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

Citation: *M. N. v Canada Employment Insurance Commission*, 2019 SST 275

Tribunal File Number: GE-19-473

BETWEEN:

M. N.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Charlotte McQuade

HEARD ON: February 15, 2019

DATE OF DECISION: March 8, 2019

Canada

DECISION

[1] The appeal is allowed.

OVERVIEW

[2] The Appellant was terminated from her employment from a non-profit agency on March 18, 2016 where she had worked since 1987. She was provided with 8 weeks' pay in lieu of notice as required by the *Employment Standards Act, 2000,* from her employer. After the 8 weeks had ended, the Appellant filed a claim for regular Employment Insurance (EI) benefits on July 5, 2016 and her benefit period was established effective May 15, 2016. The Appellant sought legal assistance regarding her termination and entered into a Minutes of Settlement (the "Minutes") with her employer on March 27, 2017. The Minutes provided that the employer would pay the Appellant a lump sum of money, from which they would withhold and deduct the $6337.00 in EI benefits the Appellant had received from the Respondent. The Minutes provided that the employer would directly pay the Respondent that sum upon being provided with a Notice of Debt. The amount of the lump sum payment to be paid to the Appellant was calculated based on what her salary payments from the date of termination on March 18, 2016 to the date of the signing of the Minutes on March 27, 2017 would have been, plus outstanding vacation pay, less all statutory deductions, less an $8000.00 retiring allowance, less the 8 weeks' pay in lieu of notice and less the $6337.00 withholding amount to be repaid to the Respondent. In addition to the lump sum payment, the Minutes provided the Appellant was to be paid a salary continuance from March 27, 2017 to March 19, 2018.

[3] The Appellant requested a Notice of Debt from the Respondent to give to the employer. In response, the Respondent issued a decision letter dated June 28, 2017. The letter stated that the Respondent was unable to pay the Appellant benefits from May 15, 2016 because she was on a salary continuance from her previous employment and therefore could not be considered unemployed. As well, a Notice of Debt for $6337.00 paid to the Appellant from May 15, 2016 was issued in the Appellant's name on July 1, 2017.

[4] The Appellant provided the Notice of Debt to the employer. However, unbeknownst to the Appellant and without her permission, rather than repaying the Respondent the $6337.00

withheld from the lump sum payment owing to the Appellant, the employer negotiated a monthly payment schedule of $130.00 with the Canada Revenue Agency (CRA). On August 8, 2017, the employer advised the Appellant that due to financial problems, it could not pay her the lump sum to her that had been agreed to in the Minutes. An amended Minutes of Settlement was then agreed to, in which the lump sum (less all the deductions including the deduction for the EI repayment) previously agreed instead be paid to the Appellant by way of a lump sum of $10,000, with the remainder of the lump sum amount to be paid by salary continuance payments. These payments were to starting immediately following the payment of the final salary continuance payment, separately agreed to in the Minutes, on March 19, 2018.

[5] The Appellant was only paid salary continuance payments from May 15, 2017 to April 30, 2018. At that point, only a fraction of the lump sum payment had been made, those payments to have started on March 19, 2018. The employer stopped the salary continuance payments due to financial trouble. The debt owing to the Respondent still has not been paid in full by the employer and remains in the Appellant's name. As of December 22, 2018, there was still $4647.00 owing with respect to the EI repayment.

[6] The Appellant repeatedly tried to get the CRA to remove her name from the debt, the employer already having withheld the amount to be repaid from her and having agreed to repay the Respondent directly. She was eventually redirected to the Respondent and on September 18, 2018, the Appellant filed a request for reconsideration of the June 28, 2017 decision letter. On December 10, 2018, the Respondent issued a decision refusing to reconsider the decision because the Appellant's reason for delay did not meet the requirements of the *Reconsideration Request Regulations* (R.R. Regulations). The Appellant appealed this decision to the Tribunal.

ISSUES

[7] Issue 1: Was the Appellant's reconsideration request submitted late?

[8] Issue 2: Did the Respondent exercise its discretion in a judicial manner when it denied the Appellant an extension of time to pursue a reconsideration request?

[9] Issue 3: If not, should the Appellant's late reconsideration request be permitted to proceed?

ANALYSIS

[10] A claimant has 30 days after a decision is communicated to him or her to make a request to the Commission for a reconsideration of that decision. The Commission may allow a further time for a request for reconsideration to be made (Subsection 112(1) of the *Employment Insurance Act* (Act).

