



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *AA v Canada Employment Insurance Commission*, 2019 SST 1712

Tribunal File Number: GE-19-2868

BETWEEN:

**A. A.**

Appellant

and

**Canada Employment Insurance Commission**

Respondent

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**SOCIAL SECURITY TRIBUNAL DECISION**  
**General Division – Employment Insurance Section**

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DECISION BY: Charlotte McQuade

HEARD ON: November 13, 2019

DATE OF DECISION: November 30, 2019

## **DECISION**

[1] The appeal is allowed. The Claimant's reconsideration request is not late. The Commission is to conduct a reconsideration of its November 29, 2016 decision.

## **OVERVIEW**

[2] The Claimant applied for Employment Insurance benefits on November 10, 2015. On November 29, 2016, the Commission determined that the Claimant had knowingly made two false representations as he failed to declare earnings from his employer, X for the weeks of March 13, 2016, March 20, 2016 and March 27, 2016. The Commission allocated these earnings, creating an overpayment, and imposed a penalty of \$2358.00 and a notice of violation.

<sup>1</sup> On March 6, 2018 the Claimant asked the Commission to reconsider its decisions. The Commission decided that the Claimant's reconsideration request was late and refused to give the Claimant an extension of time. The Claimant appealed the Commission's refusal to grant him an extension of time to the Tribunal. The Claimant says he does not remember if he got the November 29, 2016 decision letter or a phone call from the Commission about the letter. He says he has been working in Fort McMurray but living in Edmonton for the past seven years. His schedule is always changing and he is back and forth between the two places. At the time of this letter, he was living with his ex-wife and they were having problems. Sometimes he did not get all his mail or it would be misplaced.

[3] I am granting the appeal. The Commission has not proven that the November 29, 2016 decision was communicated to the Claimant before the Claimant received the letter in the Tribunal file. His reconsideration request was not therefore filed late.

## **PRELIMINARY MATTERS**

[4] The Tribunal's General Decision had rendered a decision in this appeal on November 7, 2018 in the Claimant's absence. On July 31, 2019, the Tribunal's Appeal division decided that this appeal should be returned to the Tribunal's General Division for rehearing for reason the

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<sup>1</sup> GD3-17 to GD3-18.

Appellant had not received the Notice of hearing and did not have a full opportunity to present his case. This decision arises from the rehearing of the Claimant's appeal.

[5] The Claimant has five appeals: Tribunal files GE-19-2868, GE-19-2869, GE-19-2870, GE-19-2871, and GE-19-2872. A pre-hearing conference was held on September 23, 2019 to clarify the issues under appeal and scheduling of this hearing. The Claimant expressed a preference that all his appeals be heard together. I did not see any prejudice to the parties in hearing these matters together so the appeals were heard together. All of the appeals, with the exception of Tribunal file GE-19-2872, concern decisions of the Commission to deny the Claimant's request for an extension of time to pursue a request for reconsideration. However, since all four of these appeals deal with different initial decisions for which a reconsideration was requested, a separate decision will be rendered in each appeal. Tribunal file GE-19-2872 deals with an unrelated issue and so a separate decision will also be issued for that appeal.

## **ISSUES**

[6] I have to decide if the Claimant filed his reconsideration request late. If he did, I then have to decide if the Commission properly exercised its discretion in refusing an extension of time. I can only intervene in the decision if that is the case. If the Commission did improperly exercise its discretion, then I have to decide whether the Claimant can be granted an extension, having regard to the test set out in the law for granting an extension.<sup>2</sup>

## **ANALYSIS**

[7] A claimant has 30 days from the date the Commission communicates its initial decision to the claimant to ask the Commission to reconsider a decision.<sup>3</sup> If the claimant does not ask the Commission to reconsider its decision within the 30-day period, the Commission may allow more time if it is satisfied that the following conditions have been met: there is a reasonable explanation for requesting a longer period; and, the claimant has demonstrated a continuing intention to request a reconsideration.<sup>4</sup>

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<sup>2</sup> Section 1 of the *Reconsideration Request Regulations*.

<sup>3</sup> Paragraph 112(1)(a) of the *Employment Insurance Act*.

<sup>4</sup> Subsection 1(1) of the *Reconsideration Request Regulations*.

[8] When the reconsideration request is made more than 365 days after the day on which the Commission communicated its decision to the claimant or if the claimant submitted another application for benefits after the decision was communicated, then two additional conditions must be met: 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 other persons if a longer period to make that request were allowed.<sup>5</sup>

[9] The onus is on the Claimant to prove on a balance of probabilities that he satisfies all of the requirements for an extension.

[10] The Commission's decision to extend the deadline is discretionary.<sup>6</sup> This means I can only change the decision if the Commission did not exercise their discretion judicially. Acting judicially means the Commission considered all relevant factors, did not consider irrelevant factors, acted in good faith, and did not act in a discriminatory manner when it made its decision.

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[11] If the Commission acted judicially, then I may not change its decision to deny the Claimant an extension of time to request reconsideration. However, if I find the Commission did not exercise its discretion judicially, then I may step into the Commission's role and decide whether the Claimant has met the criteria for an extension.

