



Citation: *RS v Canada Employment Insurance Commission*, 2022 SST 1241

Social Security Tribunal of Canada Appeal Division

Decision

Appellant: R. S.

Respondent: Canada Employment Insurance Commission
Representative: Angèle Fricker

Decision under appeal: General Division decision dated May 6, 2022
(GE-22-926)

Tribunal member: Charlotte McQuade

Type of hearing: Teleconference
Hearing date: November 3, 2022
Hearing participants: Respondent's representative
Decision date: November 8, 2022
File number: AD-22-364

Decision

[1] The appeal is dismissed. The General Division made an error of law. I have substituted my decision for the General Division but I reach the same result as the General Division. The Claimant cannot have an extension of time to file his appeal to the Tribunal's General Division.

Overview

[2] R. S. is the Claimant. The Claimant asked the Commission to antedate (backdate) a request for Employment Insurance (EI) Family Caregiver benefits to January 1, 2010. The Canada Employment Insurance Commission (Commission) refused that request. The Claimant asked the Commission to reconsider. On December 15, 2021, the Commission decided the Claimant's reconsideration request was late. The Commission decided the Claimant did not meet the requirements set out in the law for an extension of time to pursue his reconsideration request.¹

[3] On March 12, 2022, the Claimant appealed the Commission's December 15, 2021, decision to the Tribunal's General Division. However, the General Division decided the Claimant had filed his appeal to the Tribunal past the required time to do so and refused the Claimant an extension of time to pursue his appeal.

[4] The Claimant asked for permission to appeal the General Division decision to the Appeal Division. He said the General Division had made an important error of fact but provided no explanation what that error of fact was. Even so, I granted the Claimant permission to appeal as I noticed the General Division might have made several reviewable errors.²

¹ These requirements are set out in the *Reconsideration Request Regulations* (R.R. Regulations).

² Section 58(1) of the *Department of Employment and Social Development Act* (DESA Act) describes the only types of errors that I can consider. These errors are that the General Division breached natural justice, made an error of jurisdiction, made an error of law or based its decision on an important error of fact.

[5] I find the General Division made an error of law by not analyzing important evidence the Claimant provided about his reasons for the late appeal. So, I have substituted my decision for that of the General Division. However, I reach the same result as the General Division. The Claimant cannot have an extension of time to pursue his appeal to the General Division.

Preliminary matters

The hearing proceeded in the Claimant's absence

[6] On November 1, 2022, the Claimant requested an adjournment.³ I refused that request on November 2, 2022. The Claimant was advised by email on November 2, 2022, of my decision and the reasons for it, as well as the fact the hearing would proceed as scheduled.⁴ The Claimant did not attend the hearing on November 3, 2022. A Tribunal staff member tried to contact the Claimant to see if he was having any difficulties connecting to the teleconference but was unsuccessful. A voicemail was left but was not returned.

[7] I proceeded with the hearing in the absence of the Claimant, as I was satisfied that the Claimant received the Notice of Hearing and was aware of the hearing date.⁵ The Notice of Hearing was sent to the Claimant on September 13, 2022.⁶ The Claimant confirmed his awareness of this date to Tribunal staff on September 28, 2022.⁷ The Claimant also acknowledged the hearing date in his November 1, 2022, request for an adjournment.⁸

³ AD4.

⁴ AD0A-1 to AD01-4.

⁵ See section 12 of the *Social Security Tribunal Regulations*, which says I can proceed with the hearing in the absence of a party who fails to appear, if I am satisfied the party received the Notice of Hearing.

⁶ AD0-1 to AD0-4.

⁷ Telephone log of September 28, 2022, in Tribunal records.

⁸ AD04.

[8] The Notice of Hearing told the Claimant that if the Tribunal did not grant a request for an adjournment, the hearing would go ahead as scheduled.⁹ The November 2, 2022, adjournment refusal decision also confirmed that the hearing would proceed.¹⁰

[9] Given the Claimant was aware of the hearing date, and was informed that his adjournment request had been refused and that the hearing would proceed as scheduled, I proceeded in the Claimant's absence.

Issues

[10] The issues in this appeal are:

- a) Did the General Division make an error of law by failing to analyze important evidence the Claimant provided about his reasons for the late appeal?
- b) Did the General Division make an error of law by failing to explain why it decided the Commission's decision letter was communicated to the Claimant the same day it was sent?
- c) Did the General Division base its decision on an important error of fact about when the Claimant filed his appeal to the General Division?
- d) If the General Division made any of these errors, what is the remedy?

