



Citation: *DA v Canada Employment Insurance Commission*, 2023 SST 1788

Social Security Tribunal of Canada Appeal Division

Decision

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

Respondent: Canada Employment Insurance Commission
Representative: Daniel McRoberts

Decision under appeal: General Division decision dated May 26, 2023
(GE-23-638)

Tribunal member: Pierre Lafontaine

Type of hearing: Videoconference

Hearing date: November 14, 2023

Hearing participants: Appellant
Appellant's representative
Respondent's representative

Decision date: December 13, 2023

File number: AD-23-647

Decision

[1] The appeal is dismissed.

Overview

[2] The Appellant (Claimant) applied for employment insurance (EI) benefits on December 20, 2021. The Respondent (Commission) issued two initial decisions denying benefits, dated February 3, 2022 (misconduct), and April 25, 2022 (work permit).

[3] On January 6, 2023, the Commission received the Claimant's request for reconsideration. On February 7, 2023, the Commission decided that it would not reconsider the February 3, 2022, misconduct decision, as the request for reconsideration was late, and the Claimant did not meet the criteria for granting an extension of time for making the request. The Claimant appealed the decision to the General Division.

[4] The General Division determined that it only had jurisdiction to deal with the February 7, 2023, late decision. It determined that the Claimant was late in requesting reconsideration of the misconduct decision of February 3, 2022. It concluded that the Commission had exercised its discretion in a judicial manner in denying the Claimant's request to extend the 30-day period to make a request for reconsideration of a decision.

[5] The Appeal Division granted the Claimant leave to appeal. He submits that the General Division made errors of fact and of law when it concluded that the Commission acted judicially in refusing the extension of delay.

[6] I must decide whether the General Division made errors of fact and of law when it concluded that the Commission acted judicially in refusing the extension of delay. I must also decide whether it refused to exercise its jurisdiction regarding the April 25, 2022, decision.

[7] For the following reasons, I am dismissing the Claimant's appeal.

Issues

[8] Did the General Division make errors of fact and of law when it concluded that the Commission acted judicially in refusing the extension of delay?

[9] Did the General Division refuse to exercise its jurisdiction regarding the April 25, 2022, decision?

Preliminary matters

[10] To decide the present appeal, I have listened to the recording of the General Division hearing held on May 1, 2023.

Analysis

Appeal Division's mandate

[11] The Federal Court of Appeal has determined that when the Appeal Division hears appeals pursuant to section 58(1) of the *Department of Employment and Social Development Act*, the mandate of the Appeal Division is conferred to it by sections 55 to 69 of that Act.¹

[12] The Appeal Division acts as an administrative appeal tribunal for decisions rendered by the General Division and does not exercise a superintending power similar to that exercised by a higher court.²

[13] Therefore, unless the General Division failed to observe a principle of natural justice, erred in law, based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it, I must dismiss the appeal.

¹ *Canada (Attorney General) v Jean*, 2015 FCA 242; *Maunder v Canada (Attorney General)*, 2015 FCA 274.

² *Idem*.

Did the General Division make errors of fact and of law when it concluded that the Commission acted judicially in refusing the extension of delay?

[14] The Claimant submits that the General Division ignored relevant factors in determining whether the Commission acted in a judicial manner. He argues that all the factors he submitted support his position that he had a reasonable explanation for the delay and a continuing intention to request a reconsideration.

[15] The Commission submits that the General Division erred in law in its interpretation of the legal test by substituting its discretion to that of the Commission, before concluding that the Commission's refusal should not be disturbed as the decision had been made judicially.

[16] The legislation has given the Commission the discretionary power to extend the 30-day period to request a reconsideration of a decision.

[17] The General Division had to decide whether the Commission had exercised its discretion judicially when it refused the Claimant's request to extend the 30-day time limit to make a request for reconsideration of an initial decision.³

[18] I find that the General Division decision is rather ambiguous. It appears to have misunderstood its role. The General Division was not tasked with assessing whether the Claimant met the requirements of the *Employment Insurance Act* and *Reconsideration Regulations*, but whether the Commission had properly exercised its discretion to deny the extension of time.

[19] I am of the view that although the General Division concludes that the Commission has exercised its discretion in a judicial manner by refusing to allow the extension of time, it appears to have come to that conclusion by substituting its own discretion for that of the Commission. This constitutes an error of law.

³ Pursuant to section 112(1) of the *Employment Insurance Act* and section 1 of the *Reconsideration Request Regulations*.

Did the General Division refuse to exercise its jurisdiction regarding the April 25, 2022, decision?

[20] The Claimant submits that he did not receive the April 25, 2022, decision letter.

