



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *W. M. v. Canada Employment Insurance Commission*, 2018 SST 328

Tribunal File Number: GE-17-2638

BETWEEN:

W. M.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Candace Salmon

HEARD ON: March 13, 2018

DATE OF DECISION: April 5, 2018

DECISION AND REASONS

DECISION

[1] The appeal is allowed. Having regard to all the evidence, the Tribunal finds the Canada Employment Insurance Commission (Respondent) did not exercise its power judicially and the Appellant is allowed further time to make a reconsideration request.

OVERVIEW

[2] The Respondent issued a decision regarding the allocation of a pension on September 20, 2013. The Appellant sent or delivered a request for reconsideration on October 18, 2013, which was not received by the Respondent. The Appellant requested reconsideration again in October 2017; the Respondent determined the request was late, and on November 18, 2018 it wrote a letter to the Appellant confirming it refused to allow an extension of time. The Appellant seeks a decision overturning the Respondent's refusal to grant an extension of time for making a reconsideration request.

ISSUES

[3] Was the reconsideration request made late?

[4] If so, did the Respondent properly exercise its discretion in refusing to allow the Appellant further time to make a reconsideration request?

ANALYSIS

[5] A claimant has a 30-day period to request the Respondent reconsider a decision (*Employment Insurance Act* (Act), para. 112(1)(a)). For those reconsideration requests made beyond 30 days, the Commission has discretion to allow claimants further time (*Daley v. Canada (Attorney General)*, 2017 FC 297). This discretion must be exercised according to the criteria set in the *Reconsideration Request Regulations* (Regulations). Subsection 1(1) allows further time if the Respondent is satisfied there is a reasonable explanation for requesting a longer period and the claimant has "demonstrated a continuing intention to request reconsideration."

[6] In some cases two additional requirements, under subsection 1(2) of the Regulations, must be met: 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.” One of the circumstances where these additional criteria apply is when the request is made more than 365 days after the day on which the decision was communicated to the claimant.

[7] Discretionary decisions attract a high level of deference and the Tribunal cannot disturb the Respondent’s decision unless it finds the Respondent failed to exercise its discretion “judicially” (*Canada (Attorney General) v. Sirois*, A-600-95). The courts have interpreted “judicially” to mean whether the Commission acted in good faith, having regard to all the relevant factors, and ignoring any irrelevant factors (*Sirois, supra*).

Issue 1 - Was the reconsideration request late?

[8] The reconsideration request was late. The Appellant testified that the Respondent’s September 20, 2013 decision was communicated to him on September 26, 2013. While the Appellant believed he made a reconsideration request on October 18, 2013, the documentation was not received by the Respondent. The Appellant then made a reconsideration request on October 4, 2017. As the reconsideration request was made more than 365 days after the initial decision was communicated to the Appellant on September 26, 2013, all four criteria outlined in Regulations 1(1) and 1(2) apply.

Issue 2 - Did the Respondent properly exercise its discretion in refusing to allow the Appellant further time to make a reconsideration request?

[9] The Respondent did not exercise its discretionary power judicially when it refused the Appellant’s request to extend the 30-day period in which to request reconsideration. While the onus is on the Appellant to show that he meets the criteria set out in the Regulations, the Respondent bears the burden of demonstrating that it acted in a judicial manner in exercising its discretion, by considering all relevant circumstances (*Attorney General of Canada v. Gagnon*, 2004 FCA 351).

[10] The Tribunal finds the Appellant to be a reliable witness as his testimony was credible, and served to expand on the evidence in the file. The Appellant provided reasonable explanations for the statements he made to the Respondent. The Appellant did contradict some evidence where he told the Respondent on October 2, 2017 that he had submitted the 2013 reconsideration request by mail, and at the hearing he advised that he cannot recall for certain how he sent it in but believes it was submitted by hand at the Service Canada office on October 18, 2013. In this case, the Appellants' evidence is his recollections from 2017 and 2018. The Tribunal is not convinced of which statement is correct as the Appellant admitted he cannot remember how the reconsideration request was communicated to the Respondent, but it is reasonable to believe that he submitted it by hand to the Service Canada Centre as he testified that he visited the location on the same day for which he dated the reconsideration request documentation and believes he submitted the form at that time.

