



Citation: *MV v Canada Employment Insurance Commission*, 2023 SST 1969

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

## Decision

**Appellant:** M. V.  
**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** Canada Employment Insurance Commission  
reconsideration decision (621721) dated  
September 27, 2023 (issued by Service Canada)

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**Tribunal member:** Emily McCarthy  
**Type of hearing:** **IN WRITING**  
**Decision date:** December 12, 2023  
**File number:** GE-23-2858

## Decision

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

## Overview

[2] The Appellant was told he had an overpayment March or April 2004. He paid the amount owing at that time.

[3] On July 27, 2023, some 19 years later, the Appellant asked the Canada Employment Insurance Commission (Commission) to reconsider its 2004 decision.

[4] The Commission decided his request for reconsideration was late and refused to reconsider the 2004 decision.

[5] The Appellant is appealing that decision.

## Matter I have to consider first

[6] The Appellant was unable to attend the hearing. He emailed the Tribunal and explained that he didn't have access to a telephone. He asked if the appeal could go ahead in writing or whether his hearing could be postponed.<sup>1</sup>

[7] The Tribunal wrote to the Appellant and gave him the opportunity to provide dates on which he would be able to proceed by teleconference. The Tribunal also explained that an appeal could proceed in writing. The Appellant was asked to confirm how he wished to proceed. If he chose to proceed in writing he was asked to provide any additional submissions by November 30, 2023.<sup>2</sup>

[8] On November 22, 2023, the Appellant wrote to the Tribunal and said he wanted to proceed in writing. He made additional submissions.<sup>3</sup>

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<sup>1</sup> See GD7.

<sup>2</sup> See GD8.

<sup>3</sup> See GD9.

[9] On November 29, 2023, the Tribunal confirmed that the appeal would proceed in writing and gave the Appellant and the Commission until December 1, 2023, to submit any further representations.<sup>4</sup>

[10] No further representations from the parties were received. The appeal went ahead in writing.

## Issue

[11] I have to decide if the Commission should accept the Appellant's reconsideration request. To make this decision I must consider:

- If the Appellant's request for reconsideration is late.
- If it is late, I must decide if the Commission made its decision fairly when it refused to accept the request for reconsideration.

[12] If the Commission didn't make its decision fairly, then I can look at all the factors described by the law and make my own decision about whether the Commission should accept the Appellant's reconsideration request.

## Analysis

[13] When the Commission makes a decision about a claimant's Employment Insurance (EI) benefits, they can ask for a review of the decision. This is called a reconsideration request.<sup>5</sup>

[14] If a claimant waits more than 30 days from when they were told about the decision to make a reconsideration request, the request is late.<sup>6</sup> The Commission has to decide whether it will accept the late reconsideration request.

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<sup>4</sup> See GD10.

<sup>5</sup> See section 112(1) of the *Employment Insurance Act*.

<sup>6</sup> See section 112(1) of the *Employment Insurance Act*.

[15] When it looks at a late reconsideration request, section 1(1) of the *Reconsideration Request Regulations (Reconsideration Regulations)* requires the Commission to ask two questions:

- Does the claimant have a reasonable explanation for being late?
- Has the claimant shown that they always meant to ask for a reconsideration, even though they were late?<sup>7</sup>

[16] If a claimant makes a request for reconsideration more than 365 days after the initial decision<sup>8</sup> section 1(2) of the *Reconsideration Regulations* requires the Commission to look at two additional questions:

- Does the reconsideration request have a reasonable chance of success?
- Would there be prejudice to the Commission or any other party if the Commission accepted the late reconsideration request?<sup>9</sup>

[17] The Commission can only accept a late reconsideration request if the answer to **all** four questions is “yes”. This means an Appellant has to meet all four conditions for the Commission to accept the late reconsideration request when the request is more than 365 days late.

[18] The Commission makes its own decisions about accepting or refusing late reconsideration requests. This is called a discretionary power.<sup>10</sup>

[19] Even though the Commission has discretionary power to accept or refuse a late reconsideration request, the Commission must make its decisions judicially, or fairly. The Commission must look at all of the information when it makes a decision. The

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<sup>7</sup> Subsection 1(1) of the *Reconsideration Request Regulations*. The Commission will consider whether the claimant has a reasonable explanation for the delay and whether the claimant demonstrated a continuing intention to request a reconsideration.

