



Citation: *NR v Canada Employment Insurance Commission*, 2024 SST 199

Social Security Tribunal of Canada Appeal Division

Decision

Appellant: N. R.

Respondent: Canada Employment Insurance Commission
Representative: Angele Fricker

Decision under appeal: General Division decision dated April 29, 2023
(GE-22-3804)

Tribunal member: Glenn Betteridge

Type of hearing: Teleconference

Hearing date: February 13, 2024

Hearing participants: Appellant
Respondent's representative

Decision date: February 28, 2024

File number: AD-23-545

Decision

[1] I am dismissing N. R.'s appeal.

[2] The General Division made errors. To fix those errors, I made the decision the General Division should have made.

[3] But my decision doesn't change the outcome in N. R.'s appeal. He hasn't proved I should extend the time for him to file his reconsideration request.

[4] This means the Canada Employment Insurance Commission (Commission) doesn't have to decide whether it should pay him benefits for July 18 to August 19, 2019.

Overview

[5] I will call N. R. the Claimant because he made a claim for EI benefits.

[6] The Claimant says he has had ongoing health problems since 2016, which were caused by his work. He has had to deal with many organizations and health care providers to get compensation and benefits—private long-term disability, employment insurance sickness, and workers' compensation. He says this has left him broken.

[7] In 2019 the Claimant asked the Commission to send him a letter showing the EI benefits it had paid him under his claim. The Commission sent him a letter dated July 12, 2019 (**July 2019 letter**). The letter said he had a right to request a reconsideration.

[8] Later he figured out there were three periods—two in 2016 and one in 2019—when he didn't have any employment income or get any benefits. (The 2019 period was from July 18 to August 19, 2019.) So he wrote to the Commission asking to be paid

benefits for these three periods.¹ The Commission received that letter on October 6, 2022 (**October 2022 letter**).

[9] The Commission treated his October 2022 letter as a request for reconsideration of its July 2019 letter.² It decided the Claimant had missed the 30-day time limit to file a reconsideration request. And it refused to extend the time.³ I will call this the **late reconsideration issue**.

[10] The Claimant appealed to the General Division. The General Division dismissed his appeal. It said it had no jurisdiction to decide what it saw as the **real issue in the appeal**—whether the Claimant was eligible for EI benefits for the three periods, in 2016 and 2019.

[11] The Claimant appealed to the Appeal Division. (At the Appeal Division the Claimant said he was no longer asking for benefits for 2016.) The Claimant and the Commission both say the General Division made an error. But they don't agree on the error. And they don't agree how I should fix an error if I find one.

Issues

[12] There are three issues in this appeal

- Did the General Division make an **important factual error** when it found the Commission's July 2019 letter wasn't a decision?
- Did the General Division make an **error of jurisdiction** when it didn't decide the late reconsideration issue?
- If the General Division made an error, **should I make the decision** it should have made?

¹ See the Claimant's letter at page GD03-29.

² See the Commission's notes at pages GD03-30 to GD03-33, where it treats the letter as a late reconsideration request.

³ See the Commission's reconsideration decision letter at GD03-34.

Analysis

[13] The General Division made errors in its decision. It mistakenly found the Commission didn't make a decision about the Claimant's benefits in its July 2019 letter. Then it didn't decide the issue it should have decided in the appeal.

[14] To fix those errors, I have made the decision it should have made.

[15] The rest of this decision explains what I have decided and why.

[16] The Appeal Division's role is different than the General Division's role. The law allows me to step in and fix a General Division decision where a claimant can show the General Division

- acted beyond its powers or refused to use its powers (called an **error of jurisdiction**)
- based its decision on an **important factual error**⁴

The General Division made an important factual error

[17] The General Division makes an important factual error if it bases its decision on a factual finding it made by ignoring, misunderstanding, or mistaking the evidence.⁵ In other words, where it makes a factual finding that goes squarely against the evidence or that isn't supported by the evidence.⁶

[18] At the Appeal Division—for the first time in this case—the Commission said it made a mistake.⁷ It **should not have treated the Claimant's October 2022 letter as a request for reconsideration.**⁸ The Commission says there was **no negative decision**

⁴ Section 58(1) of the *Department of Employment and Social Development Act* (DESD Act) calls these the "grounds of appeal." I wrote these grounds in plain language rather than the exact words the law uses.

