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

Citation: *KJ v Canada Employment Insurance Commission*, 2021 SST 347

Tribunal File Number: AD-21-71

BETWEEN:

K. J.

Appellant / Claimant

and

Canada Employment Insurance Commission

Respondent / Commission

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Janet Lew

DATE OF DECISION: July 19, 2021

Canada

DECISION AND REASONS

DECISION

[1] I am dismissing the appeal.

OVERVIEW

[2] The Appellant, K. J. (Claimant), is appealing the General Division decision of February 2, 2021. The General Division found that the Claimant had filed an appeal with the General Division on January 19, 2021. The General Division also found that the Claimant was appealing a reconsideration decision of March 2, 2018. The General Division concluded that the Claimant had not brought her appeal on time as the Claimant should have brought it within 30 days of receiving the March 2, 2018, reconsideration decision. As a result, the General Division decided that the appeal could not go ahead.

[3] The Claimant argues that the General Division made jurisdictional, legal, and factual errors without regard for the material before it. The Claimant also argues that the General Division considered the wrong reconsideration decision. She claims that she was appealing a reconsideration decision dated January 7, 2021.

[4] The Claimant asks the Appeal Division to allow her appeal. She asks the Appeal Division to give the decision that the General Division should have given. She says the Appeal Division should make a finding that the money she received from a particular source (the Hardship Fund) is not earnings under the *Employment Insurance Act* (EIA).

[5] The Respondent, the Canada Employment Insurance Commission (Commission), denies that the General Division made any errors. The Commission asks the Appeal Division to dismiss the appeal.

[6] I find the General Division failed to recognize that the Claimant sought to appeal the Commission's January 7, 2021, letter. Even so, as the January 7, 2021, letter is not a reconsideration decision, the Claimant had no basis to appeal it to the General Division. I am dismissing the appeal.

ISSUES

[7] The issues are as follows:

i. Which letter did the Claimant appeal to the General Division? Was it the Commission's March 2, 2018, letter or its January 7, 2021, letter?

ii. Is the Commission's January 7, 2021, letter a reconsideration decision?

iii. If not, was the Commission's January 7, 2021, letter appealable to the General Division?

iv. Is the Commission's January 7, 2021, letter a decision on the "new facts" or "material facts" issue?

v. Does the *VA* decision[1] represent a "new fact" or "material fact" under section 111 of the EIA?

ANALYSIS

[8] The Appeal Division may intervene in General Division decisions[2] if there are jurisdictional, procedural, legal, or certain types of factual errors.[3]

[9] The Claimant argues that the General Division made jurisdictional, legal, and factual errors. In particular, the Claimant argues that the General Division made two primary errors:

- It failed to consider the Commission's letter of January 7, 2021, which she argues is a reconsideration decision. She claims that she was appealing this reconsideration decision to the General Division—not the earlier March 2, 2018, reconsideration decision.
- It failed to accept that *VA* represented a "new fact."

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[1] See *Canada Employment Insurance Commission v VA*, 2020 SST 400.
[2] See section 58(1) of the *Department of Employment and Social Development Act* (DESDA).
[3] In the case of factual errors, the Appeal Division may intervene under section 58(1)(c) of the DESDA if 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. In other words, the error is on an important factual error.

[10] The Claimant argues that, if the General Division had considered the January 7, 2021, letter, it would have accepted *VA* as a new fact, and it would have applied *VA* in her case.

[11] The facts in *VA* are similar to those of the Claimant. Both the Claimant and V. A. received money from the same Hardship Fund. In *VA*, the Appeal Division determined that the money V. A. had received from the Hardship Fund was not earnings.

[12] The Claimant is looking for the same result as in *VA.* The Claimant argues that, had the General Division applied *VA*, it would have concluded that the money she had received from the Hardship Fund was not earnings relating to her employment. She also claims that, as the money was not earnings, it should not have been allocated or applied against her Employment Insurance claim to create an overpayment.

Which letter did the Claimant appeal to the General Division? Was it the Commission's March 2, 2018, letter or its January 7, 2021, letter?

[13] The Claimant argues that the General Division considered the wrong reconsideration decision. She maintains that she was appealing the Commission's letter of January 7, 2021, to the General Division. She says that the January 7, 2021, letter is a reconsideration decision. She denies that she was appealing the Commission's March 2, 2018, reconsideration decision to the General Division.

