



Citation: *DA v Canada Employment Insurance Commission*, 2023 SST 1787

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

## Decision

**Appellant:** D. A.  
**Representative:** P. C.

**Commission:** Canada Employment Insurance Commission

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**Decision under appeal:** Canada Employment Insurance Commission  
reconsideration decision (567030) dated February 7, 2023  
(issued by Service Canada)

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**Tribunal member:** Paul Dusome

**Type of hearing:** Videoconference  
**Hearing date:** May 1, 2023  
**Hearing participant:** Appellant  
Appellant's representative

**Decision date:** May 26, 2023  
**File number:** GE-23-638

## **DECISION**

[1] The appeal is dismissed. The Commission's decision dated February 3, 2022, will not be reconsidered, and remains unchanged.

## **OVERVIEW**

[2] The Appellant applied for employment insurance (EI) benefits on December 20, 2021. The Commission issued two decisions denying benefits, dated February 3, 2022, and April 25, 2022. On January 6, 2023, the Commission received the Appellant's request for reconsideration. On February 7, 2023, the Commission decided that it would not reconsider the February 3, 2022, decision, as the request for reconsideration was late, and the Appellant did not meet the criteria for granting an extension of time for making the request. The Appellant appealed to the Tribunal on February 27, 2023.

## **PRELIMINARY MATTERS**

### **Jurisdiction of the Tribunal in this appeal**

[3] There is a jurisdictional issue about what the Tribunal has authority to decide in this appeal. The only issue in this appeal is whether the February 7, 2023, decision by the Commission is correct. That decision refused an extension of time to the Appellant for filing his request for reconsideration.

[4] The Tribunal has the jurisdiction to deal with the Commission's decision to deny an extension of time to file a request for reconsideration with the Commission<sup>1</sup>. The complicating factor here is that there are two decisions that could be reconsidered. They relate to alleged misconduct (February 3, 2022), and to alleged expiry of the Appellant's work permit and SIN (April 25, 2022). If the Commission's February 7, 2023, decision relates to only one of those 2022 decisions, the Tribunal can only deal with the extension of time for that one decision.

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<sup>1</sup> *Employment Insurance Act* (Act), section 113.

[5] I find that the Commission has dealt with only the February 3, 2022, decision in its denial of an extension of time to file reconsiderations for both decisions.

[6] The Appellant's request for reconsideration filed on January 6, 2023, refers only to the misconduct decision dated February 3, 2022, despite instructions to indicate all dates if more than one decision letter is applicable. The supporting documents refer to the alleged misconduct. There is a mention that it took 23 weeks to obtain a new work permit, but nothing more (GD3-26).

[7] The Commission did look at both the misconduct and the work permit issues in reviewing the request for reconsideration. The misconduct issue is identified as RFR 567030. The work permit issue is identified as RFR 567030A. RFR is the abbreviation for Request for Reconsideration.

[8] The Commission's February 7, 2023, decision letter expressly states that the Appellant's request for reconsideration concerned the February 3, 2022, decision. It does not mention the April 25, 2022, decision. The letter has only the RFR number 567030 in the heading. The letter does not refer to the RFR number 567030A.

[9] In his Notice of Appeal to the Tribunal, the Appellant did mention the work permit (GD2-11, 12, 13). Those mentions were only as a factor in the stress the Appellant experienced from being fired for alleged misconduct. The Appellant's reasons for the appeal do not challenge the Commission's decision on the work permit issue. He included a copy of the Commission's February 3, 2022, and February 7, 2023, decision letters. He did not include a copy of the Commission's April 25, 2022, decision letter dealing with the work permit issue.

[10] The Tribunal's jurisdiction is based on the decision set out in the Commission's February 7, 2023, letter. That decision refuses to extend the time for seeking a reconsideration only for the alleged misconduct decision set out in the February 3, 2022, letter. Notwithstanding that the Commission reviewed both the February 3, 2022, and April 25, 2022, matters prior to its February 7, 2023, decision, and that the Commission in its Representations to the Tribunal deals with both of the 2022 decisions

(GD4-3), that does not give the Tribunal jurisdiction to deal with both decisions. The jurisdiction is based solely on the February 7, 2023, decision. That means that my decision can only deal with the refusal to reconsider the decision dated February 3, 2022, on the issue of alleged misconduct. This decision cannot deal with reconsideration of the April 25, 2022, decision.

