



Citation: *ZB v Canada Employment Insurance Commission*, 2023 SST 2013

Social Security Tribunal of Canada General Division – Employment Insurance Section

Decision

Appellant: Z. B.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (490055) dated August 23, 2022 (issued by Service Canada)

Tribunal member: Glenn Betteridge

Type of hearing: In person

Hearing date: September 15, 2023

Hearing participant: Appellant

Decision date: October 10, 2023

File number: GE-22-3449

Decision

[1] Z. B. is the Appellant in this appeal. I am dismissing her appeal.

[2] The Canada Employment Insurance Commission (Commission) refused to extend the time for her to request a reconsideration of its decision.

[3] She showed the Commission failed to **act judicially** when it refused to extend the time. (Below I will explain what it means to act judicially.)

[4] But she hasn't proven I should extend the time for her to file her reconsideration request.

[5] This means the Commission doesn't have to reconsider its decision. And the Appellant can't appeal the Commission's decision to this tribunal.¹

Overview

[6] The Commission can extend the 30-day deadline for a person to request a reconsideration of a Commission decision.²

[7] The Commission says it issued a decision letter to the Appellant, dated October 18, 2018. She submitted her request for reconsideration on May 17, 2022.

[8] The Commission refused to extend the deadline for the Appellant to make a reconsideration request. It says she filed her reconsideration request more than 30 days after it informed her of its decision—close to four years late. She didn't give a reasonable explanation for the delay. Her reconsideration request doesn't have a reasonable chance of success. And the Commission says it has been prejudiced by the Appellant's delay.

[9] The Appellant says she moved, so she didn't receive the decision letter. She contacted the Canada Revenue Agency (CRA) and was told she owed a debt to the

¹ The *Employment Insurance Act* (EI Act) only lets people appeal a **reconsideration decision**. See section 112.

² See section 112(3) of the EI Act.

Commission. She tried to speak with the Commission several times but wasn't able to get through. She only found out she could request a reconsideration in May 2022, when went to a Service Canada office and spoke to an agent there.

Matter I have to consider first

Documents sent to the Tribunal after the hearing

[10] At the hearing the Appellant said her health conditions help explain why it took her a long time to file her reconsideration request. She said she had medical records that showed this.

[11] I said she could refer to her health conditions and medical records during the hearing. And I set a deadline for her to send her medical records to the Tribunal. And she did.³

[12] I will accept her medical records for the period from October 18, 2018 to May 17, 2022, for three reasons:

- I gave her the opportunity to send them in.
- Her medical records for that time are relevant to a legal issue I have to decide—whether she had a reasonable explanation for the delay.
- It would not be unfair to the Commission because the Tribunal gave the Commission an opportunity to respond.

[13] So I will consider her medical records for the relevant period when I make this decision.

Issues

[14] There are three issues in this appeal:

³ See GD8 and GD9.

- whether the Appellant’s reconsideration request was late
- **if it was**, whether the Commission **acted judicially** when it refused to extend the time for her to file her reconsideration request
- if the Commission **didn’t act judicially**, should I extend the time for the Appellant to file her reconsideration request?

Analysis

The Appellant’s reconsideration request was late

[15] The Commission’s agent (the CRA) communicated the Commission’s decision to the Appellant more than 30 days before she made her reconsideration request. In other words, she filed her reconsideration request late.

– What the law says

[16] The law says a person has 30 days to ask the Commission to reconsider its decision.⁴ If a person files their reconsideration request **within 30 days** of when the Commission **communicated its decision** to them, their request is on time. If a person makes their request late, the Commission can extend the time for them to file it.⁵

[17] The Commission has to show it’s more likely than not it communicated its decision to the Appellant, and when it did that.⁶

[18] The EI Act doesn’t say what it means for the Commission to “communicate a decision” to someone. And the courts haven’t either.

⁴ See section 112(1)(a) of the *Employment Insurance Act* (EI Act). It says a person has to make their request, “within 30 days after the day on which a decision is communicated to them.”

⁵ See section 112(1)(b) of the EI Act.

⁶ See *Bartlett v. Canada (Attorney General)*, 2012 FCA 230.

[19] The courts have decided what it means under another federal law with a deadline for a person to file a legal challenge.⁷ For a decision-maker to communicate its decision, the decision-maker:

- has to take positive action
- has to advise the person of the substance of the decision
- doesn't have to tell the person all the details of the decision
- doesn't have to tell the person if they have a right of appeal or reconsideration⁸

[20] The person can't justify their delay in acting because they were waiting for the decision-maker to give them written reasons or more information about the decision.⁹

[21] The Tribunal has decided the Commission can communicate a decision by calling and telling the person about its decision.¹⁰

– **What the Commission and the Appellant say**

[22] The Commission says the Appellant confirmed she knew about the overpayment.¹¹ She made small payments. But after she spoke to the CRA, she didn't contact the Commission to get clarification about the debt, or to request a reconsideration.

[23] The Appellant testified in October 2018 she no longer lived at the address where the Commission sent its decision. So she never received the decision letter. When she

⁷ See section 18.1(2) of the *Federal Courts Act*, which says: "An application for judicial review in respect of a decision or an order of a federal board, commission or other tribunal shall be made **within 30 days after the time the decision or order was first communicated by** the federal board, commission or other tribunal [...]"

⁸ I have summarized these points from the following cases: *Bartlett v. Canada (Attorney General)*, 2012 FCA 230; *Atlantic Coast Scallop Fishermen's Association et al. v. Canada (Minister of Fisheries and Oceans)*, (1995) 189 NR 220; *Peace Hills Trust Co. v. Moccasin*, 2005 FC 1364; and *R & S Industries Inc. v Canada (National Revenue)*, 2016 FC 275.