[14] The Commission, on the other hand, denies that the Claimant could have been appealing its January 7, 2021, letter. The Commission argues that the Claimant was actually appealing its reconsideration decision of March 2, 2018.[4] In other words, the Commission says that the General Division did not fail to address the January 7, 2021, letter because it was not the subject of the Claimant's appeal.

[4] See the Commission's reconsideration decision dated March 2, 2018, at GD3-29 to GD3-30.

[15] In its March 2, 2018, letter, the Commission indicated that it was responding to the Claimant's reconsideration request. The Commission also addressed the issue of the Claimant's earnings. The March 2, 2018, letter reads, in part, as follows:

> **Issue: Earnings**
>
> The decision communicated to you on December 8, 2017 regarding this issue has been changed to the following new decision:
>
> Allocation of separation monies is maintained with following modification. Allocation of separation monies from [the employer] Hardship Fund has been adjusted as follows: Amount of 587 (average weekly earnings instead of normal weekly earnings) from week of 18 June 2017 to week ending 1 July 2017 with last week amount of $413.00 week of 2 July 2017. Benefit period has been extended 2 weeks due to first two weeks separation monies being greater than 25% of weekly benefit rate.[5]

[16] As for its January 7, 2021, letter, the Commission stated that it could not reconsider its decision. As far as it was concerned, it had already issued a reconsideration decision on March 2, 2018.

[17] The Commission also raised the issue of "new facts" in its January 7, 2021, letter. The Commission determined that it did not consider any additional information that the Claimant had given to be "new facts." It also determined that it had correctly made its decision in March 2018, or that it had made it with knowledge of the material facts the Claimant had provided.

[18] The January 7, 2021, letter reads as follows:

> The Canada Employment Insurance Commission cannot proceed with the reconsideration as requested since an Administrative Review Decision has already been rendered on this issue on March 2, 2018 and any additional information you provided is not considered to be new facts; or the decision was correctly made, or made with the knowledge of the material facts you provided.
>
> The recourse available to you is to file an appeal with the Social Security Tribunal as per, and within the timeframe provided by, the notice of Administrative Review Decision sent to you on March 2, 2018.[6]

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[5] See the Commission's reconsideration decision dated March 2, 2018, at GD3-29.
[6] See the Commission's January 7, 2021, letter, at GD3-68.

[19] The Commission argues that the Claimant's Notice of Appeal to the General Division[7] shows that the Claimant was actually appealing the March 2, 2018, letter.

[20] The Commission acknowledges that the Claimant included a copy of the Commission's January 7, 2021, letter with her Notice of Appeal. It also acknowledges that the Claimant stated that she had received the reconsideration decision on January 7, 2021.[8] But, the Commission argues that everything else about the Claimant's Notice of Appeal indicates that she was in fact appealing the Commission's March 2, 2018, reconsideration decision.

[21] The Commission notes that, although the Claimant wrote that she had received the second reconsideration decision on January 7, 2021, she also wrote that she had received the first one on March 2, 2018.

[22] When the Claimant explained why she disagreed with the reconsideration decision, she addressed the substance of the March 2, 2018, reconsideration decision. She disputed the source of the money she had received on separation. She denied that her employer had paid her. The Commission notes that, significantly, the Claimant did not address the substance of the January 7, 2021, letter in her Notice of Appeal.

[23] Then, the Claimant went on to explain why she her appeal was late.

[24] Yet, the Claimant filed her appeal with the General Division on January 19, 2021. The Commission argues that there was no need for the Claimant to explain her delay if she was truly appealing the Commission's January 7, 2021, letter. After all, she had 30 days from when she received a reconsideration decision to file an appeal.

[25] The application form for the Notice of Appeal only required an explanation for being late if a claimant was late. Section 9 of the Notice of Appeal reads:

> We must receive this completed form **within 30 days** from the date you received your reconsideration decision. If we receive your notice of appeal after the 30 days, you **must** explain why it is late.

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[7] See the Notice of Appeal – Employment Insurance – General Division, at GD2.
[8] See the Notice of Appeal – Employment Insurance – General Division, at GD2-13.