## **Focus of the Appellant's arguments**

[11] Many of the Appellant's arguments and materials are focused on why the allegation of misconduct is wrong. Those are relevant to determining if the Commission was right or wrong in denying EI benefits because of the alleged misconduct. That is not the issue that I have to decide in this appeal. I have to decide whether the Commission was right or wrong to refuse to rule on the Appellant's request for reconsideration because it was late. For that reason, I will not be dealing with many of the matters relating to whether there was misconduct or not.

## **ISSUES**

[12] I must deal with three issues in order to decide whether the Commission's decision to refuse to extend time is correct.

1. Does the Appellant have a reasonable explanation for the delay in asking for a reconsideration?
2. Has the Appellant shown a continuing intention to request a reconsideration?
3. Did the Commission exercise its power to refuse to reconsider the decision of February 3, 2022, in a judicial manner?

## **ANALYSIS**

[13] The time frame for making a request for reconsideration of a decision is within 30 days after the day the decision is communicated to the Appellant, or any further time that the Commission may allow<sup>2</sup>.

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<sup>2</sup> Act, subsection 112(1).

[14] In this case there are two requirements that the Appellant must meet to receive further time beyond the 30-day deadline for filing a reconsideration request<sup>3</sup>. They are: there is a reasonable explanation for the delay in requesting the reconsideration; there was a continuing intention to ask for the reconsideration throughout the period of the delay. The onus is on the Appellant to prove on a balance of probabilities that he satisfies both of those requirements.

[15] The authority conferred on the Commission to allow a further period of time after the 30-day time limit to request a reconsideration is discretionary.<sup>4</sup> As a discretionary decision, it can only be varied by the Tribunal if the Commission did not exercise its power judicially.<sup>5</sup> 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; took into account an irrelevant factor; ignored a relevant factor; or acted in a discriminatory manner.<sup>6</sup>

## **Factual background**

[16] The Appellant is a member of a regulated health profession. He received his education outside Canada. He has a B.Sc. in podiatric medicine. His employer in Canada hired the Appellant in early 2020, after a brief work placement with the employer in 2019. The employer provides services in the Appellant's regulated health profession. The Appellant moved to Canada for this job. He obtained a work permit to allow him to legally work in Canada. The work permit was only valid for the job with the employer and was to expire on March 15, 2022.

[17] On October 6, 2021, the employer ended the Appellant's employment. The employer gave no reason for dismissing the Appellant. The Appellant hired a lawyer, who corresponded with the employer on November 2, 2021. The lawyer stated that the dismissal was without cause and put forward a proposal to settle the Appellant's wrongful dismissal claim. The employer disputed the Appellant's claims. The employer

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<sup>3</sup> *Reconsideration Request Regulations* (Regulations), subsection 1(1).

<sup>4</sup> *Daley v Canada (Attorney General)*, 2017 FC 297.

<sup>5</sup> *Canada (Attorney General) v Knowler*, A-445-05.

<sup>6</sup> *Canada (Attorney General) v Purcell*, [1996] 1 FCR 644.

alleged improper conduct by the Appellant, including not being vaccinated against COVID-19. The Appellant sued the employer for wrongful dismissal on November 30, 2022. The Appellant won his case in late March 2023. The employer had wrongfully dismissed the Appellant. The employer paid the Appellant the amount ordered by the court.

[18] The Appellant applied for EI benefits on December 20, 2021. The Commission made two decisions set out in two letters. The first, dated February 3, 2022, stated that the Appellant was not entitled to EI benefits because he lost his job as a result of his misconduct. The second decision, dated April 25, 2022, stated that the Commission was unable to pay him benefits because his authorization to work in Canada expired on March 15, 2022, and the SIN was no longer valid as of that date. Both letters contained the bold face text setting out the 30-day time limit for requesting a reconsideration of the decision.

[19] The Appellant filed his request for reconsideration on January 6, 2023. The request focused on the February 3, 2022, decision based on alleged misconduct.

[20] On February 7, 2023, the Commission gave its decision on the reconsideration request. The Commission said that it will not reconsider the decision dated February 3, 2022. The reason was that the Commission had determined that the Appellant's reasons to justify the delay in making the request do not meet the requirements of the Regulations. The Appellant received the February 7, 2023, decision letter on February 18, 2023.