<sup>8</sup> Or if the Appellant has submitted another application for benefits after the decision was communicated to them see subsection 1(2) of the *Reconsideration Request Regulations*.

<sup>9</sup> Subsection 1(2) of the *Reconsideration Request Regulations*.

<sup>10</sup> See *Canada (Attorney General) v Knowler*, A-445-95.

Commission should pay attention to important information about why the Appellant was late and ignore things that are not important. It must also not act for an improper purpose, in bad faith or in a discriminatory way.<sup>11</sup>

[20] I must respect the Commission's discretionary power. Usually this means that I cannot change the Commission's decision. However, if the Commission did not make its decision fairly, then I can step into the Commission's role. Then I can make the decision to accept or refuse the late reconsideration request.

### **Was the Appellant's reconsideration request late?**

[21] Yes. I find the request for reconsideration was made more than thirty days after the Commission's decision was communicated to the Appellant.

[22] The Commission has shown that the decision was communicated to the Appellant in 2004. The Appellant says it was in March or April 2004. The Commission says the decision was dated March 1, 2004. There is a letter on the file that is dated November 16, 2004, but in his request for reconsideration the Appellant refers to a decision that was made in March or April 2004.

[23] In any event, it is not disputed that the decision was made and communicated to the Appellant in 2004. In the Appellant's request for reconsideration, he says he received the decision in April 2004.<sup>12</sup> So I accept that as a fact.

[24] The Appellant's request for reconsideration was submitted on July 27, 2023. This is more than 30 days after the Appellant learned of the Commission's decision. So, I find the Appellant's request for reconsideration was late. I also find that the request for reconsideration was more than 365 days late.

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<sup>11</sup> In *Canada (Attorney General) v. Purcell*, A-694-94, the Federal Court of Appeal states that the Commission must consider all relevant factors, ignore irrelevant factors, act in good faith, and act in a manner that is not discriminatory

<sup>12</sup> See GD3-7.

## **Did the Commission properly exercise its discretion when it denied the Appellant more time to make his reconsideration request?**

[25] No. I find that the Commission didn't act judicially when it considered the third factor and decided there was no reasonable chance of success. I find it didn't consider all of the relevant facts in deciding the reconsideration didn't have a reasonable chance of success.

[26] The Commission considered the reconsideration request's chance of success. It concluded that the appeal didn't have a reasonable chance of success because the decision was made before digital filing was in place and the Commission no longer has access to all of the official documentation. Thus, it could not identify if the agent made any mistakes in 2004.<sup>13</sup>

[27] The courts have not considered the definition of a "reasonable chance of success" in the context of s. 1(2) of the *Reconsideration Regulations*.

[28] Although I am not bound by it, I find the reasoning in *W.M. v Canada Employment Insurance Commission* persuasive.<sup>14</sup> In that decision the Appeal Division adopted the Federal Court's analysis of "reasonable chance of success" in preliminary dismissal procedures.<sup>15</sup> The Appeal Division considered whether it is plain and obvious on the face of the record that the appeal is bound to fail, regardless of the evidence of arguments that could be presented at a hearing.<sup>16</sup> The courts have also held that it is sufficient for a litigant to show that they have **some** chance of success to meet this test.<sup>17</sup>

[29] I find that the Commission didn't consider all of the relevant facts when it decided there was no reasonable chance of success simply because it didn't have a complete file.

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<sup>13</sup> See GD3-11.

<sup>14</sup> See paragraph 19 of *W.M. v Canada Employment Insurance Commission* 2018 SST 328.

<sup>15</sup> See *Lessard-Gauvin v Canada (Attorney General)* 2003 FCA 147.

<sup>16</sup> See *W.M. v Canada Employment Insurance Commission*

<sup>17</sup> See *Hunt v Carey Canada Inc.* [1990] S.C.R. 959.

[30] As the Appellant points out, the Commission was able to produce some of the file documents.<sup>18</sup> These include a portion of the original application for benefits and a letter from the Commission dated November 16, 2004, which adjusted the allocation of his earnings.<sup>19</sup>

[31] The Commission didn't consider whether the notice of decision dated November 16, 2004, disclosed some possibility that the reconsideration request could succeed.

[32] This means I find the Commission didn't act judicially when it decided that the appeal had no reasonable chance of success. It didn't consider all of the relevant facts.