[26] The fact the Claimant explained her delay suggests that she was appealing the Commission's March 2, 2018, reconsideration letter.

[27] But, the Claimant insists that she was appealing the January 7, 2021, letter, even if parts of her Notice of Appeal to the General Division appear as if she was appealing the March 2, 2018, reconsideration decision. She argues for some leeway in how she filled out the appeal form. She claims that she completed the form without counsel's help.

[28] I find that it is not clear-cut that the Claimant intended to appeal just the March 2, 2018, reconsideration decision. While there is no doubt that the Claimant sought to overturn the Commission's March 2, 2018, reconsideration decision, it seems that she believed that she could only do this by appealing the January 7, 2021, letter too.

[29] The Notice of Appeal form asked the Claimant to attach the reconsideration decision that she was appealing. She attached just the January 7, 2021, letter but referred to both the March 2, 2018, letter and the January 7, 2021, letter as the reconsideration decisions.

[30] Although the Claimant provided an explanation for being late with her appeal, suggesting that she was appealing the March 2, 2018, decision, she also wrote, "was declined again Jan 7/2021 so was sent this form to see if this case can go forward."[9] This last sentence suggests that the Claimant believed that she was appealing the January 7, 2021, letter to the General Division.

[31] Overall, I find that the evidence suggests that the Claimant believed she was appealing both the March 2, 2018, reconsideration decision and the January 7, 2021, letter.

[32] Given that the Claimant indicated that she was appealing both the March 2, 2018, letter and the January 7, 2021, letter, the General Division should have clarified which letter the Claimant was appealing. Or, at the very least, it should have considered the January 7, 2021, letter, in addition to the March 2, 2018, reconsideration decision. It should have considered the January 7, 2021, letter to decide whether it was a decision that the Claimant could appeal.

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[9] See the Notice of Appeal – Employment Insurance – General Division, at GD2-14.

[33] Instead, the General Division focused solely on the Commission's March 2, 2018, reconsideration decision. The General Division made an error by overlooking the January 7, 2021, letter altogether.

Is the Commission's January 7, 2021, letter a reconsideration decision?

[34] No. The Commission's January 7, 2021, letter is not a reconsideration decision because the Claimant was not entitled to a second reconsideration decision when she had already received one on the same issue.

[35] The Claimant argues that the January 7, 2021, letter is a reconsideration decision. She argues that, because the letter is a reconsideration decision, she was entitled to appeal the letter to the General Division. The Claimant relies on the *Reconsideration Request Regulations* (Regulations). She argues that the Regulations let claimants make as many reconsideration requests as they want.

[36] The Commission denies that it reconsidered any decisions in its January 7, 2021, letter. In fact, it denies that it made any decision at all in that letter. So, it argues that the Claimant could not have had any appeal rights because of from the January 7, 2021, letter.

[37] In addition, the Commission argues that it did not have any basis to issue another reconsideration decision on January 7, 2021, because it had already issued a reconsideration decision on the same issue in March 2018. The Commission argues that parties are not entitled to an indefinite number of reconsiderations, no matter how many times they ask for one.

[38] The issue here is whether the Claimant was entitled to make a second reconsideration request in relation to the Commission's initial decision of December 8, 2017. If not, then the January 7, 2021, letter could not have been a reconsideration decision because the Claimant had already received a reconsideration decision in March 2018.

[39] I find that the Regulations do not allow an indefinite number of reconsideration requests. The Regulations deal with late reconsideration requests. The Regulations lay out the circumstances under which the Commission can extend the time for requesting a reconsideration.

[40] Section 112(1) of the EIA sets out when a claimant (or other person who is the subject of a decision by the Commission), or the employer of a claimant, may request a reconsideration by the Commission. The section states that they:

> may make **a request** to the Commission in the prescribed form and manner for a reconsideration of that decision at any time within
>
> (a) 30 days after the day on which a decision is communicated to them; or
> (b) any further time that the Commission may allow. [emphasis added]

[41] The use of the words "a request" and the tight timeline for making such a request are instructive. They suggest that a claimant is entitled to one reconsideration request. If Parliament had intended a claimant to be entitled to an indefinite number of requests, surely, the language would have reflected this, and surely, there would not be a restrictive 30-day time frame within which a claimant could make a request. The language does not say, for instance, that a claimant may make "requests" to the Commission.