### **Issue 1. Does the Appellant have a reasonable explanation for the delay in asking for a reconsideration?**

[21] The Appellant has not given a reasonable explanation for the delay in asking for a reconsideration from February 3, 2022, to January 6, 2023, when he asked for a reconsideration of the misconduct decision.

[22] The Appellant gave a number of reasons for the delay. They relate to his personal circumstances following the dismissal from his job. They explain why his attention was focused elsewhere than on EI matters.

[23] These reasons can be summarized as follows:

- a. **The dismissal.** The dismissal from his job without notice or reason was shocking. It put his right to remain in Canada at serious risk. His work permit only allowed him to work for that employer.
- b. **New employment.** He was under great pressure to find a new employer immediately in order to remain in Canada. Without a new employer and a renewed work permit, his permanent residence application was also in jeopardy.
- c. **Legal advice.** He was focused on finding new employment and using his savings to obtain legal advice about his dismissal by the employer and about his immigration status. He was fast running out of savings.
- d. **Stress and financial hardship.** As a result of these factors, he was under severe mental stress and financial hardship at that time.
- e. **Unfamiliarity with the law.** Not being from Canada, he was unfamiliar with how government agencies work in Canada, especially with regard to reviews and appeals.
- f. **Dyslexia.** He has dyslexia, so it takes him longer to process written information. He does not always process information and timelines in a standard way.

[24] I will review these reasons in sequence, under their bold face headings.

[25] **The dismissal.** The dismissal without notice or reason was shocking. The potential consequences for the Appellant were more severe than for a Canadian citizen or permanent resident. Notwithstanding the shock, the Appellant had hired a lawyer by November 2, 2021, and had applied for EI benefits on December 20, 2021. He dealt with the Commission's officers about his application. After receiving the February 3,

2022, misconduct decision, he felt there was no hope in continuing with a reconsideration request to the Commission.

[26] That is not a reasonable explanation for the delay. The Appellant may have felt too stressed to continue. But he had access to a lawyer for advice if needed. The reconsideration process does not require a lawyer. The Appellant could have started and continued the reconsideration process himself. He said that he was waiting for evidence to dispute the employer's claims of misconduct. While such evidence would be helpful, waiting for it is not a reasonable explanation for missing the time limit to start the reconsideration process. The Appellant already had evidence to counter the employer's claims. He filed with his Notice of Appeal screen shots showing a number of positive reviews from clients during his time with the employer (GD2B-15 to 26). That was evidence to counter the employer's claims that the Appellant made patients uncomfortable, leading to multiple requests that the Appellant not treat them. The employer's specific claim was that the Appellant told patients his COVID-19 conspiracy theories, did not wear a mask and said he was unvaccinated. The Appellant also filed the employer's reference letter for him, dated October 31, 2021 (GD2A-26). The letter describes the Appellant as a valuable asset to the employer and patients. He was willing to work through lockdowns, delivering high standards of treatment and care for each patient who came to see him. The Appellant also filed notes of a conversation with the employer on September 16, 2021 (GD2-33). That could be taken as evidence against the Appellant. The note concerned inappropriate conversations with staff. The note stated that the employer will not tolerate any further expression of the Appellant's views about COVID-19 and vaccinations in the clinic. That last document shows that the Appellant does not limit himself to disclosing only information favourable to him.

[27] **New employment.** Finding a new job was a priority for the Appellant. A job would provide income to him. It would support getting a work permit for the new job. It would support his permanent residence application. It would support his remaining in Canada, rather than having to leave. Looking for work is also a requirement that all claimants must meet in order to receive EI regular benefits. This focus on finding a job is not a reasonable explanation for delaying a reconsideration request. Not making the



request meant that the Appellant was giving up his chance of getting EI benefits, and of relieving the financial hardship he had.

[28] **Legal advice.** The Appellant had legal advice to deal with the employment issue and with the immigration matter. Not getting or acting on legal advice about the EI issue was not a reasonable explanation for the delay.

