



Citation: *ZW v Canada Employment Insurance Commission*, 2021 SST 276

**Social Security Tribunal of Canada
General Division – Employment Insurance Section**

Decision

Appellant: Z. W.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (0) dated March 3, 2021 (issued by Service Canada)

Tribunal member: Christianna Scott

Type of hearing: Questions and answers

Decision date: June 10, 2021

File number: GE-21-388

Decision

[1] I am allowing the appeal.

[2] I find that the Canada Employment Insurance Commission (the Commission) did not consider important facts when deciding whether to allow Z. W. (the Claimant) more time to ask the Commission to reconsider its original decision.

[3] After considering all of the facts, I find that the Claimant has shown that he had a reasonable explanation for the delay in asking for a reconsideration and a continuing intention to make his request for reconsideration.

[4] This means that the Commission must give the Claimant more time to ask for the reconsideration of the Commission's original decision.

Overview

[5] The Claimant applied for employment insurance benefits. The Commission paid him benefits. About four years later, the Commission started an investigation into the Claimant's benefit period. The Commission decided that the Claimant knowingly made false statements in his claim for benefits. The Commission decided that, for part of the benefit period, the Claimant was not available for work and he was also self-employed. The Commission made this decision on November 22, 2019 (original decision).

[6] On July 24, 2020, the Claimant asked the Commission to reconsider its original decision. The Commission refused to reconsider its original decision because it decided that the Claimant waited too long to ask for a reconsideration.

[7] The Commission argued that when the Claimant received the original decision he was told that he had 30 days to ask for a reconsideration. But he didn't act and waited too long before finally asking for a reconsideration.

[8] The Claimant disagreed. He argued that the Commission should not have refused to reconsider his file. He said that he received the original decision right before

he travelled overseas for medical treatment. He said that when he returned to Canada he was too ill to gather the information he needed to ask for a reconsideration.

[9] So, the Claimant has appealed the Commission's refusal to give him more time to ask them to reconsider their original decision. He has appealed the Commission's refusal before the Social Security Tribunal of Canada (the Tribunal).

Matter I have to consider first

[10] Another member of the the General Division of the Tribunal (the General Division) originally heard this appeal. The Claimant disagreed with the General Division's decision. The Claimant felt that the General Division made errors in its decision. He appealed the matter before the Appeal Division of the Tribunal. The Appeal Division allowed the Claimant's appeal because it decided that the General Division made an error of law in its decision. The matter was returned to me for reconsideration without any particular instructions. The Appeal Division only remarked that the evidentiary record before the original member of the General Division was in complete.

[11] I have reviewed the original record at the General Division and the Appeal Division. This includes listening to the recording of the oral hearing before the General Division. I have decided to deal with this appeal through questions and answers. I proceeded in this manner because:

- The *Social Security Tribunal Regulations* say that hearings must be conducted as informally and quickly as the circumstances and the consideration of fairness and natural justice permit.¹ I therefore considered that the quickest and most thorough way of proceeding was to review the record and complete the gaps in the information through questions and answers.
- The legislator gave me a wide discretion to decide what evidence will be considered and how to proceed when a matter is sent back to the General Division. In the absence of any specific instructions from the Appeal Division, I

¹ Section 3(1)a) of the *Social Security Tribunal Regulations*.

have the discretion to decide on how to proceed based on the particularities of the matter before me.²

- The appeal does not raise issues around the truthfulness of the Claimant's statements. So, I consider that a hearing through questions and answers is most appropriate in the situation.

Issues

[12] Did the Claimant wait too long to ask for reconsideration of the Commission's original decision?

[13] If so, did the Commission exercise its discretionary powers judicially, that is to say in a fair manner, taking into consideration all of the important information and ignoring information that is not important?

[14] If the Commission did not exercise its discretion judicially, I must decide whether the Claimant should be allowed more time to ask for a reconsideration. In order to do this, I will need to consider whether the Claimant had shown:

- a reasonable explanation for the delay; and
- a continuing intention to ask for reconsideration.

[15] If I find that the Claimant has proven those two points, then the Commission must give him more time to ask for the reconsideration of its original decision. But, if I consider that the Claimant did not prove these two points, then the Commission does not need to give the Claimant more time to ask for reconsideration.

Analysis

[16] The *Employment Insurance Act* (Act) sets out that a claimant may make a request for reconsideration of a decision from the Commission within 30 days after the day the decision is communicated to the claimant.³

² *R.M. and Minister of Employment and Social Development*, GP-19-1863.