⁵ Section 58(1)(c) of the DESD Act says it's a ground of appeal where the General Division based its decision on an erroneous finding of fact it made in a perverse or capricious manner or without regard for the material before it. I have described this ground of appeal using plain language, based on the words in the Act and the cases that have interpreted the Act.

⁶ See *Garvey v Canada (Attorney General)*, 2018 FCA 118; and *Walls v Canada (Attorney General)*, 2022 FCA 47.

⁷ See page GD04-4 of the Commission's written argument.

⁸ See that letter, which the Claimant didn't put a date on, at GD03-29.

in the July 2019 letter it sent to the Claimant. The letter only confirmed benefits the Claimant requested and received in his claim.

[19] I disagree with the Commission. And I find the General Division made a mistake about or misunderstood the Commission's July 2019 letter when it agreed with the Commission about this.

[20] That letter says, in part

You received Worker's Compensation (WCB) Benefits: May 27, 2018 – September 22, 2018 **Therefore all payments during that period are now an over payment and must be paid back Any weeks not payable due to the WCB do not count as paid Due to this adjustment** [Emphasis added.]

[21] I have reviewed the evidence at the General Division. This includes the Commission's letters to the Claimant, notes of its calls with the Claimant, and notes about the decisions it made. The July 2019 letter was about an ongoing claim.⁹ The claim was complicated. It involved conversion from sickness to regular benefits, and back.

[22] In a December 12, 2018 letter, the Commission retroactively disentitled the Claimant for **not providing information** about his WCB.¹⁰ This meant he had an overpayment and debt. He requested a reconsideration of that decision.¹¹

[23] The Commission's July 2019 letter **includes a new decision**. The Commission disentitled him based on information he gave the Commission about the **WCB benefits he received**. And it had the legal power to create an overpayment and debt because he received those benefits. It also told him for the first time how his WCB benefits affected the remaining regular and sickness benefits he might be entitled to under his claim. The Commission acknowledges the claim hadn't ended and the Claimant hadn't received all the weeks of under the claim.¹²

⁹ See that letter at pages GD03-27 and GD03-28.

¹⁰ See pages GD03-18 and GD03-19.

¹¹ See pages GD03-21 to GD03-23.

¹² See page AD04-5.

[24] The General Division decided **the Commission didn't make a decision in its July 2019 letter**.¹³ This isn't correct. The General Division made a mistake about this fact. And the General Division based its decision on this mistake when it found it had no jurisdiction to decide the late reconsideration issue. That was the issue from the Commission's reconsideration decision. So the General Division based its decision on **an important factual error**.

The General Division didn't decide the issue it had to decide

[25] The General Division makes an error if it acts beyond or refuses to exercise its decision-making power.¹⁴ In other words, the General Division makes an error if it decides an issue it has no power to decide **or** doesn't decide an issue it has to decide. In law these are called **errors of jurisdiction**.

[26] The Commission argues the General Division made an error of jurisdiction when it didn't decide the issue under appeal.¹⁵ This was the late reconsideration issue.

[27] At the hearing, the Claimant said he found many mistakes he believed were made. He said he didn't care any more and was fed up with the situation.

[28] I agree with the Commission and have great sympathy for what the Claimant said.

[29] Reconsideration decisions are not always detailed. Sometimes they don't use words or concepts from the sections of the *Employment Insurance Act* (EI Act) the Commission relied on to make the decision. Where this is the case, the Tribunal can take a broad approach to its jurisdiction, within the limits of the law, to manage appeals fairly and efficiently. This broad approach allows the General Division to look at the

¹³ See paragraphs 15 to 19 of the General Division decision, under the heading, "Matter I have to consider first."

