



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *D. D. v. Canada Employment Insurance Commission*, 2018 SST 362

Tribunal File Number: GE-17-3618

BETWEEN:

D. D.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Katherine Wallocha

HEARD ON: March 28, 2018

DATE OF DECISION: May 1, 2018

DECISION

[1] The appeal is dismissed. The Tribunal finds that the claimant should not be granted an extension of time to request a reconsideration of the Commission's decision.

OVERVIEW

[2] The claimant was in receipt of EI benefits when he found part-time work. He completed his claimant's reports but he reported his rate of pay and not his gross pay. The Commission informed the claimant by letter dated September 14, 2016, that his earnings were allocated to his claim resulting in an overpayment. A penalty and violation were also imposed. The Commission received a request for reconsideration on September 27, 2017. The Commission refused to reconsider their decision because more than 30 days had passed since the decision was communicated to the claimant. The claimant appealed to the Social Security Tribunal (Tribunal).

PRELIMINARY MATTERS

[3] The claimant informed the Tribunal at the beginning of the hearing that he had a death in the family and he was not in his area of residence. He stated that while he read the appeal docket, it was a while ago and he did not have the docket with him. The claimant was asked if he was comfortable continuing with the hearing and he stated that he wanted to continue.

ISSUE

1. When was the Commission's decision communicated to the claimant?
2. Did the Commission exercise its discretion in a judicial manner in denying the claimant's request to extend the 30-day period to make a Request for Reconsideration?

ANALYSIS

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

[5] Where the Commission has denied an extension of time to request a reconsideration under section 1 of the *Reconsideration Request Regulations* (Reconsideration Regulations), the only question before the Tribunal is whether the Commission exercised its discretion judicially

in refusing the extension of time. The issues of the claimant's overpayment, penalty and violation are not questions before the Tribunal. The Tribunal can only intervene if it determines that the Commission did not exercise its discretion judicially.

[6] The Tribunal must first determine if the claimant's request for reconsideration was in fact filed late. A claimant can request that the Commission reconsider a decision within 30 days after the day on which the decision was communicated to the claimant under paragraph 112(1)(a) of the *Employment Insurance Act* (EI Act).

1. When was the Commission's decision communicated to the claimant?

[7] The responsibility to inform the claimant of decisions about their claim for EI benefits and its effects lies with the Commission. The burden of proving that the communication was received by the claimant rests with the Commission (*Bartlett v. Canada (Attorney General)*, 2012 FCA 230).

[8] The Tribunal finds that the decision dated September 14, 2016, was communicated to the claimant on November 15, 2016.

[9] The Tribunal recognizes that a lot of time has passed making it difficult for the claimant to remember exactly when the decision letter was received. He testified that he remembers receiving "a group of letters" around the end of his claim. The claimant's benefit period was established on August 2, 2015, and he remembers receiving five extra weeks of EI benefits under the *Budget Implementation Act*, 2016. A benefit period is normally 52 weeks and adding five extra weeks would end his claim on September 3, 2016, before the decision letter was sent.

[10] The Commission stated that there is no record of mail being sent to the claimant undelivered. In its representations to the Tribunal, the Commission stated that the claimant was aware of the decision dated September 14, 2016, and he delayed 348 days until September 27, 2017, to make a request for reconsideration. There is no information in the appeal docket to show if the Commission communicated the decision verbally to the claimant and the Commission has not provided evidence to indicate how it knew the decision dated September 14, 2016, was communicated to the claimant.

[11] The claimant submitted his Request for Reconsideration stating that he was verbally communicated the decision on November 15, 2016. He testified that after he received the letters, he contacted the Commission for an explanation. He further stated that he spoke to the Commission a few times and was told when he had called to talk to them about the decision. The Tribunal finds that the claimant received the decision letter and contacted the Commission for clarification; therefore, he was verbally communicated the decision on November 15, 2016. He filed his request on September 27, 2017, more than 10 months late.

2. Did the Commission exercise its discretion in a judicial manner in denying the claimant's request to extend the 30-day period to make a Request for Reconsideration?

[12] A decision by the Commission regarding an extension of time to request a reconsideration is discretionary (*Daley v. Canada (Attorney General)*, 2017 FC 297). Therefore, the Commission's decision can only be varied if the Commission did not exercise its power judicially (*Canada (Attorney General) v. Knowler*, A-445-95). A discretionary power is not exercised judicially if it can be shown that the decision maker: acted in bad faith; acted for an improper purpose or motive; took into account an irrelevant factor; ignored a relevant factor; or acted in a discriminatory manner (*Canada (Attorney General) v. Purcell*, 1 FC 644).