[17] When a reconsideration request is made after 30 days, the Commission may grant the claimant more time to make a request for reconsideration⁴. The decision, by the Commission on whether to grant more time is discretionary.⁵ This means that I can't interfere to change the Commission's decision unless I find that the Commission did not exercise its discretion "judicially." I will explain later what is needed to show a failure of the Commission to act judicially.⁶

[18] A claimant must show certain requirements to prove that an extension of time is warranted. When claimants asked the Commission to reconsider its decision more than 30 days after they got the original decision but less than 365 days, the claimant must show that:

- there is a reasonable explanation for the delay; and
- they had a continuing intention to request a reconsideration.⁷

Issue 1: Was the Claimant's request made outside the 30-day limit?

[19] I find that the Claimant asked for reconsideration of the Commission's decision after the 30-day limit.

[20] The Claimant agrees that he made his request for reconsideration after the 30-day limit. He says that he received the Commission's original decision on December 17, 2019.⁸ The Claimant also agrees that the Commission received his reconsideration request on July 24, 2020.⁹

[21] So, I find that there is no evidence in this appeal to lead me to believe that the Claimant made his reconsideration request within 30 days of the original decision having been communicated to him.

³Paragraph 112 (1)(a) of the Act.

⁴ Paragraph 112 (1) (b) of the Act.

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

⁶ See below paragraph 23 of this decision.

⁷ Subsection 1(1) of the Regulations

⁸ See GD2-1 and GD3-58.

⁹ See GD3- 41 and GD3-42.

Issue 2: Did the Commission exercise its discretionary powers judicially?

[22] No, I find that the Commission did not exercise its decision-making powers in a judicial manner.

[23] A decision from the Commission concerning the extension of time to request reconsideration is discretionary.¹⁰ This means that I can't interfere with the Commission's decision unless I find that the Commission did not exercise its power judicially.¹¹ A discretionary power is not exercised judicially if the decision maker: acted in bad faith; acted for an improper purpose; took into account an unrelated factor; ignored an important factor or acted in a discriminatory manner.¹²

[24] The Commission decided that the Claimant did not have a reasonable explanation for the delay and did not show a continuing intention to ask for reconsideration. The Commission came to this conclusion based on the following:

- The Claimant was aware of the decision, which clearly stated that the Claimant was found to have been self-employed since October 20, 2014, and unavailable for work since September 1, 2014. The decision also said that the Commission decided that the Claimant knowingly made false statements;
- The Claimant was told in the original decision that he had 30 days to ask for a reconsideration if he disagreed with the decision;
- Although the Claimant stated that he was away due to illness, he did not say for how long. So, this reason does not account for the delay;
- He did not show a continuing intention to follow up with a reconsideration request because he waited for 214 days before he reached out to the Commission.¹³

¹⁰*Daley v. Canada (Attorney General)*, 2017 FC 297.

¹¹ *Canada (Attorney General) v. Knowler*, A-445-95.

¹² *Canada (Attorney General) v. Purcell*, 1 FC 644.

¹³ See GD3-58.

[25] I find that the Commission did not look into important information around the reasons for the Claimant's delay. The Commission knew that the Claimant was ill and travelled to get treatment. However, there are few details on the record about critical elements that were essential to the Commission fully understanding the reasons for the delay and whether the Claimant had a continuing intention to pursue his reconsideration. The elements included:

- how the Claimant spent his time between December 17, 2019, and the day he travelled overseas for medical treatment;
- how long the Claimant was overseas for medical treatment;
- the nature of his medical condition;
- the type of treatment he received;
- the length of his recovery; and
- how he spent his time between his return to Canada (after treatment) and the date when he made his request for reconsideration.

[26] I find that all of this information, which is essential to understanding the events that surround the late request for reconsideration were lacking in the Commission's analysis.

[27] So, I find that the Commission did not act judicially when it refused to allow the Claimant more time to ask for reconsideration. The Commission did not have all of the important information to evaluate the reasons behind the Claimant's late request for reconsideration.

Issue 3: Should the Claimant be allowed more time to ask the Commission to reconsider its original decision?

[28] The Claimant explained in detail the sequence of events leading to his reconsideration request. The Claimant said that:

- He had booked his return trip overseas about a month and a half before he travelled. The purpose of this trip was to have a thorough medical exam and if possible, treatment.
- The Claimant says that he got the Commission's letter on December 17, 2019.
- He left on his trip on December 18, 2019.
- He took a leave of absence from work between December 18, 2019, and January 13, 2020.
- While overseas the Claimant had a medical exam. He had to have surgery. He was hospitalized from December 30, 2020, until January 2, 2020.¹⁴
- He returned to Canada on January 12, 2020.¹⁵
- On January 15, 2020, the Claimant went to work to speak with his boss. He explained that he could not return to full duties. After that, the Claimant's work consisted of attending weekly team meetings with his colleagues by videoconference and answering some emails.
- The Claimant says until June 2020 he was recovering from his surgery. In early June 2019, he started working more hours. He started at three hours a day and progressed to seven hours a day.¹⁶
- On June 7, 2020, the Claimant drove to Toronto to get his laptop that he had given a friend in 2014.
- Between June 7, 2020, and July 2020, the Claimant gathering information to support his reconsideration request.