[42] Similarly, the language in the Regulations also suggests that a party is entitled to only one reconsideration request. Sections 1(1) and (2) both refer to making "a request" or "the request," rather than to "requests."

[43] On top of that, allowing an indefinite number of reconsideration requests would defeat the purpose of a streamlined appeals process. If a reconsideration decision is unfavourable, the EIA offers a claimant an option. The next step for a party who is dissatisfied with a reconsideration decision may appeal that decision to the Social Security Tribunal. The EIA does not otherwise offer a party ongoing, multiple reconsiderations.

[44] Allowing an indefinite number of reconsideration requests would make the process cumbersome and hard to manage. Potentially, it could encourage unsuccessful claimants to continue making countless reconsideration requests for years, with the hopes that one day they would be successful.

[45] Given these considerations, I find that the Claimant was limited to one reconsideration request. She had already asked the Commission to reconsider its decision, in January 2018.[10] She

[10] See the Claimant's initial reconsideration request, filed on January 25, 2018, at GD3-25 to GD3-26.

received a reconsideration decision in March 2018. Asking for a second reconsideration in 2020 did not, as a result, entitle her to a second reconsideration decision from the Commission.

[46] As an aside, I note that section 112(1)(b) of the EIA gives more time beyond 30 days to make a reconsideration request. I mention this because the Claimant suggests that this extended time frame allows a claimant to make multiple requests.

[47] But, any extension beyond 30 days is at the Commission's discretion.

[48] The Commission has to exercise this discretion judicially. In other words, it must exercise this discretion correctly. It cannot base its decision to allow or refuse an extension on irrelevant factors, or without considering relevant ones.

[49] The Regulations set out the general circumstances that the Commission has to consider when deciding whether to allow an extension. The Commission may allow a longer period if it is satisfied that there is a reasonable explanation and if the person has demonstrated a continuing intention to request a reconsideration.[11]

[50] Even if the EIA or the Regulations allowed an indefinite number of reconsideration requests, a claimant would still have to clear this hurdle. They would have to show that they had a continuing intention to request a reconsideration from the time they received the Commission's initial decision. Without a continuing intention, the Commission would be unlikely to allow an extension.

[51] In this case, the evidence on file does not show that the Claimant had a continuing intention to request a reconsideration between March 2, 2018, and December 2020, when she filed her second reconsideration request.[12] For this reason, even if the Claimant had been entitled to make a second reconsideration request, the Commission would likely not have allowed an extension for her request.

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[11] See section 1(1) of the Regulations.
[12] See the Claimant's second reconsideration request, at GD3-35 to GD3-38. According to its date stamp, Service Canada received the request on December 29, 2020.

[52] So, if the Claimant was not entitled to a second reconsideration request, the Commission could not possibly have issued a second reconsideration decision. In short, despite the possibility of an extension to make a reconsideration request, I find that the Commission's January 7, 2021, letter is not a reconsideration decision.

[53] However, that does not mean the Commission did not make any decision at all. The Commission made a decision. It decided that the Claimant was not entitled to a second reconsideration decision.

[54] If the January 7, 2021, letter is not a reconsideration decision, that still leaves one question unanswered: Was the Claimant entitled to appeal the Commission's January 7, 2021, letter to the General Division if it is not a reconsideration decision?

Was the Commission's January 7, 2021, letter appealable to the General Division?

[55] No. The January 7, 2021, letter was not appealable to the General Division because it is not a reconsideration decision.

[56] The Claimant argues that she was entitled to appeal the Commission's January 7, 2021, letter to the General Division because there were "new facts." She points to *VA* as a new fact. The Appeal Division issued *VA* on May 11, 2020, little more than two years after the Commission issued its reconsideration decision.

[57] In its January 7, 2021, letter, the Commission decided that "any additional information [the Claimant] provided is not considered to be new facts …."[13]

[58] The Claimant argues that the Commission made a legal error when it decided that the new information she had given did not represent "new facts" under section 111 of the EIA.[14]

[59] As a result, the Claimant argues that the General Division should have also considered whether the Commission had wrongly decided that there were no new facts.