[11] The Tribunal finds that the Respondent did not meet its burden of showing that it exercised its discretion judicially. The Appellant relied on the 2013 reconsideration request, which he believed he made, and the Respondent confirms it did not receive. The Respondent considered that the Appellant believed he filed the reconsideration request in 2013, but stated to the Appellant "reconsideration cannot be completed due to such a lengthy delay." In reviewing the Respondent's reasons for coming to this decision, it stated the Appellant was aware of the September 2013 decision and delayed until October 2017 in making a reconsideration request. It further stated that it considered the reasons for the delay but the Appellant had not provided a reasonable explanation for the delay nor demonstrated a continuing intention to request reconsideration. The Respondent noted that even if the Appellant submitted the 2013 reconsideration request, he made no attempts to follow up with the Respondent to confirm receipt or check on the status.

[12] The Appellant testified that he attempted to request reconsideration in 2013 and believed it had been properly done. The Tribunal accepts this as fact. The Respondent failed to consider this evidence in coming to its original decision. The Respondent also stated in evidence that there is no record of the Appellant contacting Service Canada to follow-up on the 2013 reconsideration request. The Respondent failed to consider the Appellant's evidence of an internal claim printout from his local Service Canada office dated October 18, 2013, which

supports his submission that he visited the office and filed the reconsideration request on that date. Though the Respondent did not have this information in front of it when rendering a decision, it did not properly exercise its discretion as it failed to consider all of the relevant evidence. The Appellant also reasonably explained the lack of communication with the Respondent after the October 2013 reconsideration request: he did communicate with the Respondent into 2014 and believed that to be the reconsideration process. He also contacted the Canada Revenue Agency (CRA) when he received a Notice of Debt, and was advised that his debt would be cleared. The Appellant had no reason to follow-up after he believed the reconsideration process was finished in 2014. The Respondent does not appear to have considered this evidence in exercising its discretion, which directly relates to the issue—the Appellant did not follow up on his reconsideration request because he believed it had already been completed.

[13] The Tribunal finds the Respondent did not exercise its discretion judicially when it refused the Appellant further time to request reconsideration because it failed to consider the Appellant's documentary evidence that he visited a Service Canada Centre on October 18, 2013 and submitted a reconsideration request on that date. The Respondent also failed to consider the Appellant's conversations with the Respondent between October 18, 2013 and May 2014 which he believed were part of, and completed, the reconsideration process.

Did the Appellant have a reasonable explanation for requesting a longer period to make a reconsideration request and has he demonstrated a continuing intention to request reconsideration? (Regulations 1(1))

[14] The Tribunal finds the Appellant's explanation for requesting a longer period is reasonable. It also finds that he demonstrated a continuing intention to request reconsideration (*Daley v. Canada (Attorney General)*, 2017 FC 297).

[15] The Respondent's initial decision was made on September 20, 2013. The Appellant visited the Respondent's local office on October 18, 2013 and believes he submitted a reconsideration request at that time. The additional evidence submitted at the hearing, a benefit claim printout dated October 18, 2013 obtained from the local Service Canada office, corroborated the Appellant's other evidence that he visited his local office on October 18, 2013.

Following this, the Appellant spoke to various Respondent representatives in an effort to fix the problems he perceived within his file. He stated at the hearing that he thought this process was part of the reconsideration, and did not know he should expect a letter confirming a reconsideration decision. The Appellant communicated with the Respondent into 2014, when he was informed by the CRA that his debt would be cleared as the matter was resolved.