### **Was the Claimant's reconsideration request filed late?**

[12] No. The Commission has not proven that the November 29, 2016 decision letter was communicated to the Claimant prior to his receipt of the Tribunal file containing the decision. His reconsideration request was filed in advance of that receipt. As such, I find the reconsideration request was not filed late.

[13] The request for reconsideration of a decision must be made to the Commission within 30 days of the decision being communicated to a claimant.<sup>8</sup> The responsibility to inform the

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<sup>5</sup> Subsection 1(2) of the *Reconsideration Request Regulations*.

<sup>6</sup> *Daley v Canada (Attorney General)*, 2017 FC 297.

<sup>7</sup> *Attorney General v Purcell*, [1996] 1FCR 644.

<sup>8</sup> Paragraph 112(1)(b) of the *Employment Insurance Act*.

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.<sup>9</sup>

[14] The decision is communicated when the recipient has been advised of the substance of the decision and its effect. Ambiguous information may not constitute a communication.<sup>10</sup> The Commission has no obligation to inform the claimant of his appeal rights in order to meet its obligation to communicate the nature and effect of its decisions to him.<sup>11</sup>

[15] In normal circumstances, the Commission can discharge its burden to prove communication by showing that the letter was mailed to the claimant at the address to which prior correspondence had been delivered. If, however, a claimant denies receiving it, then the circumstances must be examined to determine whether the allegation of non-receipt is credible. If it is, then communication has not been proven.<sup>12</sup>

[16] I first have to decide if the Commission has proven that it communicated the substance and effect of the November 29, 2016 decision letter to the Claimant and when it did so.

[17] The Commission sent its initial decision letter to the Claimant on November 29, 2016.<sup>13</sup> A notice of debt dated November 26, 2016 with an overpayment of \$1572.00 due to misrepresentation of earnings was also sent out but there is no indication as to the address it was sent to.<sup>14</sup> Another notice of debt dated December 3, 2016 noting a penalty causing an overpayment in the amount of \$2358.00 was also sent to the Claimant but there is no indication as to the address it was sent to.<sup>15</sup>

[18] The Commission submits that the Claimant was aware of their decision dated November 29, 2016 when it was sent out, and the Claimant delayed until March 6, 2018 to make a request for reconsideration, which was a delay of 432 days.

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<sup>9</sup> *Bartlett v. Canada (Attorney General)*, 2012 FCA 230 (CanLII).

<sup>10</sup> *Cousins v. Canada (A.G.)*, 2007 FC 469.

<sup>11</sup> *R & S Industries Inc. v. Canada (National Revenue)*, 2016 FC 275 (CanLII).

<sup>12</sup> *Bartlett v. Canada (Attorney General)*, 2012 FCA 230 (CanLII), paras. 39 and 40).

<sup>13</sup> GD3-17.

<sup>14</sup> GD3-21.

<sup>15</sup> GD3-22.

[19] The Claimant's reconsideration request dated March 6, 2018 states the decision the Claimant is requesting reconsideration of is "the 2016 sick payment. I am disputing the overpayment and also prior years. Also I am a seasonal worker." The Claimant notes as the reason for his request, "I looked at my record of employments in 2016 and prior years and there's conflict with regard to overpayment. I am a seasonal worker." <sup>16</sup>

[20] The Commission submitted that they reviewed the notes of the Canada Revenue Agency (CRA) with respect to the recovery of the overpayment and debt and as can be seen from those notes the Appellant contacted the CRA on February 22, 2017, to request that the agreed deduction from his benefits be lowered from 50% as it was causing him hardship. The Commission says the Claimant did not indicate that he was disputing the overpayment but agreed to make repayment of the debt. The Commission submits that the Claimant has been in contact with CRA regarding repayment of this overpayment as well as other subsequent overpayments a number of times since February 22, 2017. <sup>17</sup> The Commission submits that the Claimant has also filed an application for benefits since the decision of November 29, 2016 was sent to him and established a claim effective January 21, 2018.

[21] The Claimant says that at the time of this decision he was living with his ex-wife at the address noted on the November 29, 2016 letter. However, most of the time he was working in Fort McMurray. He said he was having difficulties his wife and sometimes he would not get all his mail from her and sometimes the mail would be misplaced. He does not remember whether or not he received this decision letter. He does not recall any verbal communication from the Commission about the letter. He does not recall ever being told about a penalty or notice of violation. He was going back and forth between home and work and got mixed up with the reporting of his earnings. He said his union would send him all over the place. He sometimes he would get a letter and it would give him a deadline to call and he would get a call to work from the union and would return to work and forget about the matter. However, he said there is no way he would wait a year to appeal something if he knew he had 30 days to appeal a decision. He is not disputing the allocation of his earnings as he has mixed up the reporting of his earnings because he would be asked sometimes to work extra hours and extra days. However, he did not

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<sup>16</sup> GD3-23.

<sup>17</sup> GD3-27 to GD3-37.

realize the problem with his hours until he applied for sickness benefits in January 2018 when he could not qualify. He was told then he needed 1330 hours to qualify.