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[13] See the Commission's January 7, 2021, letter, at GD3-68.
[14] Under section 111 of the EIA, the Commission may rescind or amend a decision given in any particular claim for benefits if new facts are presented or if it is satisfied that the decision was given without knowledge of, or was based on a mistake as to, some material fact.

[60] The Commission argues that the Claimant did not have any basis to appeal its January 7, 2021, letter to the General Division for the following reasons:

- A claimant can appeal only a reconsideration decision. The Commission asserts that, as the January 7, 2021, letter is not a reconsideration decision, the Claimant could not appeal it to the General Division.

- While the Claimant says that she is allowed to appeal a rescind or amend (cancel or change) decision directly to the General Division, the Commission denies that the Claimant ever made a rescind or amend application in the first place. Since she never made such an application, the Commission denies that it ever made a decision, one way or another, about whether there were any "new facts."

- Even if the Commission had made a "new facts" decision about any new information, the January 7, 2021, letter was the first time the issue came about. The January 7, 2021, letter is not a reconsideration decision on the "new facts" issue, so the Claimant still could not appeal it to the General Division.

[61] Section 113 of the EIA sets out when a party may appeal to the Social Security Tribunal. The section states:

> A party who is dissatisfied with a decision of the Commission made under section 112, including a decision in relation to further time to make a request, may appeal the decision to the Social Security Tribunal established under section 44 of the *Department of Employment and Social Development Act*.

[62] This section establishes that a party may appeal a decision made under section 112. That section deals with reconsideration decisions. So, a party may appeal reconsideration decisions to the Social Security Tribunal. The EIA does not provide for any other circumstances when a party may appeal to the Social Security Tribunal.

[63] Even if the Commission's January 7, 2021, letter were an initial decision on the "new facts" issue, that does give the Claimant the right to appeal to the Social Security Tribunal. The rescind or amend provisions of the EIA do not let a claimant bypass the requirements of

section 113. There has to be a reconsideration decision for a claimant to be able to appeal to the Social Security Tribunal.

Is the Commission's January 7, 2021, letter a decision on the "new facts" or "material facts" issue?

[64] No. The Commission's January 7, 2021, letter is not a rescind or amend decision under section 111 of the EIA.

[65] The Commission denies that it made any decision on whether the Claimant's additional information (the *VA* decision) qualified as "new facts" or a "mistake as to some material fact" under section 111 of the EIA. It denies that it ever made a decision because the Claimant has never filed a formal application to rescind or amend any of its earlier decisions.

[66] The Claimant argues that the facts show otherwise. She says that the Commission recognized that she was making a rescind or amend application. The Commission directly responded and said that it did not consider any additional information to be new facts. It also stated that it had made the correct decision, with knowledge of the material facts she had provided. As well, the Claimant notes that the Commission used the same language in its January 7, 2021, letter as the rescind or amend provisions in the EIA.

[67] I find that the rescind or amend provisions under section 111 of the EIA are distinct from the reconsideration provisions under section 112 of the EIA.

[68] A reconsideration request does not somehow also become a request to rescind or amend the Commission's decision. They are different things. That said, when reconsidering a decision, the Commission can consider new information that it might not have had previously. But, that does not then create a rescind or amend decision. Even if an applicant were to provide new information with a reconsideration request, the Commission should consider the new information only in the context of a reconsideration.

[69] Here, the Commission contributed to any confusion by referring to "new facts" and "material facts" and by using the language of section 111. But, without a specific request from the Claimant to rescind or amend a decision, the Commission's January 7, 2021, letter remained simply a response to the Claimant's reconsideration request.

[70] The Commission's position is that the Claimant was not entitled to a second reconsideration decision. It should have concluded its letter at that point, instead of introducing "new facts" and "material facts" language.

[71] I find that the January 7, 2021, letter is not a decision under section 111 of the EIA.

[72] So, if the Claimant intends to make a rescind or amend application, her option is to ask the Commission to rescind or amend its decision under section 111 of the EIA. The Claimant cannot ask for a reconsideration on a rescind or amend request to the Commission if the Commission has yet to issue an initial decision on that issue.

Does the *VA* decision represent a "new fact" or "material fact" under section 111 of the *Employment Insurance Act*?

[73] The parties are asking me to decide whether *VA* represents a "new fact" or a "material fact" on which the Commission was mistaken and on which it based its decision, under section 111 of the EIA.

