



Citation: *AH v Canada Employment Insurance Commission*, 2022 SST 701

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

Decision

Appellant: A. H.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (410226) dated November 23, 2020 (issued by Service Canada)

Tribunal member: Raelene R. Thomas

Type of hearing: Teleconference

Hearing date: March 1, 2022

Hearing participant: Appellant

Decision date: April 4, 2022

File number: GE-21-2367

Decision

[1] The appeal is allowed.

[2] I have granted an extension of time to make the request for reconsideration.

[3] The Commission should now reconsider its August 16, 2018 decision and advise the Claimant of the results of that reconsideration.

Overview

[4] The Claimant established a claim for employment insurance (EI) benefits on January 11, 2015. He received EI benefits after that date. The Commission wrote the Claimant on August 16, 2018, stating that the Claimant had earnings in seven of the weeks while he was receiving EI benefits and he had not declared those earnings.¹

[5] Based on the information it had, the Commission decided that the Claimant had knowingly made misrepresentations when he did not declare those earnings.² The Claimant was required to repay the EI benefits. The Commission also imposed a \$632 penalty on the Claimant and imposed a notice of serious violation. The notice of serious violation meant the Claimant had to work more hours to qualify for EI benefits for the next five years or for his next two qualified claims, whichever came first.

[6] The Claimant made a request for reconsideration to the Commission on November 20, 2020. The Commission refused to reconsider its August 16, 2018, decision because the Claimant did not make his request for reconsideration within 30 days of August 16, 2018 and he did not provide a reasonable explanation for his delay. The Claimant appeals to the Social Security Tribunal.

¹ The Canada Employment Insurance Commission's Employment Insurance program is administered by Service Canada.

² The Commission made this decision on August 16, 2018. See page GD3-9 in the appeal file.

Matter I have to consider first

I am accepting documents sent in after the hearing

[7] At the hearing the Claimant stated that he had contacted Service Canada many times about the August 16, 2018 letter. He wanted a copy of what the Service Canada wrote to him January 17, 2018. Up to the date of the hearing, the Commission was not able to provide him with a copy of the January 17, 2018 document. The Claimant was stated that he had not received the January 17, 2018 document, it could not be produced and the appeal file did not contain any records of the conversations he had with Service Canada agents.

[8] After the hearing, I asked the Commission to provide:

- a) the records of conversations held with the Claimant with the Claimant from August 16, 2018 to November 20, 2020;
- b) all correspondence sent to the Claimant from August 16, 2018 to November 20, 2020; and
- c) all correspondence received from the Claimant from August 16, 2018 to November 20, 2020.

[9] The period August 16, 2018 to November 20, 2020 is the time from the date of the Commission's decision to the date the Claimant made his request for reconsideration.

[10] The Commission responded to my request and provided the records it had of correspondence that it sent to the Claimant, the records it had of conversations that it held with the Claimant, and the records it had of correspondence (forms) that it received from the Claimant for the requested time period. The Commission also provided the January 17, 2018 document. I am accepting these documents into evidence because they are relevant to the decision the Commission made on August 16, 2018 and I have considered these documents in reaching my decision.

[11] The Claimant was provided with the Commission's response and given an opportunity to make submissions. He did so on March 12, 2022. The majority of the Claimant's submission is in the form of questions about the content of the documents, and his interactions with Service Canada. It is not my role, nor that of the Tribunal, to answer those questions. Instead, I will regard the Claimant's questions as rhetorical and part of his submission as to why he disagrees with the Commission's refusal to reconsider its August 16, 2018 decision.

Issues

[12] Issue 1: Was the reconsideration request made late?

[13] Issue 2: Did the Commission exercise its discretion in a judicial manner when it denied the Claimant's request to extend the thirty-day period to make a request for reconsideration?

[14] Issue 3: If the Commission did not exercise its discretion in a judicial manner, should the Claimant be given an extension of time to request reconsideration?

Analysis

[15] Any person who is the subject of a decision of the Commission may make a request for reconsideration of that decision within thirty days after the decision is communicated to him, or any further time that the Commission may allow.³

[16] The Commission's decision whether to allow a longer period of time to make a request for reconsideration is discretionary.⁴

[17] The Commission's discretion must be exercised according to the criteria in the *Reconsideration Request Regulations*. The Commission may allow a claimant further time to make a request for reconsideration if the Commission is satisfied there is a

³ *Employment Insurance Act*, section 112(1). This is how I refer to the law that applies to this appeal.