[33] Because I have found the Commission didn't act judicially in making its decision under the Reconsideration Regulations, I can step into the Commission's role. This means I can make the decision to accept or refuse the late reconsideration request. To do so I will look at the four factors set out in section 1 of the *Reconsideration Regulations*.

### **Has the Appellant shown that he meets all four factors under the Reconsideration Regulations?**

[34] No. I find the Appellant hasn't shown that he meets any of the four factors set out in the *Reconsideration Regulations*.

#### **– Reasonable explanation and continuing intention**

[35] The evidence shows that:

- The Appellant was aware of the decision dated March 1, 2004
- The request for reconsideration was 7057 days late

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<sup>18</sup> See GD9.

<sup>19</sup> See GD3-3 to GD3-6.

- The Appellant explained that he has acquired new knowledge of the *Employment Insurance Act* because he now works for Service Canada.
- The Appellant paid the overpayment in 2004<sup>20</sup>

[36] The Appellant explained he only became aware of a possible error in the 2004 overpayment calculation after he started working for Service Canada. This is why he didn't challenge the decision earlier.<sup>21</sup>

[37] After considering these factors and the Appellant's explanation I have decided the Appellant didn't have a reasonable explanation for being late and he hasn't shown a continuing intention to seek reconsideration of the 2004 decision. The intention to seek reconsideration only arose when he became more knowledgeable about the law. This isn't a continuing intention nor is it a reasonable explanation for the delay.

[38] This means he hasn't met the requirements of section 1(1) of the *Reconsideration Regulations*.

[39] Since the request for reconsideration is more than 365 days late, I must also consider whether the Appellant has met the requirements of section 1(2) of the *Reconsideration Regulations*. That is:

- Does the request for reconsideration have a reasonable chance of success?
- Would allowing the request for reconsideration to go ahead cause prejudice to the Commission or another party?

– **Does the request for reconsideration have a reasonable chance of success?**

[40] As discussed above the threshold for deciding whether an appeal has a reasonable chance of success is low. But the Appellant hasn't explained why he believes the calculation of the overpayment was wrong.

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<sup>20</sup> See GD3-7 and GD3-9.

<sup>21</sup> See GD3-8.



[41] The Commission has provided a letter dated November 16, 2004, which shows that there was a recalculation of the Appellant's allocation of earnings.<sup>22</sup>

[42] Even so, the Appellant hasn't provided any explanation about why he believes there was an error in the calculation of the overpayment. In my view, the existence of the letter dated November 16, 2004, and the Appellant's statement that he now better understands the law because of his new employment, isn't enough to find the request for reconsideration has a reasonable chance of success.

[43] The Appellant hasn't shown that his request for reconsideration has a reasonable chance of success. I find he hasn't met the third factor.

– **Prejudice to the Commission or another party**

[44] Because the Commission no longer has access to all of the relevant documentation, I find that there would be prejudice to the Commission if the request for reconsideration was allowed to go ahead.

[45] I accept that digital filing wasn't in place at the time of the initial decision in 2004.<sup>23</sup> I also accept the Commission would not have access to all of the related documents on the file.<sup>24</sup> I find this means the Commission's ability to effectively reconsider the original overpayment decision would be hindered and the process would not be fair to the Commission.

[46] Based on this, I find that allowing the request for reconsideration to go ahead would result in prejudice to the Commission. The Appellant hasn't met the fourth factor.

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<sup>22</sup> See GD3-5 to GD3-6.

<sup>23</sup> See GD3-11.

<sup>24</sup> See GD3-9 and GD3-11.

## Conclusion

[47] The law requires that **all four factors** set out in the *Reconsideration Regulations* be met for the Claimant to be granted an extension of time to make a request for reconsideration.

[48] The Appellant hasn't shown that:

- He had a reasonable explanation for the delay
- He had a continuing intention to ask for reconsideration
- That his reconsideration request has a reasonable chance of success
- That allowing the reconsideration request to proceed would not result in prejudice to the Commission or to another party

[49] The Appellant must show that all **four factors** set out in *the Reconsideration Regulations* are met before a late request for reconsideration that is more than 365 days late can be allowed to go ahead. The Claimant hasn't met any of the four factors.

[50] This means the appeal is dismissed.

Emily McCarthy  
Member, General Division – Employment Insurance Section