



Citation: *DY v Canada Employment Insurance Commission*, 2023 SST 1949

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

Decision

Appellant: D. Y.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission
reconsideration decision (572191) dated June 22, 2023
(issued by Service Canada)

Tribunal member: Elizabeth Usprich

Type of hearing: IN WRITING

Decision date: August 28, 2023

File number: GE-23-2039

Decision

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

[2] The Appellant made his request for reconsideration late.

[3] The Canada Employment Insurance Commission (Commission) has discretion to allow or deny appellants an extension of time to file a request for reconsideration. The Commission didn't exercise its discretion judicially because they didn't consider all factors they should have under the law.

[4] In making the decision the Commission should have, I find the Appellant doesn't meet all four factors under the law to get an extension of time to ask for reconsideration.

[5] This means the Commission will not reconsider their initial February 7, 2019 decision.

Overview

[6] The Appellant applied for benefits in May 2017. In September 2018, the Commission wrote to the Appellant about re-examining his claim for benefits.

[7] On February 7, 2019, the Commission wrote the Appellant. The Commission found there were false representations relating to the Appellant's claim. The Commission imposed a penalty and told the Appellant he would have to pay back benefits received.

[8] On February 1, 2023, the Commission received the Appellant's Request for Reconsideration of the February 7, 2019 decision.

[9] The Commission decided on June 22, 2023, it wouldn't consider the Appellant's reconsideration request because it was beyond the 30-day reconsideration period and didn't meet the test to extend the timeline.

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

Matter I have to consider first

[11] The Appellant requested that his hearing take place in writing.¹

[12] On August 14, 2023, the Appellant was notified that the hearing would take place in writing. This was sent by email. On the same date, the Appellant was sent a letter that contained questions I wanted him to answer about his appeal.² The letter told the Appellant that he had to provide his response by no later than August 21, 2023.

[13] On August 23, 2023, the Tribunal confirmed the Appellant hadn't responded to the questions in the letter.

[14] A hearing can go ahead without the Appellant if he got the notice of hearing.³ I find that the Appellant got the notice of hearing, and the questions he was asked to respond to, because he provided the Tribunal an email address on July 17, 2023, and consented to communication via email. The Tribunal sent hearing documents, including the notice of hearing and questions, to that email address. The Tribunal's records do not show that any of the emails were undeliverable.

[15] I am satisfied the Appellant received notice of the hearing, and the questions he was asked to respond to. As of the date of issuance of this order, there still has been no communication from the Appellant. This means that I will be making my decision based only on the information in the file.

Issues

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

[17] 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?

¹ See GD2-3 where the Appellant wrote that he has a hard time hearing and understanding in person and over the phone, so prefers to have the hearing in writing.

² See GD5-3 to GD5-5.

³ See section 58 of the *Social Security Tribunal Rules of Procedure*.

Analysis

[18] When the Commission makes a decision about your EI benefits, the law allows a claimant to ask for reconsideration of that decision. But the claimant's request for reconsideration to the Commission has to be made within 30-days of that decision being communicated to them.⁴

[19] If a claimant waits more than 30-days to ask for a decision to be reconsidered, then the request is late. The Commission has the discretion to allow a claimant more time to file a request to reconsider.⁵ There are requirements that a claimant must meet to receive additional time.⁶

[20] 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?⁷

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

[22] 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.⁸

[23] 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.⁹

⁴ See section 112(1)(a) of the *Employment Insurance Act*.

⁵ See section 112(1)(b) of the *Employment Insurance Act*.

⁶ See Reconsideration Request Regulations (Reconsideration Regulations) section 1(1) and 1(2).

⁷ See Reconsideration Request Regulations section 1(1).

⁸ See *Attorney General (Canada) v Knowler*, A-445-05.

⁹ See *Attorney General (Canada) v Purcell*, [1996] 1 FCR 644.

[24] 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?

[25] 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.

[26] The Federal Court of Appeal has said the decision maker has the burden of proving that their decision was communicated.¹⁰ That means the Commission must show that their decision was communicated to the Appellant.

[27] In this case, the decision is about the result of the Commission re-examining the Appellant's claim for benefits. The Appellant applied for, and a benefit period was established, in May 2017.¹¹

[28] Later the Commission wrote the Appellant asking for information about his claim. On February 7, 2019, the Commission wrote the Appellant with a decision.¹² The letter says the Appellant was disqualified from benefits. It also says there has been allocation of earnings and a penalty and violation has been assessed.

[29] On February 1, 2023, the Appellant submitted a Request for Reconsideration to the Commission.¹³ The Commission called the Appellant about his request. The Appellant said he received the February 7, 2019 letter, but he put the letter in a drawer and didn't open it.¹⁴

¹⁰ See *Bartlett v Attorney General (Canada)*, 2012 FCA 230.

¹¹ See the Appellant's application for benefits GD3-3 to GD3-13. See also GD4-1.

¹² See GD3-14.

¹³ See GD3-17 to GD3-18.

¹⁴ See GD3-21.