[13] To grant an extension of time to request a reconsideration under subsection 1(1) of the Reconsideration Regulations, the Commission must be satisfied that the following two factors are met before granting the extension:

- a) The claimant must show that there was a reasonable explanation for the delay in making the request; and
- b) He must demonstrate a continuing intention to request the reconsideration.

[14] Further, if the request is made after the 365-day period after the day on which the decision was communicated to the person, is made by a person who submitted another application for EI benefits after the decision was communicated, or is made by a person who has requested the Commission to rescind or amend the decision, then according to subsection 1(2) of the Regulations, the Commission must also be satisfied that

- c) the request for reconsideration has a reasonable chance of success; and

- d) no prejudice would be caused to the Commission or a party by allowing a longer period to make the request.

[15] The Tribunal finds that the Commission did not exercise its discretion judicially.

[16] The Commission stated that the claimant delayed 348 days to submit his request for reconsideration. The Tribunal submitted a request to investigate and report under section 32 of the *Social Security Tribunal Regulations* (SST Regulations) for clarification about the period of the delay and requested submissions regarding the two factors under subsection 1(2) of the Reconsideration Regulations. The Commission responded that the claimant had a 30-day period to make the request; therefore, the delay in making a request for reconsideration commences 31 days after the date of the letter sent on September 14, 2016. However, paragraph 1(2)(a) of the Reconsideration Regulations does not speak to a “period of delay”. Rather, it specifies that the Commission must be satisfied that the request for reconsideration has a reasonable chance of success and no prejudice would be caused to the other party if the request for reconsideration is made after the 365-day period after the day on which the decision was communicated to the person.

[17] While the Tribunal does not agree with the Commission’s interpretation of the delay, the Tribunal finds that the Commission correctly submitted that claimant delayed less than 365 days from the date he was communicated the decision on November 15, 2016, to when he submitted the request for reconsideration on September 27, 2017. However, the claimant testified at the hearing that following the decision letter dated September 14, 2016, he submitted another application for EI benefits around August 2017. The Tribunal requested that the Commission investigate and report whether the claimant submitted another application for EI benefits. The Commission confirmed that the claimant filed another application on August 31, 2017, but did not provide submissions on subsection 1(2) of the Reconsideration Regulations.

[18] The Tribunal finds that the Commission ignored a relevant factor, made an error in law and did not apply the correct test. The Commission was asked to provide submissions regarding the factors outlined in subsection 1(2) of the Reconsideration Regulations when the Tribunal requested clarification of the time of the delay. Following the hearing, the Commission confirmed that the claimant filed another application after the decision was communicated, but

did not provide submissions on the factors set out in subsection 1(2) of the Regulations. From this, the Tribunal finds that the Commission did not exercise its discretion judicially.

[19] Since the Tribunal finds that the Commission did not exercise its discretion judicially, the Tribunal must consider whether the claimant met the requirements in section 1 of the Reconsideration Regulations in order to determine if the claimant should be allowed an extension to the 30-day deadline to request a reconsideration of the Commission's decisions.

a) Did the claimant have a reasonable explanation for the delay?

[20] The Tribunal finds that the claimant has not provided a reasonable explanation for the delay. The Tribunal recognizes that a lot of time has passed and it can be difficult to remember exactly when he received a letter or mailed a form to the Commission. The Tribunal accepts that the claimant submitted a request for reconsideration after learning of the decision in November 2016. However, the Tribunal is not convinced that the claimant did not know the request was not received and he did not follow up with the Commission until a subsequent application for EI benefits was denied in August 2017.

[21] The claimant stated that he received the decision letter and contacted the Commission for an explanation. The Tribunal has already determined that this was on November 15, 2016.

[22] The claimant testified that he completed the request for reconsideration around the time he learned of the decision, and mailed it to the Commission. When he did not hear anything, he thought the issue was resolved and everything was fine. He then applied for EI benefits again in August 2017, and he learned that the issue was not resolved. He testified that he was told to complete the paperwork again and drop it off at Service Canada which he confirmed he did on September 4, 2017. He stated that he called and learned that it too was not received so he mailed a third request for reconsideration and he sent it priority post with tracking. This time it was successfully received by the Commission on September 27, 2017.

[23] However, a call log recorded on September 20, 2017, indicates that the claimant contacted the Commission stating that he mailed the request for reconsideration on September 4, 2017, and he wanted to confirm it was received. He was told that it was not received. In the request for reconsideration that was received, he stated that he submitted this form before but

was told that it was not received. This statement leads the Tribunal to believe that the claimant submitted the form once before.