[29] **Stress and financial hardship.** The high level of stress for the Appellant is understandable. At the hearing, the Appellant testified that he got a new work permit starting March 16, 2022, and he had been working in his profession since then. That would relieve a large part of the stress. He now had a job, and could remain in Canada, working towards permanent resident status. He now had an income, though that would not eliminate the lack of income from October 2021 to March 2022, or restore savings used to pay legal bills. With the major source of stress eliminated, and the financial hardship reduced, the Appellant could have sought a reconsideration in late March or April 2022. As he found out from the Commission in early 2023, late requests for reconsideration made within 120 days of the decision to be reconsidered are treated more favourably. Had he done that, he might have received EI benefits from late December 2021 to mid-March 2022. That would have further eased the financial hardship. So, the stress and financial hardship do not show a reasonable explanation for the delay to January 6, 2023.

[30] **Unfamiliarity with the law.** Many persons claiming EI benefits face this problem whether citizens or visitors. Persons claiming EI benefits have an obligation to familiarize themselves with the requirements needed to obtain the benefits. The Appellant has demonstrated an ability to get relevant information, such as the Service Canada publication on EI and fraud (GD2A-32), the Human Resources and Skills Development Canada publication on progressive discipline (GD2A-35 to 39), and web reviews of his work by patients (GD2B-14 to 26). He also demonstrated an ability to put together an organized statement of his position with supporting documents (GD2A-1 to 14). The Appellant's ability to do that, and his having a lawyer, does not show a reasonable explanation for the delay.

[31] **Dyslexia.** The dyslexia presents the Appellant with an impairment in his functioning. From reviewing the Appellant's documents, and hearing him in testimony, the impairment is not readily apparent. That conclusion is reinforced by two facts. First, the Appellant obtained a B.Sc. degree in his health profession. That requires a higher degree of ability to understand, process and use information. Much of that information will be written. Second, in order to work in his health profession, he must be able to understand, process and use information about advances in his field, and information from co-workers about patients. Again, much of this will be written. So, in the Appellant's case, dyslexia is not a reasonable explanation for the delay.

## **Issue 2. Has the Appellant shown a continuing intention to request a reconsideration?**

[32] The Appellant has not shown a continuing intention from February 3, 2021, to January 6, 2023, to request a reconsideration of the misconduct decision.

[33] One of the reasons for the delay was that after speaking to the Commission's officer Tonya about his application in January 2022, he felt that she was less than impartial, and that there was no hope. She accepted the employer's false information. She did not accept his evidence to dispute the employer's information. He had no faith in the process. He had no confidence in applying for a reconsideration at that time.

[34] In September 2022 the Appellant contacted the Commission about contesting the employer's information. The officer told him that if he had new evidence, he could reopen the matter up to 365 days after the February 3, 2022, decision. The Appellant obtained some evidence from his lawyer. He filed a court claim against the employer on November 30, 2022. He then filed his request for reconsideration on January 6, 2023, with evidence to support his position. He expected more evidence to come out of the court proceeding.

[35] The continuing intention must be present for the entire period from the date of being notified of the February 3, 2022, decision, to the date of filing the request for

reconsideration on January 6, 2023. It is clear on the evidence that initially the Appellant did not intend to request a reconsideration, because he had no hope or faith in the process. It was not until September 2022, after speaking to the Commission, that he intended to seek a reconsideration. The Appellant's continuing intention to request a reconsideration was absent from February 3, 2022, to at least September 2022. He therefore does not meet this requirement.

[36] This reasoning also refutes the Appellant's claim that his delay being within the 365 days mentioned by the Commission by itself shows a continuing intention to request a reconsideration. The delay was within the 365 days, but the Appellant still had to show the continuing intention for the whole period of the delay. That he did not do.

### **Issue 3. Did the Commission exercise its power to refuse to reconsider the decision of February 3, 2022, in a judicial manner?**

[37] Despite the Commission referring to the wrong legal test in its Representations, the Commission did exercise its power in a judicial manner. The Appellant's reasons for claiming that the Commission did not act in a judicial manner do not succeed. I find no evidence in the record or the testimony to show that the Commission did not exercise its power in a judicial manner.

#### **– Wrong legal test in the Representations**

[38] There was an error of law in the Commission's Representations. The Commission referred to the wrong test to support the decision to refuse to rule on the Appellant's reconsideration request.<sup>7</sup> Using the wrong test would be an error of law that amounted to taking into account an irrelevant factor in making its decision. That would mean the Commission had not exercised its discretion in a judicial manner.