[11] The Commission may allow a longer period if the Commission is satisfied there is a reasonable explanation for requesting a longer period in making the request for reconsideration and the person has shown a continuing intention to request a reconsideration (Subsection 1(1) of the R.R. Regulations).

[12] In some cases, as set out in subsection 1(2) of the R.R. Regulations, the Commission must also be satisfied the request for reconsideration has a reasonable chance of success and no prejudice would be caused by allowing a longer period. This is where the request for reconsideration is made after the 365-day period after the day on which the decision was communicated to the person or the request for reconsideration is made by a person who submitted another application for benefits after the decision was communicated to the person; or is made by a person who has requested the Commission to rescind or amend the decision.

[13] The Commission's decision whether to allow more time to request a reconsideration is discretionary (*Daley v. Attorney General of Canada*, 2017 FC 297). As such, the Tribunal can only intervene if the Commission has not acted in a judicial manner in exercising its discretion.

[14] Acting in a judicial manner means acting in good faith, for proper purpose and motive, considering all the relevant factors, ignoring any irrelevant factors and acting in a non-discriminatory manner (*Attorney General of Canada v. Dunham* (1996), A-708-95 (F.C.A.); *Attorney General of Canada v. Purcell* (1995), A-694-94 (F.C.A.)).

[15] The Respondent has the burden to show it acted in a judicial manner (*Canada (Attorney General) v. Gagnon*, 2004 FCA 351). If the Tribunal finds the Respondent did not exercise its discretion judicially, then the Tribunal must decide whether the Appellant should be permitted an extension of time to pursue her request for reconsideration. The Appellant then has the burden of proof to show she met the criteria in the R.R. Regulations for an extension.

Issue 1: Was the Appellant's reconsideration request submitted late?

[16] Yes. The Appellant's reconsideration request was submitted late.

[17] The Appellant relates in her request for reconsideration dated that she received the June 28, 2017 decision letter on July 1, 2017. She testified she received it on or about that time.

[18] I find the Respondent's initial decision was communicated to the Appellant on July 1, 2017. The reconsideration request was due within 30 days of that date (paragraph 112(1)(a) of the Act). As such, it was due by July 31, 2017. The Appellant did not file her request for reconsideration until September 18, 2018. It was, therefore, filed late.

Issue 2: Did the Respondent exercise its discretion in a judicial manner when it denied the Appellant an extension of time to pursue a reconsideration request?

[19] No. I find the Appellant's confusion as to the process to follow to object to the creation of the overpayment in her name was a relevant circumstance that the Respondent did not consider when it made its decision to deny the Appellant's request to extend the 30-day period to make a request for reconsideration. I also find the Respondent misapplied the test in section 1(1) of the R.R. Regulations.

[20] In determining whether the Respondent exercised its discretion in a judicial manner, the Tribunal must decide whether the Respondent acted in good faith, for proper purpose and motive, took into account any relevant factors, ignored any irrelevant factors and acted in a non-discriminating manner. (*Attorney General of Canada v. Dunham* (1996), A-708-95 (F.C.A.); *Attorney General of Canada v. Purcell* (1995), A-694-94 (F.C.A.))

[21] The Appellant testified that she was laid off by her employer, a non-profit agency, on March 18, 2016 and paid 8 weeks of statutory notice. She then consulted with a lawyer and engaged in negotiations with her employer. The Appellant applied for EI benefits and was paid benefits from the end of the 8-week notice period, beginning on May 15, 2016. The Appellant related that when she finally settled with her employer on March 27, 2017, the employer would not sign the settlement agreement until she had obtained a "Notice of Debt" from the Respondent so the employer could repay the Respondent directly for EI monies paid to the Appellant. In that

regard the Minutes stated: “Ms. Newrick agrees to provide the Notice of Debt to the Employer’s legal counsel so that the EI repayment can be made directly by the Employer through a deduction from the lump-sum payment described in paragraph 2” (GD3-12).

[22] The Appellant sought a Notice of Debt from the Respondent. The Appellant related that when she did this, this prompted the Respondent to issue the initial decision letter of June 28, 2017 finding that she was not entitled to benefits from May 15, 2016 due to receipt of salary continuance. A Notice of Debt dated July 1, 2017 showing she owed $6337.00 was also issued. The Appellant provided this to her lawyer who provide it to her employer.

