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

Citation: *C. B. v. Canada Employment Insurance Commission*, 2018 SST 359

Tribunal File Number: GE-17-3601

BETWEEN:

C. B.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Candace R. Salmon

HEARD ON: April 3, 2018

DATE OF DECISION: April 30, 2018

Canada

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 Appellant made a claim for employment insurance (EI) regular benefits, which was disallowed by the Respondent because it determined he voluntarily left his employment. The Appellant submitted a reconsideration request over a year after he became aware of the Respondent's decision. The Respondent wrote to the Appellant to advise that it refused to reconsider the decision because the 30 day period to request reconsideration had passed. The Appellant appeals to the Social Security Tribunal (Tribunal) to overturn the Respondent's decision, and allow reconsideration beyond 30 days.

ISSUES

[3] **Issue 1**: Was the reconsideration request filed late?

[4] **Issue 2**: 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)). 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 out 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 filed late?

[8] The law allows a 30 day period for a claimant to request reconsideration of a Respondent decision (Act, section 112(1)(a)). Requests beyond that timeframe are accepted at the Respondent's discretion.

[9] The request for reconsideration was filed late. The Appellant made a claim for EI benefits on April 12, 2016, and the Respondent disallowed the claim on May 4, 2016, as it determined he voluntarily left his job. The Appellant verbally received this decision on the same date, and testified that he later contacted Service Canada and was given incorrect information by a telephone agent that he had no right of appeal. The Appellant stated he was told that because he voluntarily left his job and had obtained new employment, there was nothing further to pursue. The Appellant submitted a reconsideration request on August 31, 2017, after being advised by an accounting professional that he may have a retroactive right to EI benefits. The Respondent refused reconsideration as the request was made more than 30 days from the communication of the original decision.

[10] As the reconsideration request of August 31, 2017, was made more than 365 days after the initial decision was communicated to the Appellant on May 4, 2016, all four criteria outlined in Regulations 1(1) and 1(2) apply.

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

[11] The Federal Court has confirmed that the Respondent's decision as to whether to allow a longer period of time to make a request for reconsideration is discretionary (*Daley, supra*). 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).

[12] The Tribunal finds the Respondent did not meet its burden of showing that it exercised its discretionary power judicially. The file shows the Respondent spoke with the Appellant and considered his reasons for delay, which it determined were insufficient to allow reconsideration after 30 days. The Appellant stated to the Respondent that he delayed in filing a request for reconsideration because he obtained employment around the same time as he received the decision, and did not know that he was able to request reconsideration. The Appellant also advised the Respondent that he became aware that he may have a right to retroactive EI due to a conversation with a Canada Revenue Agency (CRA) agent. The Respondent thoroughly documented its decision, and the file shows it considered that the Appellant did not know he could request reconsideration. The Respondent also considered whether he had a continuing intention to request reconsideration and that the request was made more the 365 days late. The Respondent determined the Appellant did not demonstrate a continuing intention to request reconsideration, because there was a 454 day gap between the decision and the request for reconsideration, with little communication from the Appellant. The Respondent also noted the Appellant established a new claim for benefits on May 21, 2017, and did not express an intention to appeal the decision of May 4, 2016, at that time.

[13] The Appellant made a second reconsideration request, and testified at the hearing that he did so because he asked a Service Canada agent how to appeal the reconsideration decision and was told to file a second request. The Appellant stated he was provided the appeal form, and it was the same reconsideration request form he had already completed. He stated that he noted this to the Service Canada agent, who advised him it was the correct form. On the second

reconsideration request, the Appellant stated he had spoken with a representative of Service Canada in 2016 who gave him incorrect information and told him he was not able to pursue a claim for benefits because he had voluntarily left his job and was now reemployed. The Respondent wrote to the Appellant and advised it could not reconsider the decision again because it had already rendered a decision on the issue and the additional information provided was not considered to be new facts, or the decision was correctly made, or made with the knowledge of the material facts provided.

[14] There is no evidence that the Respondent considered any irrelevant facts, or made a decision in bad faith, or in a discriminatory manner (*Canada (Attorney General) v. Purcell*, A-694-94). However, the Respondent made a decision without considering the additional fact that the Appellant contacted Service Canada after his request for reconsideration yielded a negative result and was told he could do nothing further because he voluntarily left his employment. This is relevant evidence which was not considered when the original decision was made, thus the Tribunal finds the Respondent's discretion was not exercised judicially.

