within the 30-day period because his dismissal was still going through litigation; and (3) the Appellant had no prior experience dealing with employment insurance.

[23] Having found that the Respondent's discretion was not exercised judicially, the Tribunal must now render the decision that the Respondent should have given which in this case is to grant the Appellant an extension of time to submit his reconsideration request (*Daley v. Canada (Attorney General)*, 2017 FC 297).

**Should the extension of time to request reconsideration be granted?**

**A) Reasonable explanation for the delay**

[24] The Tribunal accepts that the Appellant provided a reasonable explanation for the delay in submitting his reconsideration request. This is because despite seeking guidance from the Respondent on how to proceed, the Appellant was not told that the 30-day period could be extended until a year later when he attended the Service Canada office for an unrelated matter.

[25] The Tribunal accepts the Appellant's evidence that given his limited experience with employment insurance he acted based on the information he obtained from the Respondent about how he could proceed in his circumstance. That information was that the Appellant only had 30 days to submit his request and he should not bother submitting his reconsideration request within the 30-day period because of his ongoing litigation. The Tribunal finds that the Appellant acted in a reasonable manner during the period of delay given the circumstances presented during the hearing.

[26] The Appellant argued that the information provided in the initial decision made no mention that the 30-day timeframe could be extended. This is supported by the February 24, 2016, initial decision which states, in part, as follows:

Our decisions are based on the Employment Insurance Act and its Regulations. If you disagree with this (these) decision(s), **you have 30 days following the date of this letter (or from the date you were verbally notified, whichever occurred first)** to make a formal request for reconsideration to the Commission. For more information on how to request a reconsideration and to access the *Request for Reconsideration of an Employment Insurance decision* form, please visit [www.ei.gc.ca](http://www.ei.gc.ca), contact us at 1-800-206-7218 or visit the nearest Service Canada Centre.

[Reproduced as Written]

[27] The Tribunal finds that the Appellant provided credible testimony that, despite his despair during the aforementioned conversation, the Appellant was not advised of the provision in the Regulations that would allow an extension of time to request reconsideration. In addition, the Appellant provided credible evidence regarding the litigation process relating to his employment and his status in Canada which supported his arguments that he continued to question the Respondent about his entitlement to benefits, until he was told very clearly that he only had 30 days to request reconsideration. Again, despite the Appellant asking questions during that initial conversation, he was told he had to have evidence to prove there was no misconduct and that he only had 30 days from the date the initial decision was issued to request reconsideration.

[28] The Tribunal does not accept the Respondent's argument that the Appellant ought to have enquired as to his right of recourse during the period after his litigation was resolved in October 2016 or before he submitted his reconsideration request on February 27, 2017. This is because



long before February 27, 2017, the Respondent clearly communicated to the Appellant that he only had 30 days from February 24, 2016, to make a reconsideration request. It is unreasonable to think that given the Appellant's limited experience with employment insurance that he would be expected to continue to enquire about the same issue over and over again when he was clearly told by the Respondent that he only had 30 days to request reconsideration.

[29] It was not until the Appellant attended the Service Canada office for an unrelated matter that the Respondent told the Appellant that he could request an extension of time to submit his reconsideration request. The Tribunal finds that the Appellant acted promptly once he was provided this information as he submitted his reconsideration request the same day.

### **B) A Continuing Intention to Request Reconsideration**

[30] The Tribunal finds that the Appellant has proven a continuing intention to request reconsideration. In making this finding the Tribunal accepts that the Appellant initially took efforts to enquire about submitting his reconsideration request within the 30-day period when he engaged in discussions with the Respondent on how he could proceed. Being new to Canada and this being his first dealings with employment insurance, the Tribunal accepts the Appellant's evidence that he enquired about how he could proceed in his circumstances and he was told he only had 30 days to request reconsideration and he should not bother to do so given his circumstances. The Appellant acted based on what he was told by the Respondent, who manages the employment insurance fund, and he did not take action until a year later when he was told he could still submit his reconsideration request.

[31] The Tribunal does not accept the Respondent's submission that the Appellant cited "working" as a reason for his delay in his reconsideration request. This is because the reconsideration request submitted by the Appellant makes no mention about him working. However, there is mention in the Record of Decision dated March 31, 2017, that the Appellant "cited" working as a reason for delay.

[32] The Appellant conceded that he told the Respondent that he was busy dealing with his litigation matters and that he was working. However, the Appellant argued that this answer was not provided in response to why he delayed in making his reconsideration request. Rather, the

Appellant stated that this was his answer to explain what he was doing during the period of delay but was not the cause of the delay. The Appellant further explained that he had apologized to the Respondent during this conversation because he misunderstood what was being asked of him, which is noted in the Supplementary Record of Claim dated March 31, 2017.

[33] The Appellant asserted that he told the Respondent that he delayed in making his reconsideration request because he was told he only had 30 days to submit the reconsideration request. When he enquired about filing his reconsideration request the Respondent told him not to submit his request because he could not prove there was no misconduct while these matters were still going through litigation. The Appellant argued he was given no options because the litigation process would take longer than 30 days.

[34] The Tribunal finds that the Appellant has proven he had a continuing intention to request reconsideration. This finding is made in part due to the fact that the Appellant discussed submitting a reconsideration request with the Respondent, within the 30-day period. It was during this discussion that he was told not to submit his reconsideration request at that time because he could not prove there was no misconduct while these matters were still going through litigation. One he was told about the extension provision he submitted his reconsideration request the same day.