⁴ *Daley v. Canada (Attorney General)*, 2017 FC 297. This is how I refer to the court cases containing principles the law requires me to apply to the circumstances of this appeal.

reasonable explanation for requesting a longer period and the Claimant has demonstrated a continuing intention to request reconsideration.⁵

[18] Where a Claimant's request for reconsideration is made more than 365 days after the decision was communicated, as is the case here, the Commission must also be satisfied that the request has a reasonable chance for success and no prejudice would be caused to the Commission or another party to the appeal.⁶

[19] I must decide whether, in denying the request for an extension of time to make the request for reconsideration, the Commission acted in good faith, with proper purpose and motive, took into account any relevant factors, ignored any irrelevant factors, and acted in a non-discriminating manner.⁷

[20] I can only intervene when I determine that the Commission did not exercise its discretion judicially. If I find that the Commission's discretion was not exercised judicially, then I will make the decision the Commission should have given.⁸

The reconsideration request was made late

[21] I find the request for reconsideration was made late because the request was made more than thirty days after the Commission's decision was communicated to the Claimant.

[22] It is the responsibility of the Commission to inform the Claimant of decisions about their claim for EI benefits and its effects. The burden of proving that the communication was received by the Claimant rests with the Commission.⁹

[23] The Commission sent the Claimant a letter detailing its decision about the Claimant's failure to report earnings while receiving EI benefits. The letter is dated

⁵ *Reconsideration Request Regulations*, section 1(1)

⁶ *Reconsideration Request Regulations*, section 1(2)

⁷ *Canada (Attorney General) v. Sirois*, A-600-95; *Canada (Attorney General) v. Purcell*, A-694-94

⁸ My decision must be in accordance with subsection 54(1) of the *Department of Employment and Social Development Act* which allows me to dismiss the appeal, or confirm, rescind or vary a decision of the Minister or Commission in whole or in part.

⁹ *Bartlett v. Canada (Attorney General)*, 2012 FCA 230

August 16, 2018. This evidence tells me the Commission made its decision on August 16, 2018 and communicated that decision to the Claimant on August 16, 2018.

[24] The Claimant testified that when he read the August 16, 2018 letter he saw the phrase “We wrote to you on January 17, 2018 about the following issue.” This evidence tells me that the Claimant received the Commission’s August 16, 2018 decision.

[25] The thirty-day period for requesting a reconsideration of the Commission’s decision expired on September 17, 2018.¹⁰

[26] The Claimant received the Claimant’s request for reconsideration on November 20, 2020. This is a delay of 797 days. This is more than 30 days after the Claimant learned about the Commission’s decision. As a result, I find the Claimant’s reconsideration request was made late.

The Commission did not exercise its discretion in a judicial manner

[27] I find the Commission did not act judicially when it decided that it would not allow the Claimant a longer period to request reconsideration.

[28] The Claimant testified at the hearing that he has Attention Deficit Hyperactivity Disorder (ADHD). He testified that he read the August 16, 2018 letter.¹¹ He focused on the statement “We wrote to you on January 17, 2018 about the following issue.”

[29] I accept the Claimant’s testimony that he did not receive the January 17, 2018 document.

[30] The Claimant explained that due to his ADHD he has to do things in chronological order. The Claimant said that due the ADHD he needed to have the January 17, 2018 document, to see what it said before he could move on with the content of the August 16, 2018 letter. He does not like to be blamed for things he did

¹⁰ Thirty days after August 16, 2018 falls on Saturday, September 15, 2018. The Monday following is September 17, 2018.

¹¹ The August 16, 2018 letter contains the Commission’s decision.

not do. He testified that he believed the Commission made its decision that he knowingly made false misrepresentations based on the January 17, 2018 document.

[31] The Claimant said that in many of his calls to Service Canada that he would ask for a copy of the January 17, 2018 document only to be told that he should not focus on that document.

[32] In its Record of Decision (ROD), the Commission considered the explanation given by the Claimant that he never received the January 17, 2018 document. The Commission noted that he had spoken Service Canada agents in November 2018 and again in November 2019.

[33] In both conversations and in a later conversation with a Service Canada agent on November 26, 2020, the Claimant consistently made reference to the fact that he did not receive the January 17, 2018 document. The Commission repeatedly told the Claimant that it could not produce the January 17, 2018 document. Although, the January 17, 2018 document was not the Commission's decision, the Claimant required that document before he could deal with the Commission's actual decision made on August 16, 2018.

[34] The ROD noted the Claimant's focus on the January 17, 2018 document. I recognize that the January 17, 2018 document does not contain a Commission decision. However, the Commission did not consider what led to the Claimant's focus on the January 17, 2018 document and how its failure to provide the January 17, 2018 document to the Claimant prevented the Claimant from making his request for reconsideration.

[35] In my opinion, I think the fact that the Claimant's ADHD led him to focus on the January 17, 2018 document was a relevant factor which the Commission failed to consider. That the Claimant believed he required the January 17, 2018 document before he could proceed to deal with the August 16, 2018 letter was a relevant factor that should have been considered. That the Commission's inability to provide the January 17, 2018 document to the Claimant would exacerbate the Claimant's focus on

that document and inhibit his ability to deal with the August 16, 2018 letter is another relevant factor that should have been considered. By not considering these relevant factors, I find that the Commission did not exercise its discretion in a judicial manner.