¹⁴ Section 58(1)(a) of the DESD Act says it's a ground of appeal where the General Division acts beyond or refuses to exercise its jurisdiction. Jurisdiction means the legal power to decide.

¹⁵ See the Commission's written argument at pages AD04-1 and AD04-4.

underlying requests and Commission decisions to figure out the scope of the reconsideration decision.¹⁶

[30] The General Division took a broad approach to its jurisdiction in this appeal.¹⁷ (I assume it did this to deal efficiently with the issue the Claimant wanted it to deal with.) But it should not have done that.

[31] There was one issue the Claimant could appeal to the General Division. And it was clear from the reconsideration decision. That issue was the **Commission's refusal to extend the 30-day deadline** for him to file his reconsideration request of the Commission's July 2019 decision letter. The General Division had to decide **whether the Claimant's reconsideration request was late**. And if it was, whether the Commission **acted judicially** when it refused to extend the deadline.

[32] The General Division didn't agree that was the issue in the appeal.¹⁸ So it didn't decide this issue. **This was an error of jurisdiction.**

[33] The General Division also said it was up to a claimant to decide what they want to appeal to the Tribunal.¹⁹ I disagree.

[34] The General Division gets its power to decide a legal issue from the Commission's reconsideration decision **and** a claimant's appeal of that decision to the General Division.²⁰

[35] A claimant can choose **whether** to appeal the Commission's reconsideration decision to the Tribunal. But if they decide to appeal, they can't make the appeal be about an issue that's not from the Commission's reconsideration decision. And the General Division can't give a claimant—or itself—the power to do that.

¹⁶ See paragraph 13 of the Appeal Division's decision in *MS v Canada Employment Insurance Commission*, 2022 SST 933.

¹⁷ See paragraphs 2, 9 to 11, and 20 of the General Division decision.

¹⁸ See paragraphs 9 and 10 of the General Division decision.

¹⁹ See paragraphs 2 and 20 of the General Division decision.

²⁰ See sections 112 and 113 of the *Employment Insurance Act* (EI Act).

[36] Where the Tribunal takes too broad an approach to its jurisdiction, it risks exceeding the limits of the law. And this can end up going against the goal of managing appeals fairly and efficiently.

Fixing the error by making the decision the General Division should have given

[37] The law gives me the power to fix (remedy) the General Division's errors. In appeals like this one, I usually

- send the case back to the General Division to reconsider, **or**
- make the decision the General Division should have made (based on the evidence at the General Division without considering any new evidence)

[38] I asked the Claimant what he wanted me to do. He said he was at a loss. He had nothing to say.

[39] The Commission argues I should send the case back to the General Division to reconsider the later reconsideration issue. The Commission also made an alternative argument. It agrees with me making the decision the General Division should have made, on two conditions. First, if I find the evidence before the General Division was complete. Second, the Claimant agreed with me making the decision.

[40] I listened to the recording of the General Division hearing and reviewed the other evidence before the General Division. Even though the General Division didn't decide the late reconsideration issue, the hearing was about that issue. The General Division asked the Claimant questions based on the legal tests to decide the late reconsideration issue, including the test for extending the 30-day deadline.²¹

[41] So the parties had a full opportunity to present evidence to the General Division on the issues in the Claimant's appeal. I have the evidence I need to make the decision the General Division should have made. I will do that next.

²¹ This test comes from the *Reconsideration Request Regulations* (RRR), made under the EI Act.

A late reconsideration request: the issues I have to decide

[42] The law says that a person can ask the Commission to reconsider its decision **within 30 days** after the day on which it communicates the decision to them.²² If they don't file it by that deadline, their request is late.

[43] But the Commission can extend the deadline to file a reconsideration request.²³ The *Reconsideration Request Regulations* (RRR) set out the legal test the Commission has to use when it decides whether to extend the deadline.

[44] To decide the Claimant's appeal, I have to consider

- Was his reconsideration request late, and if it was, how late was it?
- Did the Commission act **judicially** when it refused to extend the 30-day deadline?
- If it didn't, has the Claimant met the legal test for me to extend the 30-day deadline (from the RRR)?