[35] The Tribunal accepts the evidence that the Appellant continued through the litigation process which ended in October 2016. The Appellant did not submit his reconsideration request for a few months after this based because he was acting on the initial information provided to him by the Respondent. This was that he only had 30 days from when the initial decision was made to request reconsideration.

[36] The Tribunal does not accept the Respondent's submission that there was nothing preventing the Appellant from enquiring about the policy and procedures. This is because the evidence supports the Appellant did enquire and that enquiry was made during the Appellant's initial discussions with the Respondent. It was the Respondent's reply, telling the Appellant that he must submit his reconsideration request within the 30-day timeframe, and that he should not do so given his circumstances, which prevented the Appellant from making enquiries at that time.

### **Additional Criteria**

[37] In some cases, additional criteria set out in subsection 1(2) of the Regulations may apply. In such cases, when there is a reasonable explanation for requesting a longer period and the person has demonstrated a continuing intention to request reconsideration; the Respondent must also be satisfied the request for reconsideration has a reasonable chance of success and that no prejudice would be caused by allowing a longer period. The Tribunal finds that the additional criteria are relevant to this appeal. This is because the Appellant waited over 365 days, after the decision was communicated to him on February 17, 2016, before submitting his request for reconsideration on February 27, 2017.

[38] The Tribunal acknowledges that the Respondent determined that the Appellant did not provide a reasonable explanation for the delay and he did not demonstrate a continuing intention to request reconsideration, as set out in subsection 1(1) of the Regulations. Therefore, there was no need for the Respondent to consider the additional criteria set out in subsection 1(2) of the Regulations. However, as the Tribunal has found the Appellant has met the test in subsection 1(1), the additional criteria must now be determined.

[39] The Respondent refers to “a period of delay” and states the Appellant delayed 348 days in making his reconsideration request. While it can be said that the period after the allotted 30-day period could be considered, “a period of delay”; which in this case appears to be 348 days. However, the test outlined in paragraph 1(2)(a) of the Regulations does not refer to “a period of delay”.

[40] The test provided by paragraph 1(2)(a) of the Regulations states that when the request for reconsideration is made after 365-day period after the day on which the decision was communicated to the Appellant the following must be determined. The request for reconsideration has a reasonable chance of success, and no prejudice would be caused by allowing a longer period to make the request. In the case at hand the Respondent’s decision was verbally communicated to the Appellant on February 17, 2016, and the Appellant submitted his reconsideration request more than 365 days later, on February 27, 2017. Therefore, the Tribunal finds that the Appellant made his request for reconsideration after the 365-day period after the

day on which the decision was communicated to the Appellant. Accordingly, the additional criteria stated in subsection 1(2) of the Regulations must now be considered.

**A) Reasonable Chance of Success**

[41] The Tribunal finds that it is not clear and obvious on the record that the Appellant's reconsideration request is bound to fail. The Respondent's initial decision was that they were unable to pay the Appellant benefits because he was dismissed from his employment due to misconduct. The Appellant provided evidence that his litigation process is now complete and the charges, which were laid against him in relation to this dismissal, have been stayed.

[42] Notwithstanding the Respondent's argument that the issue of whether charges are laid and/or dismissed is not determinative of a finding of misconduct, the Tribunal finds that the Appellant has presented an arguable case. This is because in support of this appeal the Appellant submitted documents from his lawyer which include, in part, email exchanges between the Appellant and his lawyer dated September 30, 2016, and August 27, 2016.

[43] The September 30, 2016, email states, in part, as follows:

...such as the state of intoxication of the complainant, and how she had extensive dealings with you after the alleged assault and did not identify you as the culprit.

[Reproduced as Written]

[44] The August 27, 2016, email states, in part, as follows:

...At 1:34am we saw him going out for a smock, but at 1:35am room XXX was open with his key, which makes it impossible for him to be in 2 places at the same time. He only went up by the elevator at 1:38am.

[Reproduced as Written Excluding the Room Number]

[45] Based on the foregoing, the Tribunal finds the Appellant has met the first criteria set out in subsection 2(a) of the Regulations. This is because there is sufficient evidence to prove the Appellant's reconsideration request has a reasonable chance of success.

## **Prejudice**

[46] The Tribunal finds there is insufficient evidence to prove that prejudice would be caused to the Respondent if the Appellant was granted an extension of time to request reconsideration of the Respondent's initial decision. The Tribunal further finds that it may be prejudicial to the Appellant if the extension of time to request reconsideration is not granted. This is because failing to grant an extension of time to request reconsideration would prevent the Appellant from proving his entitlement to benefits for the period from January 20, 2016, until August 30, 2017; which is the date he left Canada.

## **CONCLUSION**

[47] The Tribunal finds the Respondent did not exercise their discretion judicially and the Tribunal grants the Appellant an extension of time to submit his reconsideration request. The appeal is allowed.

Linda Bell

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).

#### *Department of Employment and Social Development Act*

**54 (1)** The General Division may dismiss the appeal or confirm, rescind or vary a decision of the Minister or the Commission in whole or in part or give the decision that the Minister or the Commission should have given.

(2) The General Division must give written reasons for its decision and send copies to the appellant and the Minister or the Commission, as the case may be, and any other party.

#### *Reconsideration Request Regulations*

**1 (1)** For the purposes of paragraph 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 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 *Employment Insurance Act*.