



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

[TRANSLATION]

Citation: *GC v Canada Employment Insurance Commission*, 2019 SST 1711

Tribunal File Number: GE-19-3416

BETWEEN:

G. C.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Josée Langlois

HEARD ON: November 18, 2019

DATE OF DECISION: November 26, 2019

DECISION

[1] The application to amend the General Division decision is granted, and the Commission was not justified in refusing to extend the 30-day period to request a reconsideration.¹

OVERVIEW

[2] On October 5, 2017, the General Division found that the Commission had exercised its discretion judicially when it refused to extend the time to request a reconsideration. On July 27, 2018, the Appellant applied to amend the decision given because a letter sent to the Commission dated February 3, 2013, had not been added to the Tribunal's file. On December 21, 2018, the General Division refused the Appellant's application, finding that the letter was not a new fact because it could have been discovered before the hearing of August 31, 2017, by a claimant acting diligently.

[3] The Appellant challenged this decision before the Appeal Division. On September 24, 2019, the Tribunal's Appeal Division found that the General Division had made an error of law in its interpretation of section 66 of the *Department of Employment and Social Development Act* (DESD Act) because it had made a decision on the Appellant's application to amend by considering only the new facts test. The Appeal Division also found that there had been a breach of natural justice because the hearing on the application to amend had gone ahead without the Appellant. The Appeal Division referred the case back to the General Division for reconsideration of the Appellant's application to amend the decision of October 5, 2017. I have to decide whether the decision of October 5, 2017, should be amended.

ISSUE

[4] Does the February 3, 2013, document the Appellant provided constitute a new fact, or was the decision made without knowledge of, or based on a mistake as to, some material fact?

[5] If the test under section 66 of the DESD Act is met, I will also consider these issues:

- Did the Commission exercise its discretion judicially?

¹ Section 112 of the *Employment Insurance Act* (Act) and section 1 of the *Reconsideration Request Regulations*.

- If not, did the Appellant file his reconsideration request within the 30-day time limit?
- If he did not file his request on time, does the Appellant have a reasonable explanation for his delay, and has he demonstrated a continuing intention to request a reconsideration?

PRELIMINARY MATTER

[6] An application to amend or rescind a decision can be decided on the record without a hearing.²

[7] However, the member who made the decision on the Appellant's application to amend had chosen to decide it by way of a hearing. Since the Appellant was absent from that hearing, saying that he was organizing and attending a funeral and that he could not be at the hearing for that reason, and to ensure procedural consistency, it was decided to proceed with a teleconference hearing in this case.

ANALYSIS

Do the documents and additional information the Appellant provided constitute new facts, or was the decision made without knowledge of, or based on a mistake as to, some material fact?

[8] To rescind or amend a Tribunal decision, an appellant must present new facts, present a material fact that was discovered after the decision was made, or show that the decision was made based on a mistake as to some material fact.³

[9] Each part of this test is different and must be considered before finding that the decision should not be amended or rescinded.

[10] To be considered "new facts," facts must have either happened after the decision was made or happened prior to the decision but could not have been discovered by a claimant acting diligently. The new facts must be decisive of the issue.⁴

² Section 48 of the *Social Security Tribunal Regulations*.

³ Section 66(1)(a) of the *Department of Employment and Social Development Act* (DESD Act).

[11] The Appellant submitted a document presented as potential “new facts” and is trying to show that the General Division decision was made based on a mistake as to some material fact. This is the document that will be analyzed to decide whether the test under section 66 of the DESD Act is met and whether the General Division decision of October 5, 2017, should be amended or rescinded:

- February 3, 2013, letter
- proof of delivery to the Commission by UPS courier mentioning delivery on April 2, 2013

[12] The Appellant submits that this evidence must be considered, since it is decisive to show that he had a reasonable explanation for his late reconsideration request.

February 3, 2013, Letter and Proof of Delivery to the Commission by UPS Courier

[13] The Commission’s file shows that a decision was made on January 18, 2013, informing the Appellant that it had reconsidered his claim for benefits established on June 14, 2009, and that it was unable to pay him benefits from July 26, 2009, because he had voluntarily left his job at X and it was not the only reasonable alternative in this case. The Commission also indicates that it allocated the Appellant’s earnings between June 21, 2009, and December 6, 2009, to his benefit period and that the Appellant had knowingly made false statements.

[14] At the hearing before the Tribunal’s General Division on August 31, 2017, the Appellant mentioned that he had filed a reconsideration request on February 5, 2013, and that the Commission had not considered it.

[15] The General Division member rejected this evidence from the Appellant’s testimony and, on July 27, 2018, the Appellant presented a letter dated February 3, 2013, as a new fact because it was not in the Commission’s file.⁵

⁴ *Attorney General of Canada v Chan*, [1994] FCJ No 1916.

⁵ RAGD2-5.

[16] On November 18, 2019, I asked the Commission whether its file included the February 3, 2013, letter.

[17] On November 20, 2019, the Commission indicated that the letter was not in its file. However, as it had mentioned in its submissions of August 18, 2016, a letter dated February 20, 2013, is similar in content. The Service Canada Centre received this letter on June 16, 2016.

