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

Citation: *A. M. v. Canada Employment Insurance Commission*, 2018 SST 346

Tribunal File Number: GE-17-3239

BETWEEN:

A. M.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Employment Insurance Section

DECISION BY: Candace Salmon

HEARD ON: March 27, 2018

DATE OF DECISION: April 16, 2018

Canada

DECISION

[1] The appeal is allowed. Having regard to all the evidence, the request for reconsideration was not filed late.

OVERVIEW

[2] The Appellant worked as a firefighter in a remote community. When the Appellant left his employment, he applied for Employment Insurance (EI) benefits. The Canada Employment Insurance Commission (Respondent) established a claim, which eventually resulted in the Appellant being overpaid as it was determined that he misrepresented his income and voluntarily left his employment. The Appellant was assessed an overpayment, but claims he was unaware of the amount owing as he did not receive the related phone messages or letters. The Appellant requested the Respondent reconsider its decision, but as his request was made more than 30 days after the Respondent's decision was communicated, it denied his request to reconsider. The Appellant appeals to the Tribunal seeking to overturn the decision on extending the period of time to request reconsideration.

ISSUES

[3] Was the reconsideration request filed late?

[4] Did the Respondent exercise its discretion judicially in refusing to allow the Appellant further time to make a reconsideration request?

ANALYSIS

[5] A claimant has a 30-day period during which to request the Respondent reconsider a decision (*Employment Insurance Act*, (Act) para. 112(1)(a)); requests for reconsideration made beyond 30 days may be accepted at the Commission's discretion (*Daley v. Canada (Attorney General)*, 2017 FC 297).

[6] The *Reconsideration Request Regulations* (Regulations) state the criteria which must be considered in determining whether an extension of time to file a reconsideration request may be allowed. 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."

[7] 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 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."

[8] 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 filed late?

[9] The reconsideration request was not filed late. The Respondent's initial decision was made via letter dated May 27, 2016. The Appellant filed a request for reconsideration on August 22, 2017. While the reconsideration request was filed more than 365 days after the decision was mailed to the Appellant, the law states that a claimant may make a request to reconsider a decision anytime within 30 days after the decision was *communicated* to him (Act, s. 112(1)).

[10] The Appellant stated at the hearing of this matter that he left his job in Alberta to return to British Columbia when there was a shortage of work, in but he moved multiple times after he returned. He estimated he returned to British Columbia in mid to late 2015, though he does not recall the exact date. He stated that when he went back to British Columbia he lived briefly with his parents while in between other apartments. The Appellant stated he had moved in with his parents for a few weeks at a time on multiple occasions while preparing to move to other locations. He stated that he kept his parents' address as his home address so he had some continuity in his mail and did not have to move his address with each service provider every time he physically moved locations. Unfortunately, while he stated he did not want to place blame on his family, he added that his father has had several strokes and is frequently forgetful. The

Appellant does not know if his father's condition is related to his not receiving his mail, but he suspects his mail has been accidentally misplaced or thrown out at times.

[11] The Appellant stated his parents did not tell him if he had mail, and while he did receive some of his post, he was never told he had letters from the Canada Revenue Agency (CRA) or the Respondent. He was also unaware of any telephone messages, though the Commission's evidence states he was left two messages after a voicemail recording that positively identified him as the recipient. The Respondent also submitted that the telephone number submitted by the Appellant on his initial application, request for reconsideration, and notice of appeal was the same number each time, corresponding to the Appellant's cell phone, which does not support the Appellant's contention that he did not receive any voicemail messages relating to this issue. The Appellant stated he did not recall receiving any telephone messages, and reiterated that he was unaware of the issues in his EI file until the accounting office at his new workplace advised that the government was garnishing his wages and he made a call to find out why. He had no explanation as to why the Respondent's voicemails did not reach him, but reiterated to the Tribunal that they did not.

[12] The Tribunal finds the Appellant a reliable witness as his testimony was credible and consistent. The Appellant provided reasonable explanations for the assertions he made relating to his lack of receiving his mail. The Appellant testified that he moved locations frequently after he left his job in Alberta, and since he did not know there was any issue with this EI claim, he did not know to follow up with the Respondent. The Appellant acted reasonably when he visited his local Service Canada Centre upon finding out about the debt for the first time through his employer, and filed a request for reconsideration. While the Appellant stated to the Respondent that it must have had the wrong number or sent his mail to the wrong address, the Tribunal finds no evidence that he was intentionally deceptive.

[13] The matter before the Tribunal is whether the Respondent communicated its decision to the Appellant. While there is no case law interpreting the meaning of "communicated" in relation to the Act, in *Bartlett v. Canada (Attorney General)*(2012 FCA 230) the Federal Court of Appeal stated that the burden of proving that a decision has been communicated rests with the decision-maker:

> [39] In my view, if the February 2, 2009 letter was to be held as the starting point for the appellant to initiate judicial review proceedings**, it was then incumbent on the respondent to show that the letter was indeed received by the appellant**, i.e. that the Minister's agent effectively communicated the decision to the appellant**…. It was not the burden of the appellant to disprove receipt of the alleged decision; the burden was rather on the respondent to establish that it was effectively communicated to the appellant. (emphasis added)**

[14] Communication requires positive action on the part of the decision-maker to advise a party of the substance and effect of a decision. The burden of proving communication rests with the decision-maker. Communication does not require that the full particulars be given to a party or that a party be made aware of any right of appeal or reconsideration.

[15] The Respondent submits that the Appellant only got in contact to file a request for reconsideration once his wages were garnished. While the Respondent further submitted it was "difficult to fathom" that the Appellant did not receive any notifications from the multiple avenues it pursued to notify him, the Appellant submits just that—that he did not know about the overpayment and received no communication advising him of the same. Given the evidence on record and the testimony given at the hearing of this matter, the Tribunal accepts that the Appellant did not know about the overpayment until his wages were garnished. Upon receiving notification of the garnishment from his company's accounting office, the Appellant contacted the Respondent and sought reconsideration. The communication of the decision has not been proven by the Respondent, thus it has failed to meet its burden and the request for reconsideration cannot be found to have been filed late.

Issue 2: Did the Respondent exercise its discretion judicially in refusing to allow the Appellant further time to make his reconsideration request?

[16] Given the Tribunal's finding on Issue 1, it is unnecessary to consider Issue 2.

CONCLUSION

[17] The appeal is allowed. The Tribunal finds the reconsideration request was not filed late and must be adjudicated based on having been filed in time.

Candace R. Salmon
Member, General Division - Employment Insurance Section

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