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))

[15] 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, supra.)*

[16] The Respondent's decision relative the Appellant's initial application for benefits effective March 27, 2016, was made on May 4, 2016. The Appellant made another initial application for benefits, effective May 21, 2017, on June 1, 2017. Prior to receiving a decision on the second claim, the Appellant made a request on August 31, 2017, for reconsideration of the May 4, 2016, decision. The Respondent wrote to the Appellant on September 20, 2017, and advised his request for reconsideration was made past the 30 day period allotted in the Regulations and the decision would not be reconsidered. The Appellant made a second reconsideration request on October 11, 2017, which the Respondent denied to adjudicate by letter dated November 2, 2017, because it had already rendered a decision in the matter. On

November 10, 2017, the Appellant appealed to the Social Security Tribunal (Tribunal) to overturn the Respondent's decision.

[17] The Appellant stated he could not recall on what date he spoke with the Service Canada agent, but believed based on his conversation that he had no recourse to request reconsideration because he had voluntarily left his employment and was re-employed at the time he contacted Service Canada. The Respondent's records state the Appellant advised that he did not "bother" pursuing the decision, and confirm that he stated he was told by a CRA agent to enquire about retroactively appealing the decision. The Respondent also submitted the Appellant received notice of the decision on May 4, 2016, but did not start his new job until May 22, 2016, so had 18 days to make requests as to whether he could request reconsideration. The Appellant admitted to the Tribunal that it was "foolish" on his part to not investigate the Respondent's decision further, but he did not believe it mattered at that point because he was already re-employed and not in need of EI benefits. The Respondent submits the Appellant was aware of the May 4, 2016, decision and delayed until August 31, 2017, to make a request for reconsideration, which was a personal choice made because he had obtained new employment. The Respondent also submits the Appellant has not provided reasonable explanation for why he delayed more than a year after the decision was issued in requesting reconsideration. Further, the Respondent notes that whether or not the Appellant received bad advice, or may have misunderstood the advice, the decision letter of May 4, 2016, clearly and in bold font advised him he had 30 days to submit a request for reconsideration if he disagreed with the decision.

[18] 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). The Appellant has demonstrated a continuing intention to request reconsideration since he became aware that he was able to pursue it. The Appellant stated in his first request for reconsideration that the May 2016, decision was communicated verbally to him, and he stated at the hearing that he asked a Service Canada agent if there was anything else he could do. He was advised that he had no recourse. The Appellant stated he was back at work and did not pursue the matter because he believed he had no appeal option, based on the conversation with the Respondent's own agent.

[19] It is reasonable to conclude the Appellant may not have known he had a right to request reconsideration: while it may have been in bold on the decision letter, the Appellant had already spoken to a Service Canada representative and received the decision. The Tribunal finds as fact that the Appellant did not know he had a right to request reconsideration based on his statement at the hearing that he did not know he could have requested reconsideration until he spoke with a CRA agent in 2017. It is not unreasonable to conclude that he did not note the section of the letter which advised of his reconsideration rights. The Appellant submitted that he received notice of the Respondent's May 4, 2016, decision by telephone, and it is not unreasonable to believe he did not read the decision letter as it served to confirm information he thought he had already received. The Appellant has also provided a reasonable explanation for requesting a longer period to make a reconsideration request because he believed he was advised by the Respondent's agent via telephone that he had no right of appeal, and thus did not request reconsideration until he became aware of his eligibility.

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))

[20] Courts have not yet considered the definition of "reasonable chance of success" in the context of subsection 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).

[21] The Tribunal finds there is a reasonable chance of success and it is not obvious the appeal is bound to fail because the Appellant testified that he originally made an application for EI benefits because he left his job based on the promise of a new job. This job offer was rescinded, leaving the Appellant with no employment. As there may be a basis for the Appellant's voluntary leaving of his job to pursue another opportunity, the appeal is not bound to fail.

[22] The Tribunal finds that no prejudice is likely to be caused to the Respondent or another party by allowing further time to request 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

[23] 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 because it failed to consider all of the relevant evidence. The Tribunal, in exercising this discretion, finds 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:	C. B., Appellant

ANNEX

THE LAW

Employment Insurance Act

Reconsideration Request Regulations