[18] The Commission's arguments, like the Tribunal member's analysis in the decision of October 5, 2017, indicate delivery by UPS courier on February 4, 2013, even though the evidence section of the General Division decision mentions a UPS slip indicating delivery on April 2, 2013.

[19] The Appellant submitted a letter dated February 3, 2013, with proof of delivery on April 2, 2013, that indicates that he is disputing the claim for \$11,318.

[20] This courier slip shows that the letter was apparently delivered on April 2, 2013, not February 4, 2013, as the Commission assumed. Regarding the General Division decision, even though it identifies the courier slip among the evidence, this particular evidence was not analyzed. The Commission, like the General Division member, did not consider or analyze it. In addition, the General Division did not analyze this evidence—the February 3, 2013, letter—to determine whether the Appellant [had] a reasonable explanation for his delay. The General Division decided the issue of whether the Commission had exercised its discretion judicially, and it found that it had, given that the Commission had considered all relevant factors when it made its decision. However, the circumstances surrounding the delivery of the February 2013 letter and the error in the assumed delivery date were not raised.

[21] As he testified at each of the hearings he attended, the Appellant submits that this letter delivered to the Commission is decisive in the assessment of his file.

[22] We are talking about the February 3, 2013, letter and its delivery to the Commission by UPS courier. Of course, this letter is comparable in content to the February 20, 2013, letter in the Commission's file, and I note that, with the evidence presented, it is impossible to determine the exact contents of the delivery by courier, especially since the Commission never received it.

However, since the Appellant cited this evidence to make his case at the hearing on August 31, 2017, this evidence should have been analyzed to determine whether the Appellant had a reasonable explanation for his delay. But the General Division did not analyze this issue, and the analysis is incomplete.

[23] For this reason, I am of the view that the decision was made based on a mistake as to some material fact, since it is material to determining the outcome of the case, and that the decision given is based on an incorrect delivery date.

[24] Of course, the Commission submits that it never received this letter, whether on February 5, 2013, as the General Division mentions in its decision of October 5, 2017, or at any other time. It argues that the letter was delivered to another address, and it says that the February 20, 2013, letter on file, which is similar in content to the one dated February 3, 2013, was not delivered until June 16, 2016.

[25] I am faced with contradictions because the UPS slip indicates delivery on April 2, 2013. The contents of the delivery were allegedly sent to the wrong address, and the General Division pointed out that the **Commission was well positioned to know its points of service**. The fact is that the Appellant's testimony is consistent and that he maintains that he sent a letter dated February 3, 2013, to the Commission in 2013 requesting a reconsideration using an official form in June 2016 because his file was not settled.

[26] In the decision of October 5, 2017, the General Division presumed that the Appellant knew that his file was not settled because he was in ongoing talks with the Employment Insurance recovery division over the repayment of his debt. The fact is that, in finding that the Commission had considered all relevant circumstances, the General Division made an error because the February 3, 2013, letter, and the error in the date accepted for the delivery by UPS courier on April 2, 2013, were not raised. The General Division made its decision based on a mistake as to some material fact because the Commission had not considered these factors or had accepted an incorrect date.

[27] For this reason, the evidence the Appellant presented, namely the February 3, 2013, letter, could change the decision that was made. Part of section 66 of the DESD Act is met. The

Appellant did not present a material fact that was discovered after the decision was made or prior to the decision but could not have been discovered by a claimant acting diligently. And this letter is not a new fact, since it was not submitted after the decision was made. However, the General Division made its decision based on a mistake as to some material fact when it failed to analyze the circumstances surrounding the delivery of this February 3, 2013, letter that was not in the Commission's file, specifically the error in the delivery date the Commission accepted and based its assessment on to make its decision.

[28] I am satisfied that the Appellant is not trying to re-argue his position or argue it differently, since he stated this same position at the initial hearing.

[29] The February 3, 2013, letter and the delivery notice dated April 2, 2013, presented in support of his application to amend the decision show that the decision was made based on a mistake as to some material fact because the circumstances were not considered and the Commission's decision was based, among other things, on the argument that the letter was delivered on February 4, 2013.⁶ While the letter is similar in content to the one in the Commission's file, the impact of the circumstances surrounding the date of the letter, and of the delivery, is significant enough to conclude that, in failing to consider this letter, the General Division made a mistake as to some material fact.

[30] The General Division decision of October 5, 2017, should be amended to consider this evidence.⁷

Did the Commission exercise its discretion judicially?

[31] 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 claimant has demonstrated a continuing intention to request a reconsideration.⁸

⁶ Section 66(1)(a) of the DESD Act.

⁷ Section 66 of the DESD Act.

⁸ Section 1 of the *Reconsideration Request Regulations*.

[32] The Commission's power to grant an extension is discretionary and can be disturbed only if the Commission did not exercise it judicially.⁹ The Commission must show that it acted in good faith, taking into account all relevant factors and ignoring irrelevant ones.¹⁰

[33] The Commission did not consider all relevant circumstances when assessing the reasons for the Appellant's delay in requesting a reconsideration, since the Commission indicates delivery by courier on February 4, 2013, when the delivery slip says April 2, 2013.