– The Claimant's reconsideration request was over a year late

[45] The Commission's decision letter is dated **July 12, 2019**.²⁴

[46] The Commission says it received the Claimant's reconsideration request on October 6, 2022. This is the received date stamped on his letter. So the Commission says his reconsideration request was just over three years (**1152 days**) late.²⁵

[47] The Claimant told the Commission he doesn't remember getting the letter.²⁶ But he does remember that he went to a Service Canada Centre and asked for a letter. He needed it to access benefits through his union.²⁷ He doesn't remember the date he did

²² See section 112(1)(a) of the EI Act.

²³ See section 112(1)(b) of the EI Act.

²⁴ See the letter at pages GD03-27 and GD03-28.

²⁵ See the Commission's notes of its call with the Claimant at page GD03-30.

²⁶ See page GD03-30.

²⁷ See page GD03-30, and this is also what the Claimant said at the hearing at 34:28 of the recording.

that. But he says he gave the letter to his union and expected to get private disability benefits starting in late July 2019.

[48] The Commission's evidence shows the Claimant contacted the Commission three times in June and July 2019 to get it to issue the July 2019 letter.²⁸ That evidence also shows the Commission mailed the letter to the Claimant on July 12, 2019.

[49] I accept the evidence that shows the Claimant received the decision letter soon after July 12, 2019. I also accept the date the Commission received his reconsideration request, as shown by the October 6, 2022 date stamp. There is no evidence that goes against the evidence about these dates. And I have no other reason to doubt that evidence.

[50] I find the Claimant's **reconsideration request was late**. He requested a reconsideration **over three years** after the Commission communicated its decision to him.

– **The Commission didn't act judicially when it refused to extend the time**

[51] The Tribunal can review the Commission's refusal to extend time only if the Claimant can show the **Commission didn't act judicially**, meaning it

- acted in bad faith
- acted for an improper purpose or motive
- considered an irrelevant factor
- overlooked a relevant factor
- acted in discriminatory way²⁹

²⁸ See the Commission's notes at pages GD3-24 to GD3-26.

²⁹ See *Attorney General of Canada v Purcell*, 1995 CanLII 3558 (FCA).

[52] Because the Claimant's reconsideration request was over 365 days late, the *Reconsideration Request Regulations* (RRR) say he has to show these four things to get an extension of time

- he had a **reasonable explanation** for being late
- he had a **continuous intention** (in other words, he always meant) to ask the Commission to reconsider its decision³⁰
- his reconsideration request had a **reasonable chance of success**
- getting the extension of time **wouldn't be unfair** to (in other words, **prejudice**) the Commission³¹

[53] At the General Division, the Claimant can raise a new consideration that wasn't before the Commission. If it is relevant and the Commission didn't consider it, then the General Division can decide the Commission didn't act judicially.³²

– **The parties' arguments**

[54] The Commission says it acted judicially when it refused to extend the 30-day deadline.³³ It says it considered all the relevant circumstances. The Commission's file notes say there is no evidence the Claimant was prevented physically and medically from submitting his reconsideration request sooner.³⁴

[55] The Claimant said the Commission's decision was unfair. The Commission's agent would not let him explain himself.³⁵ The agent told him to listen, relied on the EI laws and rules, and scoffed at his reasoning about why he should get benefits. He said

³⁰ See section 1(1) of the RRR.

³¹ Section 1(2) of the RRR says that a person also has to satisfy the Commission that their request for reconsideration had a reasonable chance of success, **and** no prejudice would be caused to the Commission or another party if the Commission extended the time. A person has to show these extra things where, after the Commission communicated the decision to them: (a) they have asked for a reconsider over 365 days later; (b) they made another application for benefits; or (c) they asked the Commission to rescind or amend the decision under section 111 of the EI Act.

³² See *Attorney General of Canada v Dunham*, 1996 CanLII 3967 (FCA).