Analysis

[11] The Claimant had asked the Commission to reconsider a decision it made denying his request to antedate a claim for Family Caregiver benefits to January 1, 2010.

⁹ AD03.

¹⁰ AD0A-1 to AD01-4.

[12] On December 15, 2021, the Commission decided that the Claimant's reconsideration request was late and the Claimant did not meet the requirements in the law for an extension of time to pursue his reconsideration request.¹¹

[13] On March 12, 2022, the Claimant appealed the Commission's December 15, 2021, decision to the Tribunal's General Division.¹²

[14] The Claimant's appeal to the Tribunal's General Division appeared to be late. So, the General Division had to decide whether the appeal was late and if so, whether the General Division could grant the Claimant an extension of time to pursue his appeal.

[15] The General Division decided that the Claimant's appeal was late and refused him an extension of time.

[16] The Claimant is now appealing the General Division's decision to the Appeal Division. He submitted in his Application to the Appeal Division that the General Division made an error of fact but did not explain that. The Appeal Division sent the Claimant a letter asking for further explanation about what he meant, but the Claimant did not respond.

[17] I granted leave to appeal to the Claimant anyway, as my review of the General Division revealed several possible reviewable errors.

[18] Prior to the hearing of the appeal, the parties were invited to provide submissions about the possible errors the General Division had made. The Claimant did not provide submissions. The Commission provided submissions, agreeing that the General Division made an error of law by failing to address evidence before it about the Claimant's reasons for the delay. However, the Commission asks me to substitute my decision to find that the Claimant should be refused an extension of time.

¹¹ GD3-32.

¹² GD2.

The General Division made an error of law

[19] The General Division made an error of law by failing to address important evidence the Claimant provided about his reasons for the delay in filing his appeal.

[20] The law says that an appeal of an EI matter must be brought to the General Division within 30 days of the decision being communicated to the appellant.¹³ However, the General Division can allow an extension of time of up to one year.¹⁴

[21] The General Division's authority to extend the time for appeal is a discretionary one. The Federal Court has said that the factors to be considered in order to grant an extension of time are:¹⁵

1. A continuing intention to pursue the application or appeal
2. The matter discloses an arguable case
3. There is a reasonable explanation for the delay; and
4. There is no prejudice to the other party in allowing the extension.

[22] The weight given to each of the above factors may differ in each case, and in some cases, different factors will be relevant. The overriding consideration is that the interests of justice be served.¹⁶

[23] The Claimant said in his Notice of Appeal to the General Division that he did not remember when he received the decision he was appealing. He gave no reasons for the appeal except for saying, "refer on file."

[24] The Claimant explained in his Notice of Appeal why his appeal was late, but his explanation was very brief. The Claimant said there was no prejudice to "your" position

¹³ See section 52(1)(a) of the DESD Act.

¹⁴ See section 52(2) of the DESD Act.

¹⁵ See *Canada (Minister of Human Resources Development) v Gattellaro*, 2005 FC 883.

¹⁶ See *Canada (Attorney General) v Larkman*, 2012 FCA 204.

and the delay was unintentional due to the complexity of the issue. He also said he was a full-time caregiver to his 94-year-old mother.¹⁷

[25] The General Division thought it needed more information to make a decision. So the General Division sent the Claimant a letter on April 19, 2022, asking him to respond to the following questions:¹⁸

“a) Explain why the appeal is late, is there a reasonable explanation for the delay of over two months beyond the 30 day limit as indicated in the decision letter dated December 15, 2021.

b) Explain how there has been a continuing intention on your part to appeal and what steps you have been taken which show your intention to appeal.

c) Explain why you believe there is an arguable case”

[26] The letter provided that if the Claimant did not respond within 10 days the General Division may decide if the extension should be granted or refused based on the information already on file.¹⁹ Since the Claimant did not respond to request for information, on May 6, 2022, the General Division made its decision based on the information it already had.²⁰

[27] To decide if the Claimant’s appeal was filed late, the General Division first had to decide when the Commission’s decision was communicated to the Claimant and when he filed his appeal to the General Division.

[28] The General Division said the Claimant had not stated when he received the reconsideration decision but the fact that he was appealing the decision was proof that it was communicated to him.

¹⁷ See GD2-6.

¹⁸ See GD5-1.

¹⁹ GD5.

²⁰ See paragraph 6 of the General Division decision.

[29] The General Division appears to have concluded that the December 15, 2021, decision was communicated to the Claimant on December 15, 2021, as it decided the Claimant had until January 15, 2022, to file an appeal.²¹

[30] The General Division decided that the Claimant filed his appeal to the General Division late, on March 24, 2022.²²

[31] Having decided the Claimant's appeal was late, the General Division next had to decide whether the Claimant could have an extension of time to continue his appeal.