[21] The Commission acknowledges that it did not send an accurate notice to the Claimant when it determined that his late reconsiderations for both earlier decisions would be denied. Despite this, the Commission submits that it did make two distinct decisions.

[22] The Commission submits that by engaging with one decision only, the General Division has left the Claimant in a situation whereby they could continue to be denied benefits even in the event the February 2022 decision was reviewed and decided in the Claimant's favour, without any further recourse available.

[23] I note that the Commission rendered an initial decision on February 3, 2022. It concerned a disentitlement because the Claimant lost his employment because of misconduct. On April 25, 2022, the Commission issued another decision refusing EI benefits. It concerned the expiration of the Claimant's work permit.

[24] In his detailed request for reconsideration, the Claimant indicates that he is disputing the misconduct decision. He also indicates that his work permit was tied to his sole employment and thus, his dismissal put his very presence in Canada under threat.⁴

[25] During an interview by the Commission, the agent mentions that both decisions are under review for late reconsiderations.⁵ The agent then rendered two different decisions regarding misconduct and availability because of the expiration of the work permit.⁶

⁴ See GD3-25, GD3-26.

⁵ See GD3-38.

⁶ See GD-3-42 to GD3-46.

[26] While it is true that the late reconsideration letter only mentions the decision of February 3, 2022, the file clearly shows that the Commission rendered and communicated two distinct late decisions, including the decision of April 25, 2022.

[27] At the very least, the General Division should have taken a broad approach to its jurisdiction, within the limits of the law, to manage the Claimant's appeals fairly and efficiently. While the late reconsideration decision only mentions the February 3, 2022, decision, and not the April 25, 2022, decision, the findings, and its consequences are intertwined.

[28] For these reasons, I find that the General Division refused to exercise its jurisdiction regarding the April 25, 2022, decision.

Remedy

There are two ways to fix the General Division's errors

[29] When the General Division makes an error, the Appeal Division can fix it in one of two ways:

- 1) It can send the matter back to the General Division for a new hearing;
- 2) It can give the decision that the General Division should have given.

The record is complete, and I can decide this case on its merits

[30] The Claimant suggest that I render the decision that should have been rendered by the General Division. I explained to the Claimant that I would not consider the evidence he filed in support of his application for leave to appeal to do so. He understood my explanation but maintained I should render the decision that should have been rendered.

[31] The Commission suggest that I refer the matter back to the General Division for reconsideration.

[32] I agree with the Claimant. After listening to the recording of the General Division hearing, I am of the view that the record before the General Division is complete, and I therefore can render the decision that the General Division should have given.

The late application

[33] In his written submissions, the Claimant goes to great lengths to explain why he was fired without cause and how this impacted his work permit. However, those issues are not before me.

[34] I must decide whether the Commission exercised its discretion in a judicial manner when it denied the Claimant's request to extend the 30-day reconsideration period.⁷

[35] The evidence shows that the Claimant did receive the initial decision letter dated February 3, 2022, and knew in April 2022, that he needed to provide his renewed work permit to the Commission. He filed his reconsideration request only on January 6, 2023, more than eleven months after the Commission communicated to him its initial decision. There is no doubt that the reconsideration request is late.

[36] The Commission may allow a longer period to make a request for reconsideration of a decision if the Commission is satisfied that there is a reasonable explanation for requesting a longer period and the person has demonstrated a continuing intention to request a reconsideration.⁸

[37] When the Commission refuses a late request for reconsideration, it must show that it used its discretionary powers properly.⁹

[38] I find that the Commission did not use its discretionary powers properly.

[39] First, the Commission indicates in its submissions to the General Division that the Claimant did not provide any reasons for missing the 30-day deadline to submit his

⁷ Section 112 of the *Employment Insurance Act*.

⁸ See article 1(1) of the *Reconsideration Request Regulations*.

⁹ See *Canada (Attorney General) v Gagnon*, 2004 FCA 351.

reconsideration, which is inaccurate.¹⁰ Second, the Commission did not consider the Claimant's disability in its late decision process. Finally, the Commission considered a series of details related to the disputed reason for separation between the client and employer which are irrelevant to the question of why the client delayed in filing his request for reconsideration.

[40] Because 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 Request Regulations*.

Requirements to extend the 30-day deadline

[41] In this case there are two requirements that the Claimant must meet to receive further time beyond the 30-day deadline for filing a reconsideration request. They are:

(1) there is a reasonable explanation for the delay in requesting the reconsideration;

(2) there was a continuing intention to ask for the reconsideration throughout the period of the delay.¹¹

[42] The onus is on the Claimant to prove on a balance of probabilities that he satisfies both of those requirements.

