



Citation: *SN v Canada Employment Insurance Commission*, 2023 SST 1783

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

Decision

Appellant: S. N.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (558460) dated December 9, 2022 (issued by Service Canada)

Tribunal member: Leanne Bourassa

Type of hearing: Videoconference

Hearing date: May 10, 2023

Hearing participants: Appellant

Decision date: September 29, 2023

File number: GE-22-4177

Decision

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

[2] The Appellant made her request for reconsideration late, and the Canada Employment Insurance Commission (Commission) exercised its discretion judicially when it refused to extend the time for the Appellant to ask for its decision to be reconsidered.

Overview

[3] The Appellant applied for Employment Insurance (EI) sickness benefits and received all the benefits she was entitled to.

[4] She later asked for regular EI benefits and did her claimant reports. She reported that she was not able to work between September 6 and September 17, 2021. The Commission decided that she was not entitled to benefits for those weeks and sent her a letter dated November 3, 2021, telling her she would not be paid for that period.

[5] On November 15, 2022, the Appellant asked the Commission to reconsider this decision. The Commission refused to reconsider the decision because she was making the request outside of the 30 days limit for requesting reconsideration. The Commission found that the reasons she had given for the delay in asking for the decision to be reconsidered did not meet the requirements of the *Reconsideration Request Regulations*.

[6] The Appellant says that after discussing with an agent of Service Canada she was scared to contact them again. She says she did not receive the November 3, 2021, letter. She says she has enough hours from her work to get regular benefits.

[7] The Commission says that the Appellant did not have a reasonable explanation for the delay in requesting reconsideration, nor had she demonstrated a continuing intention to request reconsideration between November 3, 2021 and November 15, 2022. It maintains that it exercised its discretion in a judicial manner when exercising its

discretion when denying the Appellant's request to extend the 30-day period for requesting reconsideration.

[8] I must decide if the Commission exercised its discretion fairly.

Issue

[9] Was the Appellant's reconsideration request made late?

[10] Did the Commission exercise its discretion judicially when it denied the Appellant's request for an extension to the 30-day time limit to request a reconsideration?

Analysis

[11] When the Commission makes a decision about your EI benefits, the law allows you to ask for reconsideration of that decision. But the request to the Commission has to be made within 30-days of that decision being communicated to you.¹

[12] If you wait more than 30-days to ask for a decision to be reconsidered, you are late. The Commission has the discretion to allow a claimant more time to file a request to reconsider.² There are requirements that an appellant must meet to receive additional time.³

[13] The Commission considers two questions for a late reconsideration request. First, does the claimant have a reasonable explanation for being late? Second, has the claimant shown that they always meant to ask for a reconsideration, even though they were late?⁴

[14] If a claimant waits more than 365 days to ask for a reconsideration of a decision, then there are two additional questions that the Commission has to consider. In those cases, the Commission must also consider if the request for reconsideration has a

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

² See section 112(1)(b) of the *Employment Insurance Act*.

³ See *Reconsideration Request Regulations* (Reconsideration Regulations) section 1(1) and 1(2).

⁴ See *Reconsideration Request Regulations* section 1(1).

reasonable chance of success and if there would be any prejudice caused by allowing the longer period for the reconsideration request.

[15] When the Commission has the discretion to do something, as they do here, it can only be changed by the Tribunal **if** the Commission didn't exercise its power judicially.⁵

[16] A discretionary power is not exercised judicially if it can be shown that the decision maker: acted in bad faith; acted for an improper purpose or motive; considered an irrelevant factor or ignored a relevant factor; or acted in a discriminatory manner.⁶

[17] If the Commission didn't properly exercise its discretion, I can make the decision the Commission should have, based on the requirements set out in the Reconsideration Regulations.

Issue 1: Was the reconsideration request made late?

– When was the decision communicated?

[18] To decide if the Appellant's reconsideration request was made late, I first need to consider when the Commission communicated its decision to the Appellant.

[19] The Federal Court of Appeal has said that the decision maker has the burden of proving that their decision was communicated to the Appellant.⁷ In this case, that means the Commission must show that their decision was communicated to the Appellant.

[20] The decision, in this case, is about whether the Appellant was available for work between September 6 and September 17, 2021.⁸

[21] The Commission says the decision was communicated to the Appellant verbally on November 3, 2021 and also by a letter with that same date.

[22] It is not disputed that the Appellant applied for sickness benefits in October 2020. Once she had received all her sickness benefits, she received regular benefits from

⁵ See *Attorney General (Canada) v Knowler*, A-445-05

⁶ See *Attorney General (Canada) v Purcell*, [1996] 1 FCR 644.

⁷ See *Bartlett v Attorney General (Canada)*, 2012 FCA 230.

