



Citation: *FF v Canada Employment Insurance Commission*, 2023 SST 1376

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

Decision

Appellant: F. F.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (598669) dated June 31, 2023 (issued by Service Canada)

Tribunal member: Kristen Thompson

Type of hearing: Teleconference

Hearing date: October 4, 2023

Hearing participant: Appellant

Decision date: October 5, 2023

File number: GE-23-2251

Decision

[1] The appeal is dismissed. The Tribunal disagrees with the Appellant.

[2] The Appellant hasn't shown that the Commission didn't use its discretion judicially when it didn't give the Appellant an extension of time to ask it to reconsider its initial decision.

Overview

[3] The Commission decided to change the Appellant's weekly Employment Insurance (EI) benefit rate from \$573 to \$508, based on additional information from the employer, in its initial decision dated September 16, 2021. The Appellant asked the Commission to reconsider its decision, in her request dated June 3, 2023, and received by the Commission on June 12, 2023.

[4] The Appellant was late in requesting a reconsideration of the decision, so she needed to ask for an extension of time from the Commission. The Commission refused to give her an extension of time.

[5] The Commission says that it used its discretion judicially when it refused to give the Appellant an extension of time.

[6] The Appellant disagrees and says that the Commission overlooked relevant factors. She says that her insurable earnings decreased because she was placed on light duties after a car accident, and her pre-accident earnings should be used to calculate her weekly benefit rate. She also says that she contacted the Commission several times but wasn't told to request a reconsideration.

[7] I have to decide whether the Commission used its discretion judicially when it denied the extension of time. If it did, I can't change the Commission's decision. If it didn't, I have to make the decision that it should have made.

Issue

[8] Did the Commission use its discretion judicially when it refused to give the Appellant more time to ask for a reconsideration of its initial decision, dated September 16, 2021, changing her weekly benefit rate from \$573 to \$508?

[9] If not, should the Appellant have more time to ask the Commission to reconsider its initial decision?

Analysis

What does the Appellant need to show?

[10] You have 30 days to ask the Commission to reconsider a decision.¹ The Commission may give you an extension of time if your request for reconsideration is late.²

[11] To get an extension, you have to show that:

- you have a reasonable explanation for asking for more time, and
- you continually intended to ask the Commission to reconsider its decision³

[12] Sometimes, you also have to show that:

- your request has a reasonable chance of success, and
- there is no prejudice to the Commission or another party to allow a longer period⁴

[13] You have to meet all four factors when certain conditions apply, including when you ask for a reconsideration more than 365-days after the Commission told you of its decision.⁵

¹ See paragraph 112 (1)(a) of the *Employment Insurance Act* (Act).

² See paragraph 112 (1)(b) of the Act.

³ See subsection 1(1) of the *Reconsideration Request Regulations* (Regulations).

⁴ See subsection 1(2) of the Regulations.

⁵ See subsection 1(2) of the Regulations.

[14] The Commission says that the request for reconsideration is more than 365-days late, so all four factors apply. I see no evidence to indicate otherwise. So, I find that all four factors apply.

Did the Commission use its discretion judicially?

[15] I find that the Commission used its discretion judicially when it denied the extension of time.

[16] The Commission's decision whether to give the Appellant more time is discretionary.⁶ This means that it is open to the Commission to decide whether the Appellant has met the requirements to get the extension.

[17] The law says that I can only make a decision on the extension of time itself if I first find that the Commission used its discretion in a non-judicial manner or acted in a perverse or capricious manner without regard to the material before it.⁷

[18] Discretion is used in a non-judicial manner if the Commission did one of the following:⁸

- acted in bad faith
- acted discriminatorily
- acted for an improper purpose or motive
- considered an irrelevant factor
- overlooked a relevant factor

[19] The Appellant has to prove that the Commission didn't exercise its discretion judicially. She has to prove this on a balance of probabilities. This means she has to

⁶ See *Canada (Attorney General) v Daley*, 2017 FC 297.

⁷ See *Canada (Attorney General) v Tong*, 2003 FCA 281.