[39] The Representations used the concepts of "reasonable person" and "good cause". Those concepts relate to the issue of antedating an application for EI benefits

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<sup>7</sup> GD4-3, last paragraph, referring to the claimant not acting like a reasonable person in his situation would, and GD4-4, first paragraph, referring to good cause.

to an earlier date than when it was actually made.<sup>8</sup> The test for a late reconsideration request uses the concepts “reasonable explanation for requesting a longer period” and “continuing intention to request a reconsideration”.<sup>9</sup> These two different tests involve different legal and factual matters.<sup>10</sup>

[40] That error in the Representations does not affect the January 7, 2023, decision to deny a reconsideration. On reviewing the Commission’s conversations with the Appellant, and the reasoning in its Record of Decision, the Commission applied the correct test in arriving at its January 7, 2023, decision. My decision in this appeal has to be based on the test used to arrive at the January 7, 2023, decision. The subsequent error in the Representations does not change the correct legal test used to arrive at the January 7<sup>th</sup> decision.

– **The Appellant’s reasons**

[41] The Appellant made a number of submissions at the hearing on the issue of whether the Commission had exercised its discretion to refuse to reconsider the February 3, 2022, decision in a judicial manner. It is important to focus on the February 7, 2023, decision to refuse the request to reconsider. This issue of discretion does not relate to any discretion that may have been involved in making the February 3, 2022, decision to refuse to pay EI benefits. This discretion issue focuses on the two criteria of reasonable explanation for the delay, and a continuing intention to request a reconsideration. The focus is on what the Commission decided about those two factors in the February 7, 2023, decision, and on whether that decision was made in a judicial manner. I will deal with those in sequence.

[42] First, the Appellant said that the Commission did not take into account the employer’s false statements about the alleged misconduct in assessing the Appellant’s delay. Those false statements were a fraud on the EI program, and an offence under the *Criminal Code of Canada*. Any false statements made by the employer are relevant

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<sup>8</sup>Act, section 10(4).

<sup>9</sup>Regulations, section 1(1).

<sup>10</sup>*RH v Canada Employment Insurance Commission*, 2014 SSTGDEI 20; *Canada (Attorney General) v Burke*, 2012 FCA 139.

to the initial decision to deny EI benefits for misconduct. They are not relevant to the reconsideration decision. What is relevant to the reconsideration decision is what the Appellant did that showed a reasonable explanation and continuing intention. The actions of the employer are not relevant to those factors. The employer's actions do not constitute a reasonable explanation for the Appellant's delay in requesting a reconsideration of the initial decision.

[43] Second, the Appellant said that the Commission did not act in good faith in deciding the reasonable explanation factor. In deciding that factor, the Commission ignored the evidence of false information from the employer. The Appellant felt that he was the victim of a criminal act by the employer that defrauded him of EI benefits. The Commission should have explored that issue before deciding that he did not have a reasonable explanation. As noted above, false statements from the employer are relevant to the initial decision, not to the later decision that is the subject of this appeal. The Commission did not fail to act in good faith by focusing on the Appellant's actions, not on the employer's actions.

[44] Third, the Appellant felt that the different Commission officers at the initial decision and at the reconsideration decision levels did not want to help him. They accepted the employer's false information and ignored his true relevant evidence. Again, this submission focuses on the decision-making at the initial level and does not address the two factors involved in making the decision at the reconsideration level.

[45] Fourth, the Appellant dealt with improper purpose or motive. He said that the Commission was not impartial and discriminated against him because of his position on the COVID-19 vaccine. He was not vaccinated and would not disclose his vaccination status to the employer. Again, this submission focuses on the decision-making at the initial level and does not address the two factors involved in making the decision at the reconsideration level. That is confirmed by the Record of Decision (GD3-42). The Appellant provided his information disputing the employer's information about the dismissal. He provided his explanation for the delay. That consisted of information about the employer's false and inconsistent information, rather than information on his

reasonable explanation. He provided no information about his continuing intention to request a reconsideration. Because the Appellant did not provide information about the two factors, the Commission decided that the Appellant had not proven either factor. That is neither an improper purpose nor motive on the part of the Commission. Nor is it a lack of impartiality, nor is it discrimination.

[46] For these reasons, the Commission did exercise its discretion in a judicial manner, when it denied the Appellant's request for reconsideration

## **Conclusion**

[47] The appeal is dismissed. The Commission's decision dated February 3, 2022, will not be reconsidered, and remains unchanged.

Paul Dusome  
Member, General Division – Employment Insurance Section