[24] The claimant was interviewed by the Commission on October 13, 2017. The claimant informed the Commission that he had submitted a request for reconsideration twice in the past but both seemed to have gone missing. He stated that he submitted one he thinks around September 2016 and mailed it to an address he was given over the phone. He then stated that he submitted one at his local Service Canada office around January 17, 2017. He stated that the form was the same both times as the one he submitted in September 2017. He stated that he did not follow up on those previous requests because he stopped getting letters and thought his request took care of everything.

[25] The Commission informed the claimant of all of the dates of the notices of debts and monthly statements of account that were sent out to him which would have indicated that everything was not taken care of and there was still an outstanding balance. The claimant responded that he might have gotten a couple of those bills.

[26] Further, the claimant stated that he was disputing the audit decisions he received that were made on July 27, September 14, October 12, November 15, 2016, and January 23, 2017. The Commission advised the claimant these were related to allocations made as the employer was reporting out to the Commission that he was working for periods at a time and each of their reports generated audit decisions.

[27] The Commission stated in the Record of Decision that with the five audit letters, there were also 31 notices of debt and monthly statements of account that were sent until the request for reconsideration was filed. The claimant testified that he does not remember receiving 31 letters because that would have caused a red flag and he would have called the Commission. He stated that he received four or five letters and those were the ones in the group that he received at the end of his claim.

[28] The claimant moved in April 2017; however, he testified that he had been living with a friend whom he continued to visit often so he was still getting his mail. The Commission stated that 20 notices of debt were mailed to the claimant after the claimant moved. The claimant

testified that he does not believe that he received these 20 letters because he went to his friend's house every other day as it was a close friend.

[29] In the Notice of Appeal date stamped received on November 18, 2017, the claimant stated that he submitted his request for reconsideration before his claim ended. He was told his original documents were not received so he went to his local Service Canada office. At this time he stopped receiving letters and figured it was all taken care of.

[30] The Tribunal attempted to determine the timeline at the hearing. The claimant testified that he mailed his request the first time, then brought it into Service Canada, then sent it registered mail. The claimant confirmed he mailed the first one and it was determined that this was around November 15, 2016. He stated that he dropped off the second one on September 4, 2017, and mailed the last one that was received on September 27, 2017. When asked to explain his statement to the Commission that he sent another request to the Commission in January 2017, he responded that he might have sent in four requests.

[31] The claimant further stated in the Notice of Appeal that he was admitted to the hospital on August 18, 2017, and he was dismissed from his employment. He testified that he was speaking with a counsellor at the hospital who assisted him in applying for EI benefits and this is when he learned that he did not qualify for benefits because the violation imposed required that he work more hours. The claimant stated that he was in the hospital for four weeks. The Tribunal asked the claimant how he hand delivered the request for reconsideration on September 4, 2017, when he was in the hospital; he stated that his girlfriend mailed it in for him.

[32] The Tribunal does not find the claimant's statements and testimony credible that he submitted three and possibly four requests for reconsideration until one was finally delivered successfully. While it is reasonable that one letter was lost in the mail, the Tribunal does not find it credible that the request the claimant said he hand delivered to Service Canada was not received. Further, the claimant received the five audit letters; therefore, it is reasonable to conclude that he continued to receive the statements of account and notices of debt the Commission was sending regularly. From this, the Tribunal finds that the claimant had to know that the issue was not resolved but he chose to ignore it until he was subsequently denied further EI benefits.

b) Has the claimant demonstrated a continuing intention to request a reconsideration?

[33] A claimant is expected to pursue the appeal as diligently as could reasonably be expected of an individual (*Grewal v. Canada (Attorney general)*, 85-A-55).

[34] The Tribunal finds that the claimant has not demonstrated a continuing intention to request a reconsideration. While the Tribunal is willing to accept that the claimant did submit a request for reconsideration in November 2016, this request was not received. Since the claimant continued to receive notices of debt and statements of account, he had to know that the issue was not resolved but he chose not to follow up or make efforts to seek resolution. Therefore, the Tribunal finds that the claimant did not pursue the appeal as diligently as could reasonably be expected.

CONCLUSION

[35] The legal test requires that all four factors set out in section 1 of the Reconsideration Regulations be met in order for the claimant to be granted an extension of time to request a reconsideration by the Commission. Since the claimant has not met the first two factors, the Tribunal finds that the claimant's appeal cannot succeed.

[36] The Tribunal concludes that the claimant's request for an extension of time to the 30-day period to make a request for reconsideration under subsection 112(1) of the EI Act is refused.

[37] The appeal is dismissed.

K. Wallocha

Member, General Division - Employment Insurance Section

HEARD ON:	March 28, 2018
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	D. D., the claimant

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 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*.