[30] The Appellant also told the Commission that he knew he was in trouble and didn't open the letter out of fear.¹⁵

[31] The Commission says the Appellant made a personal choice not to review the letter that was sent to him.¹⁶

[32] I find the Commission has met the burden of proving their decision was communicated to the Appellant. There is no dispute the Appellant received the letter. He acknowledged this on his Request for Reconsideration¹⁷ and during his calls with the Commission.¹⁸

[33] The letter was dated February 7, 2019. If I allow 10 days for mailing, I find the Appellant would have received the letter, at the latest, by February 18, 2019.¹⁹

[34] The Appellant has a responsibility to read letters that are sent to him. He can't avoid having a decision communicated to him, by refusing to read the letter.

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

[35] The Appellant requested reconsideration of the February 7, 2019 decision on February 1, 2023. 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?

[36] The Commission has discretion to grant additional time for a claimant to file a request for reconsideration.²⁰

¹⁵ See GD3-22.

¹⁶ See GD4-3.

¹⁷ See GD3-18.

¹⁸ See GD3-21 and GD3-22.

¹⁹ This considers that both February 16, 2019 and February 17, 2019 were on a weekend when no mail is delivered.

²⁰ *Daley v Canada (Attorney General)*, 2017 FC 297.

– **Factors the Commission must consider**

[37] When the Commission looks at a late reconsideration request, it must ask two questions:²¹

- Does the Appellant (claimant) have a reasonable explanation for being late?
- Has the Appellant (claimant) shown that he always meant to ask for a reconsideration even though the request was late?

– **Request over 365 days late**

[38] The law also says two additional factors must be considered in particular circumstances.²² If one of the particular circumstances applies then the Commission must also consider two additional factors.

[39] The Commission says the Appellant took over 365 days to request reconsideration. This hasn't been disputed. This means the particular circumstances apply and the Commission must also consider these two additional factors:

- Would the request for reconsideration have a reasonable chance of success?
- Would any prejudice be caused to the Commission, or another party, by allowing a longer period to make the request?

[40] 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.²³

[41] I find the Commission considered whether or not all four factors applied to this case in their Records of Decision.²⁴ Yet, the Commission found, inexplicably, that the second two factors didn't apply.

²¹ See Reconsideration Regulations section 1(1).

²² See Reconsideration Regulations section 1(2).

²³ See Reconsideration Regulations section 1(1) and 1(2).

²⁴ See GD3-25 and GD3-26.

[42] The Commission later argued since the Appellant didn't meet the general requirements in Reconsideration Request Regulations that it wasn't necessary to assess the additional two factors.²⁵

[43] As stated above, I must respect the Commission's discretion only 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.²⁶

– **Was the decision judicial?**

[44] I must respect the Commission's decision if they acted judicially. That means I can only intervene if the Commission's decision wasn't judicial.

[45] I don't find there is any evidence to suggest the Commission was acting in bad faith or for an improper purpose. The Appellant doesn't mention anything in his reasons for appeal about the Commission acting in such a way. There is no evidence in the file that this is the case. I find there is nothing to suggest the Commission acted in bad faith or for an improper purpose or motive.

[46] I have to look at whether the Commission considered an irrelevant factor or ignored a relevant factor. The Appellant's Notice of Appeal says he doesn't think the Commission was "thorough in their consideration" and that they didn't consider all of the information he provided.

[47] Unfortunately, the Appellant doesn't say what information the Commission didn't consider. The Appellant didn't answer the questions that I sent him which dealt with this issue. So, I have to look at the information in the file.

[48] The Commission notes specifically they considered all of the information that the Appellant told them during their May 9, 2023 conversation.²⁷ I find this means they did consider everything the Appellant told them during that conversation. Since the

²⁵ See GD4-3.

²⁶ See *Attorney General (Canada) v Purcell*, [1996] 1 FCR 644.

²⁷ See GD3-21.

Appellant hasn't given any more information, I can only base it on the information he already provided.

[49] But the Commission's Record of Decision shows it failed to consider a relevant factor when it made the decision to deny the Appellant an extension of time. Specifically, the Commission said it didn't consider section 1(2) of the Reconsideration Request Regulations. The Commission says it didn't apply in this case. Yet, it isn't disputed that the Appellant made the Request to Reconsider over 365 days late. This means the Commission is incorrect and the additional two factors in section 1(2) of the Reconsideration Request Regulations had to be considered.

[50] The Commission later considered these in their arguments. But they had to consider all four factors when they were making their initial decision. This means the Commission's decision wasn't judicial.

[51] I don't see any evidence in the file, or in the Appellant's Notice of Appeal, to suggest the Commission acted in a discriminatory manner.

Should the Appellant be granted an extension of time to request reconsideration?

[52] I have found the Commission didn't exercise its discretion judicially because they didn't consider a relevant factor. So, I now have the authority to make the decision the Commission should have given.²⁸

[53] It wasn't disputed that the Appellant made his request after more than 365 days. This means I must consider all four factors about whether the Appellant should be granted an extension of time.