[74] The Claimant argues that, if I agree that *VA* represents a "new fact" or "material fact" upon which the Commission made a mistake and on which it based its decision, this will mean that the money the Claimant received from the Hardship Fund is not earnings and does not have to be allocated. It would mean that the Claimant would not have an overpayment to repay.

[75] The Commission argues that I should find that *VA* does not represent a "new fact" or a "material fact" on which it was mistaken and on which it based its decision. Such a finding would leave the overpayment in place.

[76] The Claimant has yet to ask the Commission to rescind or amend its decision. And, the Commission has yet to issue an initial or reconsideration decision on the matter, and her appeal rights to the General Division have yet to be exhausted. The "new facts" or "material facts" issue is not properly before me. There is no basis for me to decide whether *VA* represents a "new fact" or "material fact" on which the Commission was mistaken and on which it based its decision.

[77] Even so, the Claimant asks me to provide direction to the parties on the issue.

[78] The Claimant argues that *VA* represents a "new fact" because an Appeal Division decision regarding the nature of the money the Claimant received did not exist previously.

[79] The Commission argues that the underlying facts have not changed. The source of the money that the Claimant received remains unchanged. The Commission argues that the only factual change is that the Appeal Division considered the issue and decided that the money the Claimant had received was not earnings.

[80] The Commission argues that, essentially, the Claimant is asking for retroactive application of the case law. The Commission submits that the courts have established that case law is not evidence. In a case called *Pathmanathan*, the Federal Court held that an administrative tribunal's decision is not evidence as it is a "judicial or quasi-judicial consideration of evidence produced by witnesses …."[15] In other words, a decision is an analysis of the evidence.

[81] The Commission also cites *Bossé*.[16] There, the Federal Court agreed that decisions are not new evidence. The Federal Court also held that decisions "are a part of the common law of the land, until such time as they are varied or overruled." The Court rejected the applicant's arguments that a finding of fact by a court in one case could be used as a means to require reconsideration based on new evidence grounds in a later case. The Court found that it would offend *functus officio*[17] and undermine finality in proceedings.

[82] In *Jhajj*,[18] the Federal Court came to the same conclusion. It examined whether a later decision of the Federal Court of Appeal could be used as the basis for reconsideration of a leave application.

[83] Ultimately, the Court decided that later case law of a higher court cannot be grounds for reconsideration, even those in which *Canadian Charter of Rights and Freedoms* considerations are relevant. The Court cited *R v Thomas,*[19] noting that the law under which the person had been convicted was later ruled unconstitutional. Even so, the Supreme Court of Canada did not extend

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[15] See *Pathmanathan v Canada (Minister of Citizenship and Immigration*), 2009 FC 885 at para 43.
[16] See *Bossé v Canada (Attorney General)*, 2017 FC 336 at paras 13 to 16.
[17] *Functus officio* means the court has discharged its duty, so it has no more duties to perform. Once a decision-maker has made a decision, they do not have any more authority. They cannot revisit a final decision.
[18] See *Jhajj v Canada (Minister of Employment and Immigration)*, 1995 CanLII 3583 (FC).
[19] See *R v Thomas*, 1990 CanLII 141 (SCC).

time to appeal in that case. From this, the Federal Court concluded that it is clear that the Supreme Court determined that finality in judicial decisions is important, not avoided even when Charter rights are involved.

[84] The Claimant argues that this line of cases is distinguishable. She denies that she is asking for retroactive application of the case law. She claims that *VA* is a new development altogether, so the decision should be applied in her case.

[85] While the facts in each of these decisions are distinguishable, it seems that the same principle applies. However, as I have indicated above, I am not making a decision on this issue as it is not properly before me.

CONCLUSION

[86] In summary, the General Division failed to recognize that the Claimant sought to appeal the Commission's January 7, 2021, letter. However, the January 7, 2021, letter is not a reconsideration decision. So, the January 7, 2021, letter was not appealable to the General Division.

[87] I am dismissing the appeal.

Janet Lew
Member, Appeal Division

HEARD ON:	June 23, 2021
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	K. J., Appellant Erin Epp (counsel) and Natasha Abraham (counsel), Representatives for the Appellant Samaneh Frounchi (counsel), Representative for the Respondent