[23] The Appellant testified that soon after the July 1, 2017 Notice of Debt was issued, she got a monthly statement showing the debt was still in her name and that the employer was repaying the debt at a rate of $130.00 per month. She continued to get monthly statements from the CRA showing the $130.00 payments and the outstanding balance. The Appellant testified that the employer had arranged with the CRA to pay back the debt at $130.00 per month, rather than paying the debt completely off with the lump sum of money it had withheld for that purpose from the lump sum she was to be paid. The Appellant testified that she had not been advised by the CRA or the employer of this change to the agreement nor had she agreed to it.

[24] The Appellant explained as soon as she saw that the $130.00 payments were being made by the employer, she directly contacted the CRA and questioned this. However, she was told by the CRA that the employer was allowed to do this. The Appellant testified that she did not contact the Respondent at this time to object to the June 28, 2017 decision as the Notices of Debt were coming each month from the CRA and she thought that was who she had to deal with. The Appellant related that she then tried to resolve the matter with her lawyer who went back and forth with the employer but the employer would take long periods of time before responding to her lawyer. The Appellant related that there was delay as it was a process of her trying to figure out how to deal with this situation. The Appellant testified that she called multiple departments of the CRA trying to get the Notice of Debt out of her name and ultimately was redirected back to the Respondent and told she had to get a reconsideration form and file it, which she then did.

[25] The Appellant explained her lawyer had never heard of a situation where an employer collects an EI remittance and does not pay it back. The Appellant advised that the employer had

gone into financial difficulty and they had to renegotiate the original Minutes agreed to. She never did receive the lump sum of money she was to receive. On August 8, 2017 the employer proposed and she agreed to, that instead of getting the full lump sum agreed to, less the other specified amounts and the amount withheld for EI repayment, she was to get a lump sum of $10,000.00 and the rest was to be paid by salary continuance, once the other salary continuance payments owed to her as per the original Minutes were complete. The Appellant testified that the employer did not pay her the $10,000.00 either. She was paid salary continuance from May 15, 2017 until April 30, 2018 at which point those payments stopped because the employer was unable to continue paying due to its financial problems.

[26] The Appellant testified that this is an extremely complex situation and it took some time for her to determine what steps needed to be taken. No one understood her situation. Because the employer had made this side arrangement with the CRA and she kept getting notices from the CRA, the process as to how to object to the fact the debt is still in her name was unclear to her.

[27] The Appellant testified that this situation is causing her great financial difficulty. Because the debt is still in her name with the CRA, she is unable to file her tax returns, as any potential refund will be taken by the CRA to satisfy the outstanding debt. She points out that she did not even get the salary payments that gave rise to the overpayment because the employer never paid her the lump sum that was agreed to and only paid a partial amount of the salary continuance payments.

[28] The Respondent sets out its reasons for denying the Appellant an extension of time to pursue her reconsideration request in its Record of Decision dated December 10, 2018 (GD3-39).

[29] I note that the Respondent did identify the correct legal test as set out in subsection 1(1) and 1(2) of the R.R. Regulations. Both sections had to be considered given the delay in filing the reconsideration request exceeded 365 days. The Respondent identified that it had to be satisfied that the Appellant had a reasonable explanation for the delay in making her request and a continuing intention to request a reconsideration. The Respondent noted it also had to be satisfied that the request for reconsideration must have 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.

[30] However, I find that the Respondent incorrectly applied the test in subsection 1(1) as to whether the Appellant had a reasonable explanation for the delay. The Respondent notes that the Appellant was aware of the Respondent's decision dated June 28, 2017 and delayed until September 18, 2018 to make a request for reconsideration which was a delay of 417 days.

[31] The Respondent determined that the Appellant had not provided a reasonable explanation for the delay in requesting the reconsideration because as of October 2017 she was aware that the employer was repaying the established debt in monthly instalments and that the debt was in her name. The Respondent states that the Appellant, however, took no action to reconsider this with the Respondent until May 2018. The Respondent noted that the Appellant did place a complaint with CRA on October 10, 2017 and was advised the debt was created under her name, as she was the one who received the money from Service Canada; therefore, legally she was the one to repay the debt. The Respondent noted that the Appellant was advised of the same by the Commission in June of 2018 as well. The Respondent went on to note that the fact that the Appellant submitted the same demand in a request for reconsideration does not change the answer she has been given multiple times or her liability of repaying the debt. It is initially the employer's responsibility to make the appropriate deductions and remit them to EI, however if that does not happen, it becomes the Appellant's obligation to repay the debt to EI.