³³ See the Commission's written argument at the General Division at page GD04-4.

³⁴ See the Commission's record of decision at page GD03-32.

³⁵ See page GD01-14. And listen to the hearing recording at 48:35.

the Commission had been deceiving and misleading at times. But he didn't give examples. He said the Commission ignored his personal individual situation.³⁶ He said the Commission made its decision based on something that was unimportant. He says if he had gotten money from EI wrongly, and it discovered that at a later date, it would have no problem coming after him to pay it back.³⁷

[56] The Claimant says he has longstanding physical and mental health issues, and his life was falling apart during the relevant time.³⁸ He fought a long time to get workers' compensation to approve his claim for a mental health injury.³⁹ Workplace bullying and harassment caused that injury. He suffered from depression and anxiety. He was in significant pain due to a knee injury. He sees a psychologist. He said his mental health state made it hard to stay on top of paperwork. His mind was chaotic, and he would procrastinate.⁴⁰

[57] He says he tried a medication for mental health for six weeks, but it wasn't good.⁴¹ He said he was homeless for a while. He said he didn't discover he hadn't received income for the periods in 2016 and 2019 until later on. Finally, he explained that his dealings with the Commission, other organizations, and health professional had broken him. At times during the hearing the Claimant seemed to be in distress, was tearful, and needed time to compose himself.

– **My findings about the evidence and the law**

[58] I accept the Claimant's evidence about his state of mind, his health challenges, his experience trying to access benefits, and his homelessness. I have no reason to doubt his evidence about these things. And no evidence goes against it.

³⁶ Listen to the hearing recording at 52:08.

³⁷ Listen to the hearing recording at 52:47.

³⁸ See the General Division appeal the Claimant sent to the Tribunal at page GD01-14.

³⁹ Listen to the hearing recording at 5:00 and 16:33.

⁴⁰ Listen to the hearing recording at 45:59.

⁴¹ Listen to the hearing recording at 41:10.

[59] The Commission wasn't aware of the Claimant's mental health and housing issues. But I can consider them to decide whether the Commission acted judicially.⁴²

[60] I find the Commission didn't use its decision-making power judicially because it overlooked the Claimant's mental health issues and homelessness. His evidence about these two things is relevant to whether he has a **reasonable explanation** for why he delayed making his reconsideration request.

[61] Because I have found the Commission didn't act judicially when it refused to extend the 30-day deadline, I can decide whether I should do that.⁴³

– **The Claimant hasn't shown he should get an extension of time**

[62] I have applied the legal test from the RRR. I find the Claimant hasn't proved I should extend the time for him to file his reconsideration request. He has only shown he meets two out of four parts of that test.

[63] I find the Claimant's health issues, state of mind, and life circumstances provide a **reasonable explanation for his delay** filing his reconsideration request. He struggled to get compensation and benefits, and this was his priority. And I accept that it took him longer to do things because of his depression, anxiety, pain, and chaotic thinking.

[64] I find the Claimant **hasn't shown he had an ongoing intention** to request a reconsideration of the Commission's 2019 decision.

[65] The Claimant says he decided to write to the Commission after he filed his taxes in **spring 2022**.⁴⁴ After he filed his taxes, he went back and reviewed his pay and benefits (EI, workers' compensation, private disability insurance). He discovered he didn't get any income from any source for three periods in 2016 and 2019. Then he wrote the October 2022 letter asking EI to pay him benefits for those periods.

⁴² See *Attorney General of Canada v Dunham*, 1996 CanLII 3967 (FCA).

⁴³ See for example *Canada (Attorney General) v Chartier*, A-42-90 (FCA); and *Canada (Attorney General) v Sirois*, A-600-95 (FCA).

⁴⁴ Listen to the hearing recording at 25:50 and 34:28. See the Commission's notes of its call with the Claimant at page GD03-34.

[66] The Commission says the Claimant didn't demonstrate a continuing intention because he didn't contact the Commission to discuss or resolve the matter.⁴⁵ It says he was aware that he could contact the Commission because he had contacted it about various claims since 2018.