⁸ See GD3-14.

January 10, 2021 to April 10, 2021 and then Compassionate Care Benefits from April 11 to June 26, 2021. Then, she received a week of regular benefits from September 19 to September 25, 2021.

[23] The Commission provided a record of a conversation with the Appellant on September 23, 2021. It shows that the Appellant had exhausted all her sickness benefits and was expecting to get regular benefits. However, she had been declaring on her claimant reports that she was not available for work. She was sick, on medication that made her dizzy, so she was unable to drive and had been calling into work sick.⁹

[24] During a second call with the Commission, on November 3, 2021, the Appellant again confirmed she was on medication from September 5, 2021, for about 2 weeks. After that her doctor changed her medication, she was less dizzy, and she was looking to work full-time as of September 20, 2021.¹⁰

[25] The Commission sent a letter to the Appellant dated November 3, 2021, saying that it was unable to pay her benefits from September 6 to September 17, 2021 because she was not medically able to work, which means she had not proven her availability for work.

[26] On November 15, 2022, over a year later, the Appellant filed a Request for Reconsideration. In the request form, she wrote that the decision had been verbally communicated to her on August 8, 2021, but that she did not remember exactly which date. She also said that she thinks that the decision letter was sent to her on February 9, 2022, but again, she did not remember exactly.

[27] The Commission's notes show they followed up on that request and spoke to the Appellant on December 13, 2022. During that call the Appellant confirmed that she was verbally notified of the decision on November 3, 2021. However, she said did not receive the letter that was mailed to her on November 3, 2021. She eventually called

⁹ See GD3-12.

¹⁰ See GD3-13.

Service Canada in early November 2022 to see what was happening with her file. She said she was told her file was closed.

[28] In her notice of appeal to the Tribunal, the Appellant wrote that she was told by the Commission that she had received a letter and had 30 days to appeal, but she didn't receive the letter because of a messy mailbox sharing with her neighbor that was sometimes messy with flyers.

[29] At the hearing, the Appellant told me that she remembers the call where she was told about the decision. R. called and informed her that she would not be paid for those weeks. She remembers the call because he was very tough with her and said she had to go back to work and then come back and make another application. She doesn't remember the date of the call, but she did get a letter in the mail around two weeks after that.

[30] The Federal Court has decided that communicating a decision requires that an Appellant know the substance of the decision and its effect.¹¹

[31] The Commission is not under an obligation to inform a claimant of appeal rights in order to meet its obligation to communicate the substance and effect of its decision.¹²

[32] The Commission's notes from the conversation on November 3, 2021 don't say that the Appellant was told that she would not be getting benefits for the weeks she reported she was sick. And the Appellant told an agent on December 13, 2022 that she did not get the letter in the mail. She repeated this in her notice of appeal to the Tribunal.

[33] I find that it is likely that the Appellant was communicated the Commission's decision on November 3, 2021. This is because although the Commission's notes are not detailed about that call, the Appellant clearly remembers the call. She remembers that the agent's name was R., which matches with the Commission's notes. Also, when

¹¹ *Cousins v Attorney General (Canada)*, 2007 FC 469 at paragraph 43; and *Peace Hills Trust Co. v Moccasin*, 2005 FC 1364 at paragraph 44.

¹² See *R & S Industries Inc. v Canada (National Revenue)*, 2016 FC 275.

the Commission called her in December 2022 about her request for reconsideration, she confirmed that she had been verbally notified of the decision. At the hearing before me, she also talked about the call with R. where he said she had to go back to work and wouldn't get benefits.

[34] At the hearing, the Appellant also remembered that she got a letter in the mail shortly after that call. This would be consistent with the notes of the call on November 3, 2021, and the letter of the same date arriving shortly thereafter. I give the Appellant's statements at the hearing more weight than her written statements because she appeared clear and straightforward when talking to me, and I was able to question her about what she was saying.

[35] The Appellant also told me that in the letter, she understood that she had 30 days to ask for reconsideration. She didn't do it because of R., the way he spoke to her and insisted she go back to work. She knew she would not be getting benefits.

[36] I find that the Appellant knew the substance of the Commission's decision and its effect. The Appellant knew she wasn't getting any EI benefit for that period where she had reported she was not working because she was too dizzy because of her medications.

[37] I also find that the Appellant was communicated the decision verbally on November 3, 2021. I accept that the Appellant received the November 3, 2021, letter and it would have arrived not later than approximately 10 days after it was issued, so no later than November 13, 2021.

[38] In reaching this conclusion, I have considered that the Appellant may have asked for information on her file when she was being assisted by a social worker from January to March 2022. However, I believe that at that time, she knew that some of her benefits from September 2021 had been refused. If that was not the case, then when she started talking to Service Canada in March 2022, she knew her file had been closed and she was already out of time to request reconsideration of the November 2021 decision.

