



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *R. M. v Canada Employment Insurance Commission*, 2019 SST 936

Tribunal File Number: GE-19-2369

BETWEEN:

R. M.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Linda Bell

HEARD ON: July 2, 2019

DATE OF DECISION: July 5, 2019

DECISION

[1] The appeal is dismissed. The Respondent, who is the Canada Employment Insurance Commission (Commission), made their decision judicially.

OVERVIEW

[2] The Appellant R. M., whom I will refer to as the Claimant, made a claim for regular Employment Insurance benefits, and established a benefit period effective April 24, 2005.

[3] The Claimant was an affected party to the challenge against the *Health and Social Services Delivery Improvement Act (Bill 29) of British Columbia*, heard in the Supreme Court of Canada. The Supreme Court of Canada ruled that some parts of Bill 29 were unconstitutional and the employer subsequently entered into negotiations with the affected employees' unions, which resulted in the Claimant receiving a \$13,002.00 settlement.

[4] On August 13, 2019, the Commission informed the Claimant that the \$13,002.00 was earnings to be applied (allocated) to his Employment Insurance benefits. This money was allocated based on his normal weekly earnings of \$618.45, from the week of April 24, 2005, ending in the week of September 18, 2015. This allocation resulted in a \$7,341.00 overpayment.

[5] The decision to allocate the money paid to employees affected by Bill 29 was appealed before the Board of Referees and the Umpire. The Appeals Division of the Social Security Tribunal was seized of the matter and rendered a decision on July 16, 2014, which was amended on August 19, 2014.

[6] Four years and nine months later, on May 16, 2019, the Commission received a request for reconsideration from the Claimant. The Commission declined to reconsider their August 13, 2009, decision, that related to the allocation of his settlement money, because they determined that he failed to request reconsideration within the required period.¹

¹ Subsection 1(1) of the *Reconsideration Request Regulations*

[7] The Claimant appeals to the Social Security Tribunal (Tribunal) and argues that the Commission's decision should be reconsidered because he never heard from them from 2009 until 2019.

ISSUES

[8] Did the Claimant request reconsideration within the required time limit?

[9] If not, did the Commission exercise their discretion properly when denying the Claimant an extension of time to request reconsideration?

[10] Is the Claimant required to repay the overpayment of benefits or can it be written off?

ANALYSIS

[11] A claimant has 30 days from the date the Commission communicates their initial decision to him or her to ask the Commission to reconsider their decision.² A decision is communicated when a claimant is made aware of the substance and effect of a decision.³

[12] If a claimant does not ask the Commission to reconsider their decision within 30 days of when the decision is communicated to them, the Commission may allow more time if they are satisfied that certain conditions have been met.⁴ This is a discretionary decision.⁵

[13] I can only interfere with the Commission's discretionary decision if the Commission did not act properly when they made their decision. It is up to the Commission to prove that they acted properly. This is called, "acting judicially". To act judicially, means that the Commission acted in good faith, for a proper purpose, in a non-discriminatory manner, considering all relevant factors, and ignoring any irrelevant factors.⁶

² Paragraph 112(1)(a) of the *Employment Insurance Act (Act)*

³ *Bartlett v. Canada (Attorney General)*, 2012 FCA 230; *Cousins v. Canada (Attorney General)*, 2007 FC 469

⁴ Subsections 112(1) and 112(3) of the *Act* and Section 1 and 2 of the *Reconsideration Request Regulations*

⁵ *Daley v. Canada (Attorney General)*, 2017 FC 297

⁶ *Canada (Attorney General) v. Uppal*, 2008 FCA 388

A) Was the reconsideration request submitted within the prescribed 30-day period?

[14] No. The onus is on the Commission to show when their decision was communicated to the Claimant, as this is the starting point from when the Claimant could ask for a reconsideration. The Commission submits that the Claimant was made aware of the Commission's decision in August 2009, when the initial decision letter and overpayment notice were sent to him. He was also made aware on September 23, 2009, when he contacted the Commission and requested a copy of their August 23, 2009, decision be resent to him.

[15] The Claimant did not dispute the fact that he was aware of the Commission's decision to allocate his settlement money. Rather, he confirmed receipt of the overpayment notice and speaking with his union representative about the group appeal. He conceded that he "mistakenly thought the issue was taken care of".

[16] The Commission provided evidence that the Claimant was one of 2400 claimants involved in the "representative appeal" brought forth by the unions to the Board of Referees, the Umpire, and ultimately seized by the Social Security Tribunal Appeals Division (AD Division). The AD Division rendered their decision July 16, 2014, and amended it on August 19, 2014, and state that the parties made it clear that they are in agreement that the settlement money, is earnings to be allocated in accordance with subsections 36(9) and (10) of the *Employment Insurance Regulations (Regulations)*.

[17] Further, the AD Division ordered in consideration of the unique circumstances of this case, any claimant affected by the allocation, could request reconsideration if the following conditions were met. The claimant must submit a written request on or before December 15, 2014, outlining their argument, such as incorrect calculation, incorrect start date of the allocation, or wrong normal weekly earnings.

[18] The AD Division also ordered that any new decision of the Commission or hearing held by the Social Security Tribunal General Division is bound by the ruling that the settlement money, is earnings to be allocated in accordance with subsections 36(9) and (10) of the *Regulations*.

[19] The Claimant readily admitted that he did not keep in contact with his union, nor did he provide his union or the Commission with his change of addresses during the period of these appeals, which I find was his responsibility given that he was aware that he was an affected party to the representative appeal.