Should the extension of time to request reconsideration be granted?

[36] Having found that the Commission's discretion was not exercised judicially, I must now give the decision that the Commission should have given, which in this case is to grant the Claimant an extension of time to submit his reconsideration request.¹²

– Reasonable explanation for delay

[37] I find the Claimant had a reasonable explanation for the delay in requesting reconsideration. This is because, due to his ADHD, the Claimant required the January 17, 2018, document before he could deal with the August 16, 2018 letter from the Commission.

[38] As noted above the Claimant testified that he has ADHD and, as a result, he needs to deal with things in chronological order. To him this meant he had to resolve the content of the January 17, 2018 document first. The appeal file shows that the Commission was unable to produce that document.¹³

[39] The Claimant was of the belief that a decision had been made in the January 17, 2018 document. No decision was made in that document. Nonetheless, I think it was important that the Claimant be able to read the January 17, 2018 document before deciding whether to ask for reconsideration of the August 16, 2018 decision. It was not until he spoke to a Service Canada agent "Lynn" in November 2020 that he could put aside his focus on the January 17, 2018 document and request reconsideration. As a result, I find the Claimant's explanation that he needed the January 17, 2018 document before he could request reconsideration to be a reasonable explanation for his delay.

¹² *Daley v. Canada (Attorney General)*, 2017 FC 297

¹³ The Commission provided the January 17, 2018 document to the Tribunal on March 9, 2022. The Tribunal forwarded the document to the Claimant on March 9, 2022.

– **Continuing intention to request reconsideration**

[40] I find the Claimant did have a continuing intention to request reconsideration from September 17, 2018 to November 20, 2020.

[41] The Commission's ROD states that the Claimant was advised numerous times that "he needed to reconsider" the decision. The ROD says that although the Claimant was in contact with the Commission during this period he never filed a formal or even a verbal request for reconsideration. It says that the Claimant was told about his reconsideration rights in the August 2018 letter, in a phone conversation in November 2018 and in August 2019. The ROD states the Claimant could have filed a reconsideration request during this period but he was frustrated with the Commission and went on to say that he did not plan on applying for benefits again, which did not happen.

[42] The Claimant's testimony is that he needed the January 17, 2018 document before he could deal with the August 16, 2018 letter. He explained that his ADHD meant that he had to deal with things in a chronological order. The Claimant testified he contacted Service Canada after he received the August 16, 2018 letter. He asked for the January 17, 2018 document and was told it could not be found.

[43] The Claimant repeatedly requested a copy of the January 17, 2018 document but the Commission was not able to provide it to him until March 9, 2022. The Claimant's contacts with the Commission focused on the January 17, 2018 document. While that document is not the Commission's decision I think that his repeated requests for that document as a prelude to dealing with the August 16, 2018 decision demonstrate a continuing intention to request reconsideration.

– **Reasonable chance for success**

[44] I find that it is not clear and obvious on its face that the Claimant's reconsideration request is bound to fail. In other words, it is not plain and obvious that the Commission will not change its decision on reconsideration.

[45] The Commission's decision was that the Claimant knowingly made false misrepresentations when he did not report his earnings while he was receiving EI benefits. As a result, the Claimant was required to pay back the EI benefits he received, pay a penalty and had to work more hours to qualify for EI benefits in the future.

[46] It is not enough that the statement or omission be false or misleading, the claimant must knowingly make the false or misleading statement or representation (emphasis added). Knowingly means the claimant knew the information provided was untrue when he made the statement, and does not include any element of intention to deceive.¹⁴

[47] The Claimant testified that in 2015 he was abusing drugs. He said that it took him a long time to figure out and remember where he was working. He was not sure if he was working at that time, with whom he was working or when he was paid. The Commission has not yet had the opportunity to consider this information with respect to determining whether the Claimant knowingly made false representations. As there may be a basis for the Claimant arguing that he did not knowingly make false representations it is not obvious that the Claimant's request for reconsideration is bound to fail.

– **Prejudice to the Commission or another party**

[48] I find that no prejudice would be caused to a party if the Claimant was granted an extension of time to request reconsideration of the August 16, 2018 decision. The Commission was able to produce January 17, 2018 document. This tells me that the Commission is able to produce all the records leading to its August 16, 2018 decision, so that both it and the Claimant can present their case on the merits of that decision.

¹⁴ *Attorney General of Canada v. Gates*, A-600-94.

Conclusion

[49] The appeal is allowed.

[50] The Commission did not demonstrate that it exercised its discretion in a judicial manner when it refused the Claimant's request for reconsideration.

[51] The Claimant has met the provisions of section 1 of the *Reconsideration Request Regulations* and is therefore entitled to an extension of time to make the request for reconsideration.

[52] The Commission should now reconsider its August 16, 2018 decision and advise the Claimant of the results of that reconsideration.

Raelene R. Thomas
Member, General Division – Employment Insurance Section