[32] The Respondent appears to have concluded that the Appellant's position is without merit and, as such, she does not have a reasonable explanation for the delay. Respectfully, that is an error in the application of subsection 1(1) of the R.R. Regulations. The merit of the request has nothing to do with the explanation for the delay. The merit of the request is only a consideration under subsection 1(2) of the R.R. Regulations in determining whether there is a reasonable chance of success.

[33] The Respondent also determined that the Appellant has not demonstrated a continuing intention to request the reconsideration because she took no action to do so for a period of 6 months, between October 2017 and May 2018, even thought she was aware that the employer had not remitted the full sum to the Respondent. The Respondent noted that the facts on file demonstrate that the employer has been steadily making payments towards the debt since October 2017. Moreover, when requested to provide additional documentation to demonstrate

the sum of monies actually received as severance, the Appellant failed to do so within the lengthy timeframe she was provided with October 22, 2018 to the beginning of December 2018.

[34] I find the Respondent did not, however, consider the relevant factor that the Appellant failed to understand the process to object to the June 28, 2017 decision, given the confusion created from the fact the ongoing notices she was receiving were from the CRA as opposed to from the Respondent. The Appellant testified that she was trying to deal with the situation but did not understand the process or the route to object. It was a process to figure out how she had to object to this situation. She thought she had to deal with the CRA as that who was issuing the monthly notices of debt. The Appellant did advise the Respondent that she had been dealing with the CRA and her lawyer. However, the Respondents notes indicate that she did not make clear to the Respondent, as she did in her testimony, that she did not understand the route she needed to take to object to the creation of the overpayment. As such, the Respondent did not have this relevant evidence before it when it made its decision and so did not consider it.

[35] I find the Commission did not exercise its discretion judicially when it made the decision to deny the Appellant's request to extend the 30-day period to make a request for reconsideration. It did not have before it the relevant information the Appellant testified as to her confusion as to how to go about objecting to the decision. Further, it erred in its application of subsection 1(1) of the R.R. Regulations in determining whether the Appellant had a reasonable explanation for the delay by considering the merits of her request for reconsideration as opposed to focusing on the explanation for the delay.

[36] As I found the Respondent did not exercise its discretion judicially, I must now determine whether the Appellant should be allowed a longer period to request a reconsideration.

Issue 3: Should the Appellant's late reconsideration request be permitted to proceed?

[37] Yes. The Tribunal finds the Appellant's late reconsideration request is permitted to proceed.

[38] The Appellant submitted her reconsideration request over 365 days after the initial decision was communicated to her. As such, she must demonstrate that she meets the four factors set out in subsections 1(1) and 1(2) of the R.R. Regulations. She must, therefore, prove

that she had a reasonable explanation for the delay and that she had a continuing intention to request a reconsideration. She must also prove that her reconsideration request has a reasonable chance of success and that there would be no prejudice caused to the Respondent or any party if the extension of time was allowed.

Did the Appellant have a reasonable explanation for requesting a longer period to make a reconsideration request and a continuing intention to appeal?

[39] Yes. I find that she did.

[40] 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).

[41] The Appellant gave detailed testimony of her efforts to find out how to dispute the initial decision. She began with contacting the CRA soon after receiving the initial statement showing the employer was only paying $130.00 per month toward the debt and was told this arrangement by the employer was allowed by the CRA. She sought assistance from her lawyer and then again, she went back to the CRA. It was not until she was finally redirected by the CRA back to the Respondent that she was told how to pursue a reconsideration request. The Appellant testified that, prior to this claim, she had never applied for or received Employment Insurance (EI) benefits. This was a complex issue and the path to try to resolve the problem was unclear.

[42] I find that the Appellant has a reasonable explanation for the delay. This is a very unusual and complex issue and it is reasonable that the Appellant did not know how to object to the fact the debt was still in her name, particularly since this was her first claim for EI benefits. It is also reasonable that she thought that the CRA was the agency to deal with, given the monthly notices were coming from the CRA.

[43] I find that the Appellant has also shown a continuing intention to file a request for reconsideration. The Respondent argues that the Appellant was aware the debt was in her name since July 1, 2017 and was also aware the employer was reimbursing the debt in monthly instalments. It was only when the employer stopped making payments did she begin to appeal the decision. The Respondent submits that she did not contest the decision with the Respondent

until May 2018 and so she has not proven that she had a continuing intention of requesting a reconsideration.