[32] In considering whether to grant the Claimant an extension of time to appeal, the General Division considered the proper legal test.²³

[33] The General Division decided that the Commission was not prejudiced by the short delay given the Commission had already provided their documents and submissions. However, the General Division decided that the Claimant had not shown a continuing intention to appeal, and had not provided a reasonable explanation for the delay or shown that he had an arguable case. The General Division decided this because the Claimant had not responded to the General Division's request for information on those issues.²⁴

[34] The General Division concluded that, in consideration of those four factors, and the interests of justice, the Claimant could not have an extension of time.

[35] I find that, in making this decision, the General Division made an error of law by failing to address the evidence before it about the Claimant's reasons for the delay.

[36] The General Division said it had not received a response to its request for additional information. So, it concluded the Claimant had not provided a reasonable explanation for the delay.²⁵

²¹ See paragraph 2 of the General Division decision.

²² See paragraph 2 of the General Division decision.

²³ See paragraphs 5 to 11 of the General Division decision.

²⁴ See paragraphs 5 to 11 of the General Division decision.

²⁵ See paragraphs 9 to 10 of the General Division decision.

[37] However, the General Division did not refer to or analyze the Claimant's explanation in his Notice of Appeal for the delay.

[38] The General Division is presumed to have considered all material before it.²⁶ However, it still must analyze the evidence in a meaningful way and address key evidence.

[39] The Claimant's explanation of the delay in his Notice of Appeal was important information concerning whether the Claimant had shown a continuing intention to appeal and provided a reasonable explanation for the delay. It may be that the General Division did not find the Claimant's explanation to be a "reasonable" explanation for the delay or to show a continuing intention. But, if that was the case, the General Division needed to address the Claimant's explanation and explain why the explanation didn't meet those two factors.

[40] The Commission agrees the General Division made an error of law by not addressing the evidence provided by the Claimant regarding the reason for the delay.²⁷

[41] By failing to address key evidence the Claimant provided about the reasons for the delay, the General Division made an error of law.

[42] Because the General made an error of law, I can intervene in the decision.²⁸ I do not need to consider any other possible errors.

Remedy

[43] To remedy the error, I can send the appeal back to the General Division for reconsideration or I can give the decision the General Division should have.²⁹

²⁶ See *Simpson v Canada (Attorney General)*, 2012 FCA 82.

²⁷ AD3-5.

²⁸ See section 58(1) of the DESD Act, which sets out the type of errors that allow the Appeal Division to intervene in a decision of the General Division.

²⁹ See section 59(1) of the DESD Act, which gives me this authority.

[44] The Commission asks me to substitute my decision for that of the General Division and refuse the Claimant an extension of time.

[45] I am satisfied the Claimant had a full and fair opportunity to provide information and make any arguments he thought were relevant to whether he could have an extension of time to appeal. The Claimant was sent a letter asking him to provide further information and was warned if it was not provided within 10 days, the General Division could make its decision on the information it already had.

[46] Since the General Division proceeded in a fair manner and the Claimant had the opportunity to provide any relevant information, I find this is an appropriate case for me to substitute my decision for the General Division.

Substituted decision

[47] I have decided that the Claimant's appeal was late and he cannot have an extension of time to appeal the Commission's December 15, 2021, decision to the Tribunal's General Division.

[48] I cannot accept the General Division's finding of fact that the December 15, 2021, decision was communicated to the Claimant on the same day. Although there may have been verbal communication to the Claimant of the decision that day, the Appeal Division has held on prior occasions that verbal communication of a reconsideration does not start the clock running. I agree with the reasoning in those decisions.³⁰ The 30-day time limit starts running from the date of written communication of the decision.

[49] The Claimant said in his Notice of Appeal that he did not remember when he received the December 15, 2021, decision.³¹

[50] The Commission submits that it is reasonable to conclude that the Claimant received the December 15, 2021, decision at least by the end of December 2021. The

³⁰ See, for example, *JL v Canada Employment Insurance Commission*, 2021 SST 697; See also *DM v Canada Employment Insurance Commission*, 2021 SST 565.

³¹ GD2-5.

Commission points out that the decision letter was sent to the Claimant on December 15, 2021. The Claimant did not provide any information to suggest that he had a change of address or was out of the country, or that there was any other reason he would not have received the letter at least by the end of December 2021.

[51] Section 19(1) of the *Social Security Tribunal Regulations* deems certain decisions made by the General Division or the Appeal Division to have been communicated to a party, if sent by ordinary mail, within 10 days after the day on which it was mailed. But this provision does not relate to decisions sent by the Commission.