A reasonable explanation for the delay

[43] The Claimant was dismissed on October 21, 2021, and applied for Employment Insurance Benefits on December 20, 2021. Initial decisions were rendered by the Commission on February 3, and April 25, 2022, denying him EI benefits.

¹⁰ See GD3-22.

¹¹ Section 1(1) of the *Reconsideration Request Regulations*.

[44] In his application to appeal to the General Division, the Claimant mentioned the reasons why he missed the 30-day time limit.¹²

[45] The Claimant put forward that his termination without cause put a great deal of pressure on him. He was employed under the Graduate to Opportunity program so his work-permit was directly tied to this employment. He had to find new employment at the time of his initial application for EI benefits, or he would jeopardize his permanent residency application. He also focused on immediately pursuing legal action against the employer to correct its wrongful allegations of misconduct and protect his work-permit with Immigration Canada. All this put him under an enormous stress and severe financial hardship, specially that he is not from Canada and unfamiliar with legal timelines. He also suffers from dyslexia, so it takes him longer to process written information and timelines in a standard way.

[46] The evidence shows that the Claimant delayed over eleven months before requesting reconsideration.

[47] I note that the Claimant was dismissed on October 6, 2021. He immediately consulted a law firm regarding his dismissal and a letter was sent to the employer as soon as November 2, 2021. He applied for EI benefits on December 20, 2021.

[48] On January 20, 2022, his former employer, after initially informing the Commission that the Claimant had lost his employment because of misconduct, now stated it had dismissed the Claimant without cause.¹³ Therefore, at the time the Claimant received the initial decision, he already had proof that he was dismissed without cause.

[49] The Claimant was able to get a new work permit on March 16, 2022, a day after the expiration of his previous permit, and start work again. Nothing prevented him from

¹² See GD2-11, GD2-12.

¹³ See GD3-36.

filing a reconsideration request after securing employment, relieving his financial stress, and protecting his permanent residency application.

[50] Although the Claimant put forward that he was not familiar with the legal process in Canada, he admittedly received the February 3, 2022, decision by mail that indicates he has 30 days to make a formal request for reconsideration to the Commission. In his application for reconsideration, the Claimant also explained why he was late in requesting reconsideration.¹⁴

[51] I have respectfully considered that the Claimant suffers from dyslexia. However, that does not explain a delay of eleven months for requesting reconsideration of financially damaging decisions by the Commission. Specially when considering that the Claimant has showed that he could strongly debate his dismissal, institute immediate legal procedures against his employer, apply for EI benefits, take care of immigration issues, and find new employment in a timely matter.

[52] I find that the preponderant evidence rather shows that the Claimant decided not to request a reconsideration after his initial bad experience with an agent of the Commission. He did not believe he could win and had lost faith in the system.¹⁵ He discussed with another agent of the Commission on March 30, 2022, about uploading a copy of his new work permit to his « My Service Canada Account » but did not ask for a reconsideration.

[53] By deciding not to pursue the matter at that time, the Claimant deprived himself of a recourse then offered to him by law to reverse the agent's negative decision and possibly obtain the EI benefits he needed and felt he was entitled to. It was only after instituting legal action against his employer during the summer of 2022, and discussing with another agent in September 2022, that he regained hope and decided to try again.¹⁶

¹⁴ See GD-3-22.

¹⁵ Based on GD-2-11 and the Claimant's oral testimony during the hearing where he repeatedly states he had lost faith in the process after being initially denied EI benefits.

¹⁶ As emerges from the Claimant's testimony during the General Division hearing.

[54] For these reasons, I cannot find that the Claimant had a reasonable explanation for the delay in requesting reconsideration.

A continuing intention to ask for the reconsideration throughout the period of the delay

[55] The Claimant must show that he had a continued intention of asking for reconsideration between February 3, 2022, and January 6, 2023.

[56] As I noted previously, it was not until September 2022, after instituting legal action against his employer and speaking to the Commission, that he showed an intention to seek a reconsideration.

[57] Based on the evidence presented to the General Division, I cannot find that the Claimant demonstrated a continuing intention to request a reconsideration between February 3, 2022, and at least September 2022.

[58] For these reasons, I cannot find that the Claimant had a continuing intention to ask for the reconsideration throughout the entire period of the delay.

Conclusion

[59] The Claimant does not meet the requirements to receive further time beyond the 30-day deadline for filing a reconsideration request of the initial decisions rendered by the Commission on February 3, and April 25, 2022, denying him EI benefits.

[60] The appeal is dismissed.

Pierre Lafontaine
Member, Appeal Division