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

Citation: *M. V. v Canada Employment Insurance Commission*, 2019 SST 2

Tribunal File Number: AD-18-621

BETWEEN:

M. V.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Janet Lew

DATE OF DECISION: January 2, 2019

Canada

DECISION AND REASONS

DECISION

[1] The appeal is allowed, and the matter is to be returned to the General Division for a redetermination.

OVERVIEW

[2] At its very root, this case is about whether the Respondent, the Canada Employment Insurance Commission (Commission), could rely on verbal communications to communicate its reconsideration decision to the Appellant, M. V. (Claimant), or whether it was required to give written notice. The issue of notice may determine whether the Claimant filed her notice of appeal within a year.

[3] The Claimant received Employment Insurance sickness benefits, but the Commission determined that she had been overpaid. The Commission maintained this decision on reconsideration, but it reduced the amount of the overpayment. The Commission verbally communicated its decision to the Claimant and then sent her a letter dated June 28, 2017, in which it confirmed its reconsideration decision and any recourse rights she had to the Social Security Tribunal.[1]

[4] The Claimant appealed the reconsideration decision to the General Division by filing a notice of appeal with the Social Security Tribunal on July 3, 2018.[2] The General Division found that the Commission had verbally communicated its reconsideration decision to the Claimant on June 27, 2017. The General Division found that the Claimant was late by more than a year when she filed her appeal on July 3, 2018, and that it therefore did not have any discretion to extend the time for filing the notice of appeal. It found that it did not have any discretion because the Claimant brought her appeal more than one year after the day on which the Commission had communicated the reconsideration decision.

[5] The Claimant appeals the General Division's decision. The Commission submits that the evidence before the General Division is inconclusive as to when it might have communicated the

[1] Commission's reconsideration decision dated June 28, 2017, at pages GD3-38 to GD3-39.
[2] Notice of appeal, filed July 3, 2018, at GD2.

reconsideration decision and any recourse rights to the Claimant. The Commission submits that the General Division therefore erred in law and based its decision on an erroneous finding of fact in a perverse or capricious manner or without regard to the material before it. The Commission requests that the Appeal Division return the matter to the General Division for a redetermination on the issue of whether the Claimant filed her appeal within a year that the Commission had communicated its reconsideration decision to her.

[6] I am allowing the appeal and agreeing with the Commission's request to return the matter to the General Division, but for different reasons.

ISSUE

[7] Did the General Division err in law when it determined that the Commission could verbally communicate its reconsideration decision to the Claimant?

ANALYSIS

[8] Section 58(1) of the *Department of Employment and Social Development Act* (DESDA) sets out the grounds of appeal as being limited to the following:

> (a) The General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;
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> (b) The General Division erred in law in making its decision, whether or not the error appears on the face of the record; or
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> (c) The General Division based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

[9] The Commission submits that the General Division erred under section 58(1)(b) and (c) of the DESDA when it determined that the Claimant had filed a notice of appeal more than one year after the Commission had communicated its reconsideration decision to her.

Did the General Division err in law when it determined that the Commission could verbally communicate its reconsideration decision to the Claimant?

[10] In the case of a decision made under the *Employment Insurance Act*, a claimant must file an appeal with the General Division within 30 days after the day on which it is communicated to a claimant. Under section 52 of the DESDA, the General Division may allow further time within which a claimant files or brings an appeal, but a claimant is not permitted to bring an appeal more than one year after the day on which the Commission communicated its reconsideration decision. An appeal cannot proceed if a claimant files it beyond the one-year timeframe.[3]

[11] For this reason, the Commission asserts that the date on which it communicated its reconsideration decision to the Claimant is critical to a finding of whether the appeal was filed beyond the legislated timeframe permitted under section 52(2) of the DESDA.

[12] The Commission argues that the General Division erred by failing to verify when the Claimant received the reconsideration decision—even if the Commission had verbally communicated it to her. The Commission further argues that, without verifying when the Commission had communicated its reconsideration decision, the General Division could not possibly have properly determined whether the Claimant was on time when she filed her appeal with the Tribunal.