[52] However, I find this provision does give some guidance as to the expected time of receipts for documents sent by ordinary mail. Having regard to that guidance and the fact the decision letter was sent over a holiday period, I agree with the Commission that it is more likely than not that the Claimant received the December 15, 2021, decision by December 31, 2021. There is no information on file to suggest any reason the Claimant would not have received the decision letter by that date.

[53] Since the decision was communicated to the Claimant by December 31, 2021, the Claimant had until January 31, 2022, to file his appeal with the Tribunal's General Division.³²

[54] The General Division decided that the Claimant filed his appeal with the General Division on March 24, 2022.³³ However, I believe this may have been a typographical error as the email accompanying the Claimant's Notice of Appeal is dated March 12, 2022, and the Tribunal's date stamp on the Notice of Appeal says it was received on March 12, 2022.

[55] The Claimant, therefore, filed his appeal on March 12, 2022, past the deadline of January 31, 2022.

³² See section 52(1)(a) of the DESD Act.

³³ See paragraph 2 of the General Division decision.

[56] I next have to decide if the Claimant can have an extension of time, having regard to the four factors the General Division considered and the interests of justice.

[57] I find the short period of delay of approximately a month and a half causes no prejudice to the Commission. The Commission does not dispute this.

[58] The Commission submits that the Claimant has not provided a reasonable explanation for the delay or shown a continuing intention to file an appeal. The Commission argues that even though the Claimant refers to delay being unintentional due to the complexity of the issue and that he was a full-time caregiver to his mother, that explanation alone is insufficient to show a continuing intention to appeal and to be considered a reasonable explanation for the delay. The Commission submits that the Claimant had the opportunity to provide additional details and arguments following the General Division's request, but failed to do so.

[59] I agree with the Commission that the Claimant's explanation simply provides too little detail to show a continuing intention to appeal or a reasonable explanation for the delay. I note that the Claimant was able to file an antedate request and request a reconsideration with the Commission, while a caregiver, so it is unclear how his role as a caregiver would explain the delay in filing his appeal to the General Division. It is also unclear how the complexity of the issue under appeal played a role in the delay. There is no information on file to suggest the Claimant was seeking out help to understand the issue or that anything changed about the Claimant's understanding of the issue by the time he did appeal on March 12, 2022.

[60] Although the delay is brief, the Claimant has not shown a continuing intention to pursue his appeal. There is no information on file suggesting the Claimant took any steps to advance his appeal, prior to the appeal being filed.

[61] The Claimant also has not shown an arguable case. To explain this, I have to describe the background to the Claimant's appeal.

[62] The Claimant was laid off on May 2, 2011.³⁴ He was paid 41 weeks of regular benefits and 9 weeks of sickness benefits in a benefit period that started on May 1, 2011, and ended on April 28, 2012.³⁵ On January 9, 2020, the Claimant made a request to antedate a claim for Family Caregiver benefits to January 1, 2010.³⁶

[63] On March 1, 2021, the Commission refused the Claimant's request to antedate a claim for Family Caregiver benefits. The Commission decided that the Claimant had been paid the maximum combined 50 weeks of special and regular weeks in his benefit period from May 1, 2011, to April 28, 2012. Also, the Claimant hadn't worked since May 2, 2011, so did not qualify for more EI benefits. The Commission also noted that the Claimant could not backdate his claim to January 1, 2010, as he was receiving monies from his employer during this period.³⁷

[64] On November 18, 2021, the Claimant filed a request for reconsideration of the Commission's decision of March 1, 2021. He argued the Commission had not given him proper information and he should have been paid Family Caregiver benefits instead of sickness benefits.³⁸

[65] The Commission decided the Claimant's reconsideration request was filed past the 30-day deadline to do so. The Commission had to decide if the Claimant could have an extension of time.

[66] The Commission may allow a longer period to make a request for reconsideration of a decision. To grant the extension in this case, the Commission had to be satisfied the Claimant provided a reasonable explanation for requesting a longer period and demonstrated a continuing intention to request a reconsideration.³⁹

³⁴ GD3-16.

³⁵ GD3-20.

³⁶ GD3-18.

³⁷ GD3-20.

³⁸ GD3-22.

³⁹ See section 1(1) of R.R. Regulations.

[67] The Commission's decision concerning an extension of time is a discretionary decision.⁴⁰ The Tribunal can only intervene in a discretionary decision if the Commission did not exercise its discretion judicially.