[20] The Commission provided evidence that the Departmental Receivable System shows that payments were made against the debt on May 21, 2015; July 4, 2016; May 29, 2017; May 22, 2018; March 6, 2019; and April 24, 2019. Based on these dates, I agree that it appears, the payments occurred when the Claimant's income tax refunds were applied against the overpayment, so the Claimant ought to have known this money was being taken and if he did not know why, he ought to have enquired earlier and not waited until his wages were garnished.

[21] Based on the evidence, as set out above, I find that the substance and effect of the decision to allocate his settlement money, was communicated to the Claimant as early as August 2009. Therefore, his request for reconsideration was late, as it was submitted more than nine years later on May 16, 2019.

B) Did the Commission exercise their discretion judicially?

[22] Yes. Upon review of the Commission's reasons for denying the Claimant an extension of time to submit his reconsideration request, I find they made their decision judicially.

[23] The Commission submitted their Record of Decision which supports that despite the Claimant requesting a copy of decision letter be resent on September 23, 2009, and his involvement with the representative appeal, he never indicated his intention to request reconsideration after the AD Division's decision was rendered on July 16, 2014, and amended it on August 19, 2014. I do not accept the Claimant's assertion that the Commission failed to consider a relevant factor namely that he did not hear from them for almost ten years. This is because the burden was on the Claimant to ensure his union and the Commission knew his correct address to notify him of the outcome of the representative appeal; which he readily admitted he did not do once he received the overpayment notice.

i) Did the Claimant provide a reasonable explanation for the delay?

[24] No. I find the Commission considered the relevant facts that were before them, which included that the Claimant was made aware of the substance and effect of their decision on or before September 23, 2009, and he did not submit his reconsideration until May 16, 2019.

[25] The Claimant states that he did not submit his request earlier because he assumed that the matter was taken care of; which I find to be improbable, given that the Claimant admits that he received the overpayment notice and then decided to stop being in contact with his union. The Claimant was very knowledgeable about submitting his annual income tax returns. Therefore, he knew, ought to have known, or was willfully blind to the fact that his income tax refunds were being applied to the overpayment.

[26] It is possible that the Claimant was complacent with having this debt paid for by his income tax refunds. I do not think that it was a coincident that he made the effort and requested reconsideration in May 2019, a few weeks after his wages were garnished, as he admitted that the garnishment creates a financial burden for him. Whatever the reason, I cannot ignore the fact that the Claimant submitted his reconsideration request more than four years after the December 15, 2014, deadline imposed by the orders of the AD Division, as set out above.

[27] If the Claimant truly intended to dispute the Commission's allocation dates, or his normal weekly earnings, he could have requested information from the Canada Revenue Agency (CRA) collections or income tax department, several years earlier. As such, I find the Claimant has not presented a reasonable explanation for the delay.

ii) Has the Claimant shown a continuing intention to request reconsideration?

[28] No. There is no evidence that the Claimant made any effort to request reconsideration of the August 13, 2009, decision prior to May 16, 2019. Therefore, I agree with the Commission that the Claimant has not shown a continuing intention to request reconsideration.

iii) Additional Criteria

[29] In some cases, such as when the reconsideration is submitted more than 365 days after the decision is communicated, additional criteria may apply.⁷ In such cases, the Commission must also be satisfied that the request for reconsideration has a reasonable chance of success and no prejudice would be caused by allowing a longer period.

[30] The Commission provided evidence that they considered the additional criteria because the Claimant submitted his reconsideration request more than four years after the AD Division decision was rendered.

[31] I considered the Claimant's testimony that he has no evidence to present regarding the allocation dates or the calculation of his normal weekly earnings that was used to allocate his settlement money. I also considered that the AD Division's decision orders are binding and state that the Claimant must submit a written request on or before December 15, 2014, outlining their argument; which he did not do. Accordingly, I accept the Commission's determination that the Claimant's reconsideration request would not have a reasonable chance of success.

[32] Further, I accept that allowing a longer period to make a reconsideration request would be contrary to the legislation and the AD Division's orders. Accordingly, I find that the Commission exercised their discretion judicially when denying the Claimant an extension of time to submit his reconsideration request.

C) Repayment of the Overpayment

[33] I am sympathetic to the Claimant's circumstances; however, there is no exception and no room for discretion. I am bound by the clear legislative provisions concerning his liability to repay the overpayment of benefits. The Claimant received benefits in excess of the amount he was entitled to receive; therefore, he is liable to repay those amounts.⁸ I cannot ignore, refashion,

⁷ Subsection 1(2) of the *Reconsideration Request Regulations*

⁸ Subsection 43(b) of the *Act*

circumvent, rewrite, nor interpret the *Act* in a manner that is contrary to its plain meaning, even in the interest of compassion.⁹

[34] As explained during the hearing, I do not have the jurisdiction to decide on matters relating to debt cancellation or reduction, as that authority belongs to the Commission.¹⁰ As such, the Claimant is at liberty to contact the Commission to determine whether they are able to reduce or write-off of the overpayment or penalties given his current financial situation.

[35] Further, a claimant cannot request reconsideration of a decision by the Respondent on a write-off matter and therefore, cannot appeal such a decision to the General Division.¹¹ The Federal Court of Canada is the court that has the jurisdiction to hear an appeal relating to a write-off issue.¹²

CONCLUSION

[36] The appeal is dismissed.

Linda Bell

Member, General Division - Employment Insurance Section

HEARD ON:	July 2, 2019
METHOD OF PROCEEDING:	Videoconference
APPEARANCES:	R. M., Appellant (Claimant)

⁹ *Canada (Attorney General) v. Knee*, 2011 FCA 301

¹⁰ Section 56 of the *Employment Insurance Regulations*

¹¹ Section 112.1 of the *Act*

¹² *Bernatchez v. Canada (Attorney General)*, 2013 FC 111