[16] The Appellant also stated he spoke with a representative of the Respondent in Halifax by telephone, who told him the calculation error in his overpayment occurred because the Respondent or the CRA mistakenly used the tax information of another person to calculate the overpayment in a post-claim audit. This is supported by call logs in the Respondent's evidence. The Appellant testified that he did receive a few Statements of Debt over the next two years, but was told by the CRA that these would not be collected and that he did not owe anything. It was not until the debt was recovered from his 2016 tax return in April 2017 that he again contacted the Respondent in an attempt to clarify why he still had an overpayment. Immediately following their response in early July 2017, the Appellant attempted to file an appeal with the Tribunal on July 27, 2017, but it could not be accepted because he did not have a reconsideration decision—a required step in order to file an appeal with the Tribunal. When the Appellant again spoke to the Respondent and requested a written decision on his reconsideration request, he was told the 2013 request had not been received and was advised to submit another. He did so in October 2017, and was provided a letter on November 18, 2017 which denied an extension of time to request reconsideration.

[17] While the length of the delay is a relevant factor, the more important consideration is the reason for the delay (*Canada (Attorney General) v. Burke*, 2012 FCA 139). While there was a delay between 2014 and 2017, the Appellant believed he did not owe anything further as the CRA had confirmed this, and he did not know his 2013 reconsideration request had not been received. The Appellant has shown dedication to following through with reconsideration; at no time does he appear to have abandoned his pursuit of a reconsideration decision. On the contrary, the Appellant's evidence is that he believed he had made a reconsideration request and the communication he had with the Respondent following his attempted filing in 2013 was the reconsideration.

[18] The Appellant visited the Respondent's local office and believed he filed a request for reconsideration in 2013. He followed up with the Respondent into 2014 relative to his claim, and testified that he communicated with the CRA regarding the debt. He believed the overpayment was cleared from his file and he did not need to follow up with the Respondent. While years have passed between the initial decision and the making of a reconsideration request, the Appellant has provided a reasonable explanation for the delay and provided a timeline of interaction with both the Respondent and the CRA that supports a continued intention to request reconsideration. The Tribunal finds the Appellant's reasons to be sufficient, thus he meets the first two criteria of the Regulations.

Does the appeal have a reasonable chance of success and would any prejudice be caused to the Commission or another party by accepting the appeal? (Regulations 1(2))

[19] Courts have not yet considered the definition of "reasonable chance of success" in the context of s. 1(2) of the Regulations. The Tribunal has decided to use the court's analysis when considering the concept of "reasonable chance of success" in relation to its preliminary dismissal procedure. The test is whether it is plain and obvious on the face of the record that the appeal is bound to fail, regardless of the evidence of arguments that could be presented at a hearing (*Lessard-Gauvin v. Canada (Attorney General)*, 2013 FCA 147).

[20] The Tribunal is aware that the root of this case is a pension allocation matter, and the Respondent submitted that as pension income must be considered earnings and as the pension was allocated correctly, the appeal does not have a reasonable chance of success. However, this file reflects numerous errors in calculation which changed the outcome and overpayment calculation multiple times. The Appellant testified that he received multiple notices that he owed money, each for a different amount, and then received a deposit from the Respondent during the time period he received the notices. The record also indicates the Appellant's overpayment was calculated using the financial information of another person at one point. This appears to have been rectified, but without further specific financial calculation details and evidence that the numbers are reflective of the correct person, the Tribunal cannot find the appeal is bound to fail. It is possible that if the Appellant's case were reconsidered, information might be shared and

findings made that could directly impact the amount of the overpayment. The Tribunal is therefore satisfied that the case has a reasonable chance of success.

[21] The Tribunal finds that no prejudice is likely to be caused to the Respondent or another party by allowing further time to request a reconsideration. The Tribunal further finds that there is no evidence relating to how the Respondent concluded it “was not satisfied that no prejudice would be caused to the Commission by allowing a longer period to make the request.” It submitted no arguments to support this conclusion. There is, therefore, no evidence before the Tribunal that the Respondent would be prejudiced by the giving of an extension of time to the Appellant to file a request for reconsideration.

CONCLUSION

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

Candace R. Salmon

Member, General Division - Employment Insurance Section

METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	W. M., Appellant