[54] The Appellant must satisfy all four factors in order to get an extension of time to file a Request to Reconsider.

²⁸ See section 54(1) of the *Department of Employment and Social Development Act*.

1) Does the Appellant have a reasonable explanation for being late?

[55] The Appellant's explanation about why he waited was surrounding emotional trauma about the unfortunate loss of his daughter to cancer in 2014. I empathize with the Appellant. The Appellant said in 2017 there were tough times for his family.

[56] The Commission looked at all of the information the Appellant gave about why he was late. The Commission decided the Appellant didn't have a reasonable explanation for his delay.²⁹

[57] The Commission notes that they considered the reasons for delay as outlined in "SROC" dated May 9, 2023.³⁰

[58] The SROC mentions a number of things the Appellant told them about what was going on his life. Some of the things discussed included the Appellant:

- admitting he received the February 7, 2019 decision letter and putting it in a drawer and not opening it;
- saying that it was "stupidity" on his part not to deal with the situation;
- saying he was suffering from depression;
- saying his wife was on disability and not working due to her depression;
- saying he and his wife lost their daughter to cancer when she was 24 and neither of them have recovered from the loss;
- saying he wasn't making enough money;
- saying that he and his wife have a low combined income;
- saying he was living from paycheque to paycheque;
- saying he wanted to pay back for his unreported earnings;
- saying he has now looked at the letters and realized it wasn't just unreported earnings that he was being asked to pay back but a finding of voluntarily leaving his job which he disputes;
- saying he expected to get some funds when his mother passed but that didn't happen; and
- saying he couldn't function.

[59] Respectfully, I understand the ongoing emotional turmoil the Appellant says he was experiencing. I expect the loss the Appellant suffered is the kind that one can likely

²⁹ See GD4-2 and GD4-3.

³⁰ SROC stands for Supplementary Record of Claim. The May 9, 2023 SROC are notes from the Commission's discussion with the Appellant about his reasons for delay. See GD3-21.

never get over. Yet, many of the things the Appellant said contributed to his delay occurred before the Commission's February 7, 2019 decision.

[60] The Appellant admitted he put the Commission's decision in a drawer. He said he was fearful about what the letter contained. So, the Appellant did nothing. I find this means the Appellant didn't have a reasonable explanation for being late.

2) Has the Appellant shown that he always meant to ask for a reconsideration even though the request was late?

[61] The Commission decided the Appellant hadn't shown that he always meant to ask for a reconsideration. The Appellant told the Commission he was aware of the debt that he owed and had been discussing repayment options with the Canada Revenue Agency.³¹

[62] The Appellant says he didn't appeal the February 7, 2019 decision sooner because he was unaware that he could and that too much time had passed.³²

[63] Respectfully, the letter the Appellant received from the Commission dated February 7, 2019, specifically says what to do if he doesn't agree with the decision. The letter says, "you have 30 days following the date of this letter (or from the date you were verbally notified, whichever occurred first) to make a formal request for reconsideration to the Commission".³³

[64] The Appellant told the Commission he only understood what made up his overpayment once he looked at their letters.³⁴ He said he then realized that the overpayment was due to allegedly voluntarily leaving his employment as well as misrepresentations that were made.

[65] The Appellant admits he didn't read the letter when he received it. The Appellant admits he didn't deal with the situation. I find the Appellant had a responsibility to read

³¹ See GD4-3.

³² See GD2-5.

³³ See GD3-16.

³⁴ See GD3-21.

his mail. I find this means the Appellant didn't have a continuing intention to ask for reconsideration from the date he received the letter to the date he made the request.

3) Would the request for reconsideration have a reasonable chance of success?

[66] The Appellant has admitted he made misrepresentations. This means that part of his reconsideration request is unlikely to have a reasonable chance of success.

[67] It is difficult to say if the Appellant would be successful with his position about whether or not he voluntarily left his job or not. There isn't enough information on file. I find it is reasonable that there may be a chance of success on this issue.

4) Would any prejudice be caused to the Commission, or another party, by allowing a longer period to make the request?

[68] The Commission says there would be prejudice to the Commission because they no longer have access to certain records.³⁵ The Commission also thinks it is possible that the employer may no longer have records involving the Appellant's separation.

[69] I find, due to the length of time that has passed, there is prejudice that would be caused to the Commission or the Appellant's employer.

Summary

[70] I found the Commission failed to consider all four factors that they were required to. This means the Commission didn't act judicially.

[71] In making the decision the Commission should have made, I find the Appellant has not met the two first factors under the law. I have still considered the second two factors and I find the Appellant has also not met both of those factors. This means the Appellant cannot be granted an extension to the time to request a reconsideration.

³⁵ The Commission notes they would no longer have access to the claimant's reports from that time. See GD4-3.

[72] That means the Commission will not be reconsidering their original February 7, 2019 decision.

Conclusion

[73] The appeal is dismissed.

Elizabeth Usprich
Member, General Division – Employment Insurance Section