– **Was the Appellant’s request for reconsideration late?**

[39] The Appellant requested reconsideration of the November 3, 2021 decision on November 15, 2022. The request was more than 30 days after the decision was communicated. This means the request to reconsider was late.

Issue 2: Did the Commission exercise its discretion judicially?

[40] As stated above, I must respect the Commission’s discretion if they acted judicially. A discretionary power is not exercised judicially if it can be shown that the decision maker: acted in bad faith; acted for an improper purpose or motive; considered an irrelevant factor or ignored a relevant factor; or acted in a discriminatory manner.

[41] The Commission says the Appellant took over 347 days to request reconsideration. I think this is a miscalculation. If the decision was communicated to the Appellant on November 3, 2021, then the November 15, 2022, request for reconsideration was made 377 days later.

[42] This means the Commission may allow a longer time to ask for reconsideration only if all the four factors in the *Reconsideration Request Regulations* are met.¹³

[43] I find that even if the request had been made less than 365 days since the day the decision was communicated to the Appellant, the Commission acted judicially when determining that not even the first two factors of the *Reconsideration Request Regulations* were met.

[44] The Commission has provided its Record of Decision explaining why it decided not to grant the extension of time to ask for reconsideration. In this document, it explains that the Appellant had not provided a reasonable explanation for the delay in requesting reconsideration. When they had discussed the request with her, she said that there was nothing that prevented her from filing at an earlier date. She also confirmed that she did not consult a reliable source of information about the situation, she did not have any

¹³ See Reconsideration Regulations) section 1(1) and 1(2).

barriers that might contribute to having difficulties with the process and she was not unable to contact a Service Canada center for any reason.

[45] The Commission also found that the Appellant had not demonstrated a continuing intention to request the reconsideration because she did not contact Service Canada for over a year after the initial decision.

[46] Finally, the Commission notes it was not satisfied that the request on the substantive issue had a reasonable chance of success. While the Appellant did say that she made a mistake when completing her reports when she said she was not available work, she did not acknowledge two statements she made on September 23 and November 3, 2021, where she said the medication she was taking was making her dizzy and unable to work.¹⁴

[47] From this information and from what the Appellant told me, I have no evidence that the Commission acted in a discriminatory manner towards the Appellant when they refused to extend the deadline for her to request reconsideration. I also do not see evidence they acted in bad faith or for an improper purpose or motive.

[48] I have considered whether the Commission ignored a relevant factor when they did not consider that the treatment the Appellant received from the agent who spoke to her on November 3, 2021, may have been a reasonable explanation for the Appellant's delay in asking for reconsideration. I have concluded that the Commission did not ignore this factor. This is because through the questions they asked the Appellant, they took the time to explore other options available to the Appellant, other than communicating with this or any other agent, to know of her rights and obligations in light of the decision. She had not taken any other steps.

[49] The Commission also questioned the Appellant about any steps she might have taken between the time the decision was communicated to her and the day she requested the reconsideration. Their notes show they asked relevant questions about

¹⁴ The fact that the Commission noted this factor adds to my conclusion that the calculation of 347 days between the communication of the November 3, 2021 decision and the request for reconsideration is not correct. This factor would only need to be considered if the request was more than 365 days late.

what the Appellant was doing to continue to seek reconsideration, and the Appellant said she didn't remember why she didn't submit her request sooner. She also said that to me during the hearing.

[50] I find that the Commission looked at all of the information the Appellant gave about why she was late. The Commission reflected on contradictions in what she told them and relied on what was consistent. The Commission decided that the Appellant didn't have a reasonable explanation for her delay. It decided that the Appellant hadn't shown that she always meant to ask for a reconsideration. The Commission didn't accept the Appellant's late reconsideration request.

[51] Based on my findings above, I find the Commission acted judicially when exercising their discretion. The Commission made its decision fairly because it looked at all of the information the Appellant gave about why her reconsideration request was late. The Commission didn't act in bad faith, for an improper purpose or in a discriminatory manner. This means that I don't have the authority to interfere in the Commission's decision not to exercise its discretion to extend the 30-day deadline for asking for the reconsideration of their November 3, 2021 decision.

[52] This also means that I do not have the authority to decide if the Commission's decision to deny the Appellant benefits for the period of September 6 and September 17, 2021 is correct.

Conclusion

[53] The appeal is dismissed. The Appellant missed the 30 day deadline to ask for the Commission's decision of November 3, 2021 to be reconsidered.

Leanne Bourassa
Member, General Division – Employment Insurance Section