⁸ See *Attorney General of Canada v Purcell*, A-694-94.

show that it is more likely than not that the Commission didn't use its discretion judicially.

[20] The Appellant says that the Commission overlooked relevant factors. She says that her insurable earnings decreased because she was placed on light duties after a car accident, and her pre-accident earnings should be used to calculate her weekly benefit rate. She also says that she contacted the Commission several times but wasn't told to request a reconsideration.

[21] The Commission says that it used its discretion judicially when it refused to give the Appellant an extension of time.

[22] The Appellant testified that she was in a car accident in 2018. She says that, when she returned to work, she performed light duties for her employer.

[23] The Appellant says that she received the Commission's initial decision. She says that she went to the Service Canada Centre several times in September and October 2021, but no one told her to fill out the request for reconsideration form.

[24] The Appellant contacted her employer's human resources department, in email dated October 15, 2021. She told her employer that she was working light duties. She told it she was assessed an overpayment by the Commission. She asked it to modify the ROE with her full-time hours pay.⁹

[25] The employer responded to the Appellant, in email dated October 20, 2021. It said that the Appellant's actual earnings and hours are reported on the ROE. It says that her bi-weekly hours were usually 65 to 68-hours. It says that it cannot modify her ROE.¹⁰

[26] The Appellant says that she doesn't disagree with the ROE the Commission used to recalculate her weekly benefit rate. However, she says that her insurable earnings decreased because she was placed on light duties after the car accident, and

⁹ See GD6-3.

¹⁰ See GD6-5.

her pre-accident earnings should be used by the Commission to calculate her weekly benefit rate.

[27] The Appellant says that each time she got a letter from the Commission or the Canada Revenue Agency (CRA), she would call and say that she doesn't agree. She says that the Commission should have considered that it didn't help her.

[28] The Appellant says that she first learned about the request for reconsideration in June 2023, when her friend told her that she could go online to get the form. She says that she filled out the form and submitted it that same day.

[29] The Appellant says that she moved to Canada from her home country due to human rights, but the decision to assess an overpayment really hurts her. She says that she doesn't know the rules and laws. She used the assistance of an interpreter at the hearing.

[30] The Commission's says it considered the following factors when it decided to deny the Appellant's delayed request for reconsideration, including:¹¹

- she was aware of the initial decision
- she hasn't shown she was prevented from submitting her request for reconsideration within 30-days
- it issued 15 notices of debt or statements of account from September 18, 2021 through to May 17, 2023, and 4 set-off's were applied from October 2021 to March 2023
- the employer provided an amended ROE, which then caused a recalculation of her claim
- her statement that agents at the Service Canada Centre didn't help her isn't credible, given the length of the delay

¹¹ See GD3-31 to 35.

[31] I find that the Commission used its discretion judicially when it denied the extension of time. I rely on the Commission's notes to make this decision. It was open to the Commission to decide that her statement that agents at the Service Canada Centre didn't help her isn't credible, given the length of the delay. I don't find that this decision was made in a perverse or capricious manner without regard to the material before it.

[1] I disagree with the Appellant that the Commission should have considered that her insurable earnings had decreased because she was placed on light duties after a car accident. This isn't a relevant factor. This is because the *Employment Insurance Act* sets out how the weekly benefit rate is calculated based on actual weekly insurable earnings.¹² As well, the Court said that decisionmakers aren't allowed to re-write legislation and can't interpret it in a manner that is contrary to its plain meaning.¹³

[32] I don't find that there is any evidence that the Commission acted in bad faith or discriminatorily, acted for an improper purpose or motive, or considered an irrelevant factor.

Conclusion

[33] The Appellant hasn't shown that the Commission didn't use its discretion judicially when it didn't give the Appellant an extension of time to ask it to reconsider its initial decision.

[34] This means that the appeal is dismissed.

Kristen Thompson
Member, General Division – Employment Insurance Section

¹² See section 14 and 17 of the Act.

¹³ See *Canada (Attorney General) v Knee*, 2011 FCA 301.