



Citation: *SR v Canada Employment Insurance Commission*, 2024 SST 79

Social Security Tribunal of Canada Appeal Division

Decision

Appellant: S. R.

Respondent: Canada Employment Insurance Commission
Representative: Kevin Goodwin

Decision under appeal: General Division decision dated September 12, 2023
(GE-23-1510)

Tribunal member: Glenn Betteridge

Type of hearing: Videoconference
Hearing date: January 16, 2024
Hearing participants: Appellant
Respondent's representative

Decision date: January 26, 2024
File number: AD-23-871

Decision

[1] I am allowing S. R.'s appeal.

[2] He and the Canada Employment Insurance Commission (Commission) agree the General Division made a legal error. They say I should rescind (in other words, cancel) the General Division decision.

[3] I accept the parties' agreement. I am rescinding the General Division decision.

Overview

[4] S. R. is the Claimant in this appeal. I am calling him the Claimant because he made a claim for Employment Insurance (EI) regular benefits in November 2020.

[5] The Commission accepted his claim and started to pay him benefits. Later, the Commission received new information and changed the start date of his claim. This meant he had received benefits for a period he shouldn't have. The Commission created an overpayment, which is a debt the Claimant has to pay back. It sent the Claimant a notice of debt, dated November 6, 2021.

[6] On March 14, 2023, the Commission received the Claimant's request for reconsideration challenging the overpayment decision. But it refused to extend the 30-day time limit for him to file his reconsideration request. The Claimant appealed that refusal to the Social Security Tribunal's (Tribunal) General Division.

[7] The General Division found the Commission didn't act judicially when it refused to extend the time limit. But the General Division decided the Claimant didn't meet the test to get an extension of time. So, it dismissed his appeal. Then the Claimant appealed to the Appeal Division.

[8] Now the Claimant and the Commission (parties) agree the General Division made a legal error. They asked me to rescind the General Division decision.

The parties agree on the outcome of the appeal

[9] The parties reached an agreement at the Appeal Division hearing. Here is a summary of what they agreed to:

- The General Division made a legal error in its decision.¹
- I should fix the error by rescinding the General Division decision.

I accept the proposed outcome

– The Commission can extend the time limit for filing a reconsideration request

[10] The law says a person has 30 days to ask the Commission to reconsider its decision.² If a person files their reconsideration request within 30 days, their request is on time. If a person makes their request after the 30-day time limit, it's late. But the Commission can extend the time for them to file their request.³ When it decides whether to extend the time, it has to follow the *Reconsideration Request Regulations* (RRR).⁴

[11] The Commission's power to extend time is discretionary. In other words, the Commission gets to decide whether or not to extend the time. But the Commission has to **act judicially** when it makes that decision.⁵

¹ A legal error is a ground of appeal under section 58(1)(b) of the *Department of Employment and Social Development Act* (DESD Act).

² See section 112(1)(a) of the *Employment Insurance Act* (EI Act). It says a person has to make their reconsideration request, "within 30 days after the day on which a decision is communicated to them."

³ See section 112(1)(b) of the EI Act.

⁴ To get an extension of time under the *Reconsideration Request Regulations* (RRR), a person has to show they meet **all the factors** that apply to their situation. Everyone has to show they meet **the two factors** in section 1(1). A person whose request is more than 365 days late, or who made another application for EI benefits, has to meet **two more factors** in section 1(2).

⁵ See *Canada (Attorney General) v Purcell*, 1995 CanLII 3558 (FCA). The Court said that, to act judicially, a decision-maker must not: (a) act in bad faith; (b) act for an improper purpose or motive; (c) take into account an irrelevant factor; (d) ignore a relevant factor; or (e) act in a discriminatory way.

[12] The Claimant appealed the Commission's refusal to extend the 30-day time limit for him to file a reconsideration request. So, the General Division had to decide the following issues, in order:

- Was the Claimant's **reconsideration request late**—past the 30-day time limit?
- If so, did the General Division **use its power judicially** when it refused to extend the time for the Claimant to file his reconsideration request?
- If the Commission used its power judicially, then the General Division had to dismiss the Claimant's appeal. If the Commission didn't exercise its power judicially, the General Division had to **apply the RRR** to decide whether to extend the time for the Claimant to file his reconsideration request.

– **The General Division correctly stated the legal tests, but didn't use them correctly**

[13] The General Division correctly stated the issues it had to decide and the legal tests it had to apply (at paragraphs 4, 5, and 9 to 11). But it didn't apply the legal tests correctly.

[14] The General Division decided the Claimant's reconsideration request was late (at paragraph 8). So next it had to:

- consider whether the Commission exercised its discretion judicially
- **and** decide the Commission hadn't
- **before** it applied the RRR to decide whether to extend the time limit

[15] But the General Division didn't do that. After the General Division decided the Claimant's reconsideration request was late, it applied the RRR (starting at paragraph 12). It should not have applied the RRR **until** it decided the Commission hadn't exercised its power judicially.

[16] Instead, the General Division decided whether the Commission exercised its discretion judicially **near the end of its analysis** (see paragraphs 31 and 36). By that point in its decision, it had **already applied the RRR**. It found the Claimant hadn't shown a continuing intention to request a reconsideration (at paragraph 24). In other words, it had already decided the Claimant didn't meet the legal test to get an extension of time.

[17] Using the legal tests in the wrong order appears to have led the General Division to combine the two legal tests into one hybrid test (at paragraph 36). The General Division dismissed the Claimant's appeal because

- even though the Commission didn't **exercise its discretion judicially**
- it only made an **error in one of the four RRR factors** in had to consider

[18] Paragraph 36 supports my finding that the General Division misapplied the legal tests it had to apply. Misapplying a legal test (in other words, using an incorrect legal test) is a legal error.

– **The remedy and what the Commission has agreed to do now**

[19] Because I have found the General Division made a legal error, I have the power to fix (remedy) the error.⁶

[20] At the hearing, the parties agreed I should rescind (in other words cancel) the General Division decision.

[21] The Commission said—in its written arguments and at the hearing—it will extend the 30-day time limit for the Claimant to file his reconsideration request. It also said it will now reconsider its decision about the claim start date and resulting overpayment.⁷

[22] This is what the Claimant wants the Commission to do.

⁶ Section 59(1) of the DESD Act gives the Appeal Division power to fix (in other words, remedy) the General Division's error.

⁷ See the Commission's written arguments at pages AD3-5 and AD3-6.

[23] But the Commission says the General Division decision prevents it from extending the time limit. The General Division decided the Claimant didn't meet the legal test to get an extension of time. This goes against the Commission's position that the Claimant meets the legal test to get an extension of time. The Commission says I should rescind the General Division decision, so it doesn't stand in the way of resolving this appeal. The Claimant agrees.

[24] The law gives me the power to fix a General Division error by rescinding (cancelling) its decision.⁸ In this appeal, it's appropriate for me to do that so the parties can proceed with their agreement about what will happen now. So, I am rescinding the General Division decision.

Conclusion

[25] I am allowing the Claimant's appeal and rescinding (cancelling) the General Division decision.

[26] The Commission says it will now extend the time for the Claimant to file his reconsideration request then decide his reconsideration request.

Glenn Betteridge
Member, Appeal Division

⁸ Section 59(1) of the DESD Act gives the Appeal Division the power to "confirm, rescind, or vary" a General Division decision, among other powers.