[68] Acting in a judicial manner means acting in good faith, for proper purpose and motive, considering all the relevant factors, ignoring any irrelevant factors and acting in a non-discriminatory manner.⁴¹

[69] The Commission decided on December 15, 2021, that the Claimant did not meet the requirements for an extension of time. This is the decision that the Claimant appealed to the Tribunal's General Division.

[70] For the Claimant to show he had an arguable case on his appeal to the General Division, he would have to show that the Commission did not exercise its discretion in a judicial manner when it refused him an extension of time to pursue his request for reconsideration.

[71] The Commission submits the Claimant has not provided any explanation describing an arguable case and the evidence on file shows the Commission did exercise its discretion judicially. The Commission says its "Record of Decision" shows it considered all the relevant factors, and did not consider irrelevant factors.⁴²

[72] I agree that the Claimant has not shown an arguable case. He has not pointed to any factors suggesting the Commission did not exercise its discretion judicially. My review of the Commission's Record of Decision shows the Commission considered relevant factors and did not consider irrelevant factors.

[73] Specifically, the Commission considered the period of delay was 232 days. The Commission considered the Claimant's explanation for the delay that he was researching the law but decided that was not a reasonable explanation for the delay.

⁴⁰ See *Daley v. Canada (Attorney General)*, 2017 FC 297.

⁴¹ See *Attorney General of Canada v Dunham* (1996), A-708-95; See also *Attorney General of Canada v Purcell* (1995), A-694-94.

⁴² GD3-30 and GD3-31.

[74] The Commission also considered that the Claimant was aware of the time limitation to request the reconsideration and was not prevented from inquiring with the Commission. Rather the delay was due to researching the law. The Commission decided that did not show a continuing intention in pursuing the reconsideration request. The Commission also noted the Claimant had no chance of success on the underlying issue as he had been paid the maximum 50 weeks of benefits that he could be paid in his benefit period.⁴³

[75] I see no arguable case that the Commission did not act judicially when it denied the Claimant an extension of time to pursue his reconsideration request.

[76] Consequently, the Claimant cannot have an extension of time to file his appeal with the General Division. Although the Commission is not prejudiced by the short delay, the Claimant has not provided a reasonable explanation for the delay, shown a continuing intention to pursue his appeal or an arguable case.

[77] I also find that granting an extension of time is not in the interests of justice.

[78] The Commission submits that the Claimant has no reasonable chance of success on the substantive issue for which he requested reconsideration. Since the Claimant was paid the maximum 50 weeks of combined special and regular benefits during the benefit period starting May 1, 2011, no Family Caregiver benefits or any further weeks of benefits could be paid in that benefit period.

[79] The Commission also points out that the Claimant's request to antedate his claim for Family Caregiver benefits to January 1, 2010, could not be granted because there was no evidence he had an interruption of earnings at that time. Further, Family Caregiver benefits were not introduced into the *Employment Insurance Act* (EI Act) legislation until 2017.⁴⁴

⁴³ GD3-30.

⁴⁴ See section 23.3 of the *Employment Insurance Act* (EI Act) which is the provision in the EI Act relating to Family Caregiver benefits. These benefits provide for a maximum of 15 weeks to care for a family member who is critically ill. This benefit was not introduced in the EI Act until December 3, 2017.

[80] I find that it is not in the interests of justice to allow an extension of time for the Claimant to pursue an appeal that ultimately cannot result in the Claimant being paid the Family Caregiver benefits he is seeking. There are multiple reasons, as pointed out by the Commission, that the Claimant's reconsideration request cannot succeed.

[81] However, the overriding factor is that Family Caregiver benefits were not introduced into the EI Act until December 3, 2017.⁴⁵ This means the substantive issue for which the Claimant requested a reconsideration has no chance of success. There is no way the Claimant can be paid the Family Caregiver benefits for the period he is seeking they be paid.

[82] I understand the Claimant may be disappointed in this result. However, having regard to the four factors noted above, and considering the interests of justice, I am refusing the Claimant an extension of time to pursue an appeal of the Commission's December 15, 2021, decision at the General Division.

Conclusion

[83] The appeal is dismissed. The General Division made an error of law. I have substituted my decision for the General Division but the result is the same. The Claimant cannot have an extension of time to pursue an appeal of the Commission's December 15, 2021, decision to the Tribunal's General Division.

Charlotte McQuade
Member, Appeal Division

⁴⁵ Generally, legislation does not apply retroactively, unless there is a clear statement in the legislation to this effect. The Claimant has not provided any information suggesting the Family Caregiver provision were intended to have retroactive effect and I see nothing in the legislation suggesting that.