[67] I have no reason to doubt what the Claimant said to the Commission or at the General Division hearing. No evidence goes against his evidence. So I accept his evidence.

[68] That evidence shows me **he didn't have an ongoing intention** to request a reconsideration. He only formed the intention **after he filed his tax return in spring 2022**. This was about three years after he received the Commission's 2019 letter. So his intention wasn't ongoing.

[69] I find the Claimant's reconsideration request—to get EI benefits for July 28 to August 19, 2019—had **no reasonable chance of success**. (At the Appeal Division the Claimant said he was no longer asking for benefits for 2016—so I have only considered 2019.)

[70] The Claimant testified he stopped filing EI claims in July 2019 because he thought he would start on private insurance benefits.⁴⁶ He also said he thought his EI claim was ending at that time.

[71] The Commission says the Claimant didn't file any reports for the period of July 28 to August 19, 2019.⁴⁷ The Commission says even if the Claimant were to file reports for that period and ask for them to be backdated, he wasn't entitled to sickness benefits.⁴⁸ He had already received the maximum of 15 weeks (weeks of April 7 to July 14, 2019)

⁴⁵ See pages GD03-33.

⁴⁶ Listen to the hearing recording at 25:50.

⁴⁷ See page GD07-02.

⁴⁸ See the Commission's written argument at page AD04-5.

under his claim.⁴⁹ And he would not be entitled to regular benefits because the medical certificate on file says he isn't capable of working until October 8, 2019.

[72] The Commission's July 2019 letter to the Claimant says he had received 13 out of 15 weeks of sickness benefits payable under his claim (as of the date of that letter).⁵⁰ After the letter, the Claimant filed a report for another two weeks (July 14 to July 27, 2019).⁵¹ The July 2019 letter also said he had received 18 out of 45 weeks of regular benefits. Finally, it says his medical recovery date is the week of October 6–12, 2019.

[73] Based on the Commission's evidence and the relevant law, I find the Claimant's reconsideration request has **no reasonable chance of success**. I have reviewed and accept the Commission's evidence that the Claimant wasn't entitled to receive EI sickness or regular benefits for July 28 to August 19, 2019. The Commission's evidence is detailed. There is no evidence that goes against it. And I have no other reason to doubt it.

[74] Extending the time for the Claimant to file his reconsideration request **would not prejudice the Commission**.

[75] The Commission says that time would be contrary to the intent of the legislation and prejudicial to the Commission.⁵² The Commission also says extending the time would cause prejudice to interested parties as it is now more difficult to obtain pertinent fact-finding and relevant documentation.

[76] I disagree with the Commission. I find it wouldn't be prejudiced because of the time that has passed. The Commission submitted very detailed evidence to the General Division (see GD03 and GD07). For example, the Commission sent information and documents from claims the Claimant made in 2009 through 2019. And there is no other evidence or argument about how the Commission would be prejudiced.

⁴⁹ See page AD04-05, and the overpayment breakdown the Commission sent to the General Division at page GD07-154.

⁵⁰ See pages GD03-27 and GD03-28.

⁵¹ See pages GD07-147 to GD07-153.

⁵² See page GD03-33.

Conclusion

[77] The General Division made errors in its decision.

[78] The law gives me the power to fix (remedy) those errors. So I made the decision the General Division should have made.

[79] I found the Commission didn't act judicially when it refused to extend the 30-day deadline for the Claimant to make his reconsideration request. But this doesn't change the outcome in the Claimant's appeal, because I decided he hasn't met the legal test to get an extension of time. **So I am dismissing his appeal.**

[80] The Claimant's case is legally complicated. If the Claimant has questions about his situation—including whether the Commission has to pay him the benefits he believes he is entitled to—he might benefit from legal advice. The Alberta Workers' Resource Centre (www.helpwrc.org) says it provides free legal help with EI problems. Its website says people in Fort McMurray can call (587) 674-2282 to book an appointment with a caseworker.

Glenn Betteridge
Member, Appeal Division