[44] The Appellant explained in her testimony the challenges of determining how to object to the June 28, 2017 decision, given the complexity of the issue and the fact she thought she had to deal with the CRA. I accept her credible testimony that when she initially contacted the CRA, she was told the employer was allowed to negotiate payment of the debt that was in her name. I accept that she then tried to seek assistance from her lawyer who went back and forth with the employer, which took time. I also accept the Appellant's testimony that she called multiple departments of the CRA trying to get the Notice of Debt out of her name and ultimately was redirected back to the Respondent and told she had to get a reconsideration form and file it, which she then did. I note that there is a letter on file of May 18, 2018 in which the Appellant is again objecting to the overpayment being in her name. On June 12, 2018, the Appellant was advised by the Respondent that she had to deal with this matter with her lawyer and the previous employer. I find that although the Appellant was unclear of the process she needed to follow to object to June 28, 2017 decision, that through the various steps she took to find a way to object, she has shown a continuing intention to request a reconsideration.

Does the request for reconsideration have a reasonable chance of success?

[45] Yes. I find that there is a reasonable chance of success with the request for reconsideration.

[46] The Respondent argues that the EI benefits were paid to the Appellant and the debt was created in her name. The Respondent asserts that she has the legal obligation to repay the debt, in accordance with section 44 and section 45 of the Act. The Respondent also argues that the repayment of the debt is outside its jurisdiction and the write-off of the overpayment is not subject to reconsideration.

[47] The Appellant argues that the overpayment amount is not accurate as she did not receive the lump sum and only some of the salary continuance payments that represented the lump sum payment. As well, she argues the overpayment should not have been created in her name, but rather in the employer's name as the employer withheld the amount owing the Respondent from

the intended lump sum payment that was to be paid to her and, therefore, has the obligation, to repay that amount.

[48] I agree with the Respondent that repayment of the debt is outside its jurisdiction and the overpayment is not subject to reconsideration. However, I find there is a reasonable chance of success on the Appellant's request for reconsideration concerning whether the overpayment amount is correct and whether the overpayment should have been created in her name in the first place.

[49] Given the fact the initial Minutes was amended to reflect a different manner of paying the lump sum and the Appellant's credible testimony that she did not receive the lump sum and only sum of the salary continuance payments that were to represent that lump sum, it is possible the overpayment amount of $6337.00 does not accurately reflect the actual earnings payments made to the Appellant. Accordingly, the Appellant has a reasonable chance of success in her reconsideration concerning whether the overpayment amount is accurately calculated.

[50] Further, I note that section 45 provides that a person who has received a benefit payment in excess of the amount to which they are entitled, shall, without delay, return the amount. However, section 46 of the Act provides that if a claimant receives benefits for a period and under a labour arbitration award or court judgment, or for any other reason, the liability of an employer to pay the claimant earnings, including damages for wrongful dismissal, for the same period is or was reduced by the amount of the benefits or by a portion of them, the employer shall remit or portion to the Receiver General as repayment of an overpayment of benefits.

[51] The Federal Court of Appeal has held that section 38(3) (now section 46) takes precedence over the general imposition of joint liability on the claimant and the employer provided by sections 45 and 47. Section 45 only applies if the employer breaches its obligation under section 46 to ascertain whether an amount would be repayable and to deduct the amount of benefits (*Lauzon v. C.E.I.C.*), 231 N.R. 111 (Fed. C.A.)

[52] The Appellant has a reasonable chance of success in her reconsideration request that liability for the overpayment is not hers. Section 46 of the Act suggests the liability for the overpayment is the employer's, not the Appellant's as there was a withholding deduction made

from the intended lump sum that was to be paid for the amount of EI benefits the Appellant had received.

[53] I find, for the reasons above, the Appellant's request for reconsideration has a reasonable chance of success.

Would any prejudice would be caused by allowing a longer period to make the request?

[54] The Respondent has not argued that allowing the Appellant an extension of time to request a reconsideration would cause prejudice to the Commission or other parties. There is no evidence that any prejudice would be caused by granting the Appellant's request. As such, I find that there would be no prejudice to the Commission or any parties by allowing the Appellant an extension of time to request a reconsideration.

CONCLUSION

[55] The appeal is allowed. The Respondent is to conduct a reconsideration of the June 28, 2017 decision.

Charlotte McQuade
Member, General Division - Employment Insurance Section

HEARD ON:	February 15, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	M. N., Appellant