[34] In considering the Appellant's evidence, the Commission inverted the day and the month and the Commission's arguments about the Appellant possibly challenging the decision on February 5, 2013, so after February 4, 2013, and the Appellant's phone call to get information from an agent on how to challenge a decision is therefore unfounded and only shows that the Appellant took steps to challenge the decision on February 5, 2013. According to the UPS courier slip, the February 3, 2013, letter, or even the one dated February 20, 2013, was sent on April 2, 2013, not February 4, 2013, as the Commission assumed.

[35] Given this error, the Commission did not exercise its discretion judicially when it refused to extend the time for the Appellant to request a reconsideration, since it made its decision based on irrelevant considerations or without taking relevant considerations into account.¹¹

Extending the Time to Request a Reconsideration

[36] I cannot intervene following a discretionary decision of the Commission unless it did not exercise its discretion judicially. Since the Commission did not exercise its discretion judicially by overlooking certain factors, I can intervene.

[37] I note that, even if the Commission reconsiders its decision, the outcome may be the same as when it made its initial decision on January 18, 2013.

⁹ *Knowler*, A-445-93; *Plourde*, A-80-90; *Chartier*, A-42-90.

¹⁰ *Sirois*, A-600-95; *Chartier*, A-42-90.

¹¹ *Ibid.*

Did the Appellant file his reconsideration request within the 30-day time limit?

[38] The facts show that the Appellant did not respect the 30-day time limit to file his reconsideration request. The Commission issued the initial decision on January 13, 2013, and, although the Appellant wrote a letter on February 3, 2013, or February 20, 2013, he filed his reconsideration request on April 2, 2013, based on the UPS courier slip.¹²

[39] The Appellant acknowledges having been informed of the decision verbally in January 2013 and, as a result, having been notified of the decision. He explains that, after that, he asked for explanations to dispute the Commission's claim against him.

[40] The Commission argues that it did not receive the Appellant's reconsideration request until June 2016. A Service Canada Centre received the reconsideration request, presented with the official form from the Commission, on June 16, 2016. The Commission says that the UPS slip does not indicate a valid address for a Service Canada or Commission office.

[41] In any event, when the Appellant made his reconsideration request on either April 2, 2013, or June 16, 2016, the 30-day time limit to request a reconsideration of the decision had expired.

[42] I find that the Appellant filed his request after the 30-day time limit.

Does the Appellant have a reasonable explanation for his delay, and has he demonstrated a continuing intention to request a reconsideration?

[43] The Appellant explains that he began steps to dispute the amount owing to the Commission in January 2013. He argues that he wrote a letter on February 3, 2013, that he sent by UPS courier on April 2, 2013.

[44] As the Commission points out, the Appellant was in contact with the recovery division for months. On June 16, 2016, after speaking with a Commission agent, the Appellant sent a letter dated February 20, 2013, requesting a reconsideration of the decision, as well as a UPS courier slip showing that the letter had been delivered on April 2, 2013.

¹² GD3-22 and RAGD5-3.

[45] But the Commission never received this letter, and the Appellant did not take appropriate steps to verify whether the letter had been received because he had proof of delivery.

[46] Even though the Commission did not receive this letter, and even though the Appellant was in contact with recovery, the fact is that, since January 13, 2013, he has demonstrated a continuing intention to request a reconsideration of the decision. The Appellant used whatever means were available—even though they were not the appropriate ones—to object to paying back the amount the Commission is asking him to repay.

[47] Of course, the file shows that the Appellant began talks to make a payment arrangement, but the fact is that he initially wanted to get the decision reconsidered, which is what he did by speaking with a Commission agent in February 2013.

[48] The Commission says that it did not receive a reconsideration request from the Appellant in February 2013, and it acknowledges that the Appellant began talks with the Employment Insurance recovery division in February 2013. It argues that the Appellant did not have good cause for waiting until June 16, 2016, to request a reconsideration.

[49] I disagree. The Appellant was verbally informed of the Commission's initial decision in January 2013. The Commission's file is documented and shows that the Appellant sought to challenge the decision from then on.¹³ The fact that the written request was mistakenly delivered elsewhere and that the Commission did not receive it does not rule out the Appellant's consistent efforts to get the decision reconsidered, even though he was discussing his file with recovery officers.

[50] I am making my decision on a balance of probabilities, and I find that the Appellant had a reasonable explanation for his delay in requesting a reconsideration, since he, in fact, had done it, but the Commission did not receive his challenge letter. The Appellant has demonstrated a continuing intention to pursue his appeal by increasing his efforts in this regard.

¹³ GD3-18.

[51] I find that the Commission was not justified in refusing to extend the 30-day period to request a reconsideration.¹⁴

CONCLUSION

[52] The appeal is allowed. The General Division decision of October 5, 2017, is rescinded and replaced with this one.

Josée Langlois
Member, General Division – Employment Insurance Section

¹⁴ Section 112 of the Act and section 1 of the *Reconsideration Request Regulations*.