[22] The Claimant testified that his recollection of conversations with the CRA were to discuss lowering his payments. He cannot recall any discussion about the decision letters. He said he would just he just would call and says the amount being deducted from his benefit is too much and then he would be given another number to call. He recalls the amount being deducted from his benefits at one point was reduced to 25% of his benefits. He had an idea that the overpayment had arisen because of his changing work schedule and mistaken reporting of his earnings. He does not recall ever being told about a penalty or notice of violation.

[23] There is no information in the appeal docket to show that the Commission communicated the decision verbally to the Claimant.

[24] The CRA's notes of the February 22, 2017 conversation say, "Regarding EI: Debtor called to reduce recoupment as 50%. Causes hardship. Full Text Screens shows an active EI claim with a weekly benefit rate of \$537. Debtor wants 25% as Recoupment. DW020 screen undated to show \$135 per week. Gave Legal warning. No employer – debtor unemployed and on EI. Address/Date of Birth/Telephone number confirmed. Screen updated for recoupment."

[25] There is nothing in the CRA notes of February 22, 2017 identifying that anything other than repayment arrangements were being discussed. The same is true of the subsequent conversations the Claimant had with the CRA.<sup>18</sup>

[26] The Claimant candidly admitted that he does not recall whether or not he not received the November 29, 2016 decision letter. There is no evidence this letter was returned to the Commission. The information from the CRA indicates other instances of returned mailed from the Claimant, but from a different address.

[27] Although there is no indication the letter was returned as undelivered, I am not satisfied the Claimant actually received the November 29, 2016 letter. He testified that he was he was going back and forth between Fort McMurray and Edmonton. He was also having difficulties

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<sup>18</sup> GD3-27 to GD3-37.

with his ex-wife and did not get all his mail from her or it was misplaced. I found his testimony to be credible and accept that he was having issues with receiving his mail at the time the November 29, 2016 decision letter was mailed. I find it is more likely than not, that he did not receive the letter in the mail.

[28] I am also not satisfied that the Claimant was aware of the substance and effect of the Commission's November 29, 2016 decision from any of the CRA discussions. The Claimant's recollection from CRA discussions were that they were to discuss payment arrangements. He had an idea that the overpayment was because of his mistaken reporting of his earnings. While the Claimant may have appreciated that he had an overpayment due to unreported earnings, he also had a pre-existing overpayment. According to the CRA notes, he also had a repayment discussion with the CRA on February 11, 2015 about an overpayment.<sup>19</sup> Given the pre-existing overpayment and the fact there is no indication in the CRA notes of February 22, 2017 or any of the notes from his subsequent conversations with the CRA of a discussion of the November 29, 2016 decision letter, I am not satisfied that the substance and effect of this decision was communicated to the Claimant in these conversations. In that regard, there is no indication that the particular overpayment arising from the November 29, 2016 decision or that the imposition of the penalty and violation were communicated to the Claimant in any of those conversations.

[29] I have considered whether the Notices of Debt were sufficient to establish communication of the November 29, 2016 decision to the Claimant. The first notice of debt refers to an amount owing relating to a misrepresentation of earnings. The second notice of debt simply says, "penalty established causing an overpayment". I find these notices are too vague to establish communication of the substance and effect of the November 29, 2016 decision. The employer in question is not referred to, nor is the period the earnings relate to. The November 29, 2016 decision not only involved an allocation of earnings but also a penalty and notice of violation. The reason for the penalty is not made clear in the second notice. There is also no

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<sup>19</sup> GD3-27.



reference to the notice of violation in either of these documents.

[30] The burden is on the Commission to prove communication of the November 29, 2016 decision and when it was communicated.

[31] I am not satisfied that it is more likely than not that the November 29, 2016 decision was communicated to the Claimant before it was sent out to him in the Tribunal appeal docket. There is nothing in any of the CRA conversations noted on file that show there was a discussion of this decision letter. There is no evidence on file that with any of the Claimant's re-applications, that he was given a copy of this decision letter. The Claimant filed a blanket reconsideration request on March 6, 2018, in an attempt to resolve the resulting problem that had arisen with his inability to qualify for sickness benefits in January 2018 because of insufficient hours. There is no indication he was given a copy of the decision letter at that time. I find he was not even aware, at the time he filed his request for reconsideration, of the substance and effect of the November 29, 2016 decision, given his blanket request. I find therefore that the November 29, 2016 decision was communicated to the Claimant upon his receipt of the Tribunal file containing the decision. I do not know what that specific date was, as this matter is a rehearing of the initial appeal. However, the Claimant's reconsideration request was clearly filed in advance of his receipt of the Tribunal file and, therefore, was not filed late.

[32] As I have found the reconsideration request was not late, it is not necessary for me to decide whether the Commission properly exercised its discretion in refusing an extension of time.

## CONCLUSION

[33] The appeal is allowed. This matter is to be returned to the Commission to conduct a reconsideration of the November 26, 2015 decision.

Charlotte McQuade

Member, General Division - Employment Insurance Section

HEARD ON:	November 13, 2019
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METHOD OF PROCEEDING:	Videoconference
APPEARANCES:	A. A., Appellant