¹⁴ See RGD11-3.

¹⁵ See RGD5-2.

¹⁶ See RGD5-4.

Was there a reasonable explanation for the delay?

[29] I find that there was a reasonable explanation for the delay.

[30] The Commission said that the Claimant has not shown a reasonable explanation for taking so long to make his request for reconsideration. The Commission said that although the Claimant explained that he was ill and travelling out of the country, he did not give enough information to explain the delay.

[31] The Claimant said that he was not able to ask for reconsideration earlier than July 2020 because he travelled out of the country for medical reasons and then convalesced for several months.

[32] I find that for the following reasons, the Claimant gave a reasonable explanation for the delay.

- The Claimant received the Commission's decision one day before he left the country for medical help. The Claimant gave proof of his departure date. He explained that he was in pain and preparing for his departure. As such, I accept his explanation that he could not make his reconsideration request before leaving.
- The Claimant was hospitalized overseas and underwent surgery. He explained that while he was abroad he was unable to ask for reconsideration. I accept the Claimant's explanation. He provided information from his treating physicians that showed that he was hospitalized and underwent surgery.
- The Claimant explained that he was convalescing between January and early June 2020. He provided information about the limited activities that he was able to do during this period. He described that he was unable to concentrate because of his pain.
- Most importantly, the Claimant highlighted that he did not have access to his laptop where he had all of the information that he needed to make his

reconsideration request. The Claimant explained that this information was in a laptop that he gave to a friend who lived in Toronto. The Claimant explained that he could not take a bus or a plane to Toronto because of the COVID-19 pandemic. He also explained that he was not well enough to drive round trip between his home and Toronto until the beginning of June 2020.

[33] In light of these circumstances, I consider that there were genuine impediments to the Claimant making his request in a timely manner. I also find that these impediments provide a reasonable explanation for the delay. I accept the Claimant's statement that he could not make a genuine request for reconsideration without access to the documents he needed. The Commission's original decision related to events that took place more than four years before. In his reconsideration request, the Claimant provided the Commission with a detailed list of his job searches to argue his position.

[34] I therefore accept the Claimant's argument that he had a reasonable explanation for the delay because his medical situation kept him from acting sooner and kept him from accessing the information that he needed to make his reconsideration request.

Was there a continuing intention to ask the Commission to reconsider its decision?

[35] I find that the Claimant has shown that he had a continuing intention to ask the Commission to reconsider its decision.

[36] The Commission argued that the Claimant did not have a continuing intention to ask the Commission to reconsider its decision because he did not contact the Commission once he returned to Canada. The Commission said that the Claimant's behaviour showed that he was not steadily focused on asking for reconsideration of the Commission's decision.

[37] The Claimant disagreed. He said that as soon as he was well enough to actively pursue his reconsideration, he did so. He argued that he had a continuing intention because he disagreed with the Commission's decision and he wanted to ask the Commission to review it.

[38] I accept the Claimant's position that he had a continuing intention to ask the Commission to reconsider its decision. First, I accept that he disagreed with the Commission's decision and was intent upon pursuing the matter as soon as he was well enough. This is because the Claimant was consistent in his statements that he was "astonished" and surprised by the Commission's decision.

[39] I also find that the Claimant's actions, once he was well enough to drive to Toronto to get his laptop confirm his level of commitment to pursuing his request for reconsideration. The documents the Claimant submitted in support of his reconsideration show a serious effort to provide the Commission with all of the information that he believed would support his request.¹⁷

[40] Last, I do not accept the Commission's statement that the Claimant's failure to contact the Commission earlier shows that he did not have a continuing intention to move forward with a request for reconsideration. As the Claimant said, he did not have access to the documents to support his request. So, I agree with the Claimant that his failure to contact the Commission earlier was not driven by him setting aside his desire to ask for a reconsideration. Rather, it was because of his inability to make his reconsideration without the documents in hand.

[41] So, I find that he Claimant has proven that he had a continuing intention to ask the Commission to reconsider its original decision.

Conclusion

[42] The appeal is allowed.

Christianna Scott
Member, General Division – Employment Insurance Section

¹⁷ See GD3-45 to GD3-56.