[13] The Commission asserts that it communicated its reconsideration decision to the Claimant—both verbally and in writing. The Commission argues that section 53 of the *Employment Insurance Act* applies. That section allows the Commission to notify a person of any decisions "in such manner as it considers adequate." The Commission relies on this provision and argues that verbal communications may constitute communication for the purposes of communicating reconsideration decisions. It rejects any suggestion that it is required to communicate any decisions in writing (but it does so in practice). The Commission submits that the evidence before the General Division, however, is inconclusive as to when it may have verbally communicated its reconsideration decision and information regarding any recourse rights to the Claimant.

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[3] *Fazal v Canada (Attorney General)*, 2016 FC 487.

[14] Notwithstanding these submissions, I do not see that section 53 of the *Employment Insurance Act* applies. That section applies when the Commission is required to notify a person of a decision "under this Part" of the *Employment Insurance Act*. Part I of the *Employment Insurance Act* deals with unemployment benefits. Section 52(1) falls within Part I and deals with reconsideration of a claim. It reads, "Despite section 111, but subject to section (5), the Commission may reconsider a claim for benefits within 36 months after the benefits have been paid or would have been payable."

[15] Section 52 does not require the Commission to notify a person of a decision. At most, it enables the Commission to reconsider a claim for benefits. Section 112, on the other hand, which falls under Part VI – Administrative Provisions, requires the Commission to reconsider its decision if a claimant makes a request under section 112(1). Section 112 states:

> **(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
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> **(a)** 30 days after the day on which a decision is communicated to them; or
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> **(b)** any further time that the Commission may allow.
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> **(2)** The Commission must reconsider its decision if a request is made under subsection (1).

[16] Because section 53 does not apply in the factual circumstances of this case, the Commission cannot rely on verbal communications to effect notice of its reconsideration decision on the Claimant. Indeed, the *Employment Insurance Act* does not expressly stipulate or provide for verbal communications of its reconsideration decisions or for any other manner of communication that the Commission may consider adequate.

[17] I find support for this interpretation in the Commission's reconsideration decision, where it wrote, "**You have 30 days, following the receipt of this notice** to file an appeal using the form provided by the Tribunal." Clearly, the Commission contemplated that, although it had verbally informed the Claimant of its decision on June 27, 2017, written notice was still required. In other words, the Claimant would have 30 days after she received the reconsideration letter

dated June 28, 2017, within which she could file an appeal. Otherwise, if the Commission was going to rely on verbal communications and if it was going to hold the Claimant to a 30-day appeal period starting on June 27, 2017, surely it would have expressly set that out in its letter.

[18] If I were to accede to the Commission's arguments that it could rely on section 53 of the *Employment Insurance Act* and allow for verbal communications of its reconsideration decision, this would be inconsistent with the Commission's reconsideration letter of June 28, 2017.

[19] I find that the General Division erred in law in finding that the Commission could verbally communicate its reconsideration to the Claimant.

DISPOSITION

[20] Under section 59(1) of the DESDA, the Appeal Division may dismiss the appeal; give the decision that the General Division should have given; refer the matter back to the General Division for reconsideration in accordance with any directions that the Appeal Division considers appropriate; or confirm, rescind, or vary the decision of the General Division in whole or in part.

[21] The Claimant indicated on the notice of appeal that she filed with the General Division that she could not recall when she received the reconsideration letter dated June 28, 2017. It is appropriate to return the matter to the General Division for a redetermination because it is imperative that the General Division clarify when the Commission might have communicated its reconsideration letter dated June 28, 2017, to the Claimant, before it can determine whether the Claimant brought her notice of appeal within one year. It is insufficient for clarification purposes to suggest that the appeal appears late and to "want to hear [the Claimant's] position on that."[4]

[22] Furthermore, the General Division did not address the merits of the Claimant's appeal, namely, whether the Claimant's long-term disability payments constituted earnings and, if so, how they should be allocated. As such, I do not have any jurisdiction to address those issues.

[4] At approximately 10:30 of the audio-recording of the General Division hearing.

CONCLUSION

[23] The appeal is allowed, and the matter is to be returned to the General Division for a redetermination.

Janet Lew
Member, Appeal Division

METHOD OF PROCEEDING:	On the record
SUBMISSIONS:	M. V., Appellant Isabelle Thiffault, Representative for the Respondent