⁹ See *Canada (Attorney General) v Trust Business Systems*, 2007 FCA 89.

¹⁰ *JS v Canada Employment Insurance Commission*, 2020 SST 492.

¹¹ See GD4-3 and GD3-18.

learned the CRA was collecting a debt, she thought it was a child tax benefit overpayment. But when she spoke to the CRA in November 2019, it told her that the overpayment was about her EI claim and she should contact Service Canada to find out the details.

[24] The Appellant agrees she had started to make debt payments to the CRA. If there is one thing she has learned since coming to Canada, you do what the CRA says.

– **In 2019 the CRA told the Appellant about the Commission’s decision**

[25] The uncontradicted evidence shows the Appellant requested a reconsideration on May 17, 2022.¹²

[26] I accept the Appellant’s evidence that she found out about the Commission’s decision in a phone call with the CRA in November 2019. I have no reason to doubt that evidence. And the Commission’s evidence supports the Appellant’s evidence about that call.¹³

[27] The CRA acts as the Commission’s agent for collecting debts. In other words, the CRA acts on behalf of the Commission.

[28] Based on the evidence I have accepted and the law about what it means for the Commission to communicate its decision, I find the Appellant’s reconsideration request was late. The evidence shows me she made her reconsideration request **more than 30 days after the CRA (acting on behalf of the Commission) communicated the Commission’s decision to her in a phone call.**

[29] The CRA advised her about the **substance of the decision** more than 30 days before she filed her reconsideration request. The CRA didn’t have to give the Appellant all the details of the debt or tell her about her right to ask for a reconsideration. The CRA told the Appellant enough to communicate the Commission’s decision. So at that

¹² See the Appellant’s reconsideration request at GD3-14 to GD3-17.

¹³ See the CRA’s “recovery notes” screen of its November 12, 2019 phone call with the Appellant at GD3-21.

point she knew she owed the Commission money from her EI claim. And the CRA advised her to call Service Canada to get details about the Commission's decision.

[30] Because I have decided the Appellant's reconsideration request was late, I have to decide whether the Commission acted judicially when it refused to extend time.

What the Appellant needs to show to get an extension of time

[31] To get an extension of time to file her reconsideration request, the Appellant has to show the Commission four things (the four-part test):

- She had a **reasonable explanation** for being late.
- She had a **continuous intention** (in other words, she always meant) to ask the Commission to reconsider its decision.¹⁴
- Her reconsideration request had a **reasonable chance of success**.
- An extension **wouldn't be unfair to the Commission**.¹⁵

[32] The Commission says the Appellant has to prove all four of these because she delayed asking for a reconsideration for more than 365 days. I have reviewed the appeal record, and I agree with the Commission—she has to prove all four things to get an extension of time.

[33] Next I will consider whether the Commission **acted judicially** when it refused to extend the time.

¹⁴ See section 1(1) of the *Reconsideration Request Regulations* (Reconsideration Regulations).

¹⁵ Section 1(2) of the Reconsideration Regulations 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 two extra things where, after the Commission communicated the decision to them: (a) they have asked for a reconsideration 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.

– **What it means for the Commission to use its discretion judicially**

[34] The EI Act gives the Commission the **discretion** to extend the time for a person to make a reconsideration request.¹⁶ In other words, the Commission gets to **decide whether or not** it should extend the time past 30 days.

[35] I have to look at **how the Commission used its discretion** when it decided to deny the Appellant an extension of time. The Federal Court of Appeal has decided the Tribunal can change the Commission's refusal to extend time where an appellant shows the **Commission didn't act judicially** because it:¹⁷

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

[36] I can also change the Commission's decision if the Appellant shows the Commission reached its decision in a **perverse or capricious manner without regard to the material before it**.¹⁸ In other words, the Commission's decision goes against the evidence or is irregular. Or the Commission made its decision without fully considering or properly understanding the evidence.

[37] The Appellant can also raise a new consideration that wasn't before the Commission. If it is relevant and the Commission didn't consider it, then the Commission didn't use its discretion judicially.¹⁹

¹⁶ See *Canada (Attorney General) v Daley*, 2017 FC 297.

¹⁷ See *Attorney General of Canada v Purcell*, A-694-94 (FCA).

¹⁸ See *Canada (Attorney General) v Tong*, 2003 FCA 281.

¹⁹ See *Attorney General of Canada v Dunham*, A-708-95 (FCA).

– **What the Appellant says**

[38] The Commission says it used its discretion judicially when it denied the Appellant an extension of time.²⁰

[39] At the hearing I asked the Appellant about each of the “acted judicially” factors.

[40] She testified the Commission didn’t consider an irrelevant fact. She said the Commission overlooked a relevant factor—her pelvic bone fracture in 2016. (But this isn’t relevant to the Commission’s decision about whether to extend the time after it made its decision in 2018.)

[41] The Appellant testified the Commission agent acted in **bad faith** and with **discrimination**. (This reason might also fall under “acted for improper purpose or motive.”) She said the agent didn’t look at anything. He didn’t take more than 20 minutes on the phone. She felt attacked the whole time. He didn’t give her a chance to speak. She testified the agent knew she was Egyptian. He spoke to her as if she was an Arab woman and a thief. Like she took EI benefit money and spent it on a vacation. But then she said the agent might have said this in different way, but this was his meaning. She didn’t remember every single word.

[42] I reviewed and considered the Commission’s notes and decision in its reconsideration file (GD3), its representations (GD4), the Appellant’s appeal (GD2) and additional document (GD5), and the Appellant’s testimony.

– **The Commission didn’t use its discretion judicially**

[43] I find the Commission didn’t use its discretion judicially, for the following reasons.

[44] The Commission’s reconsideration file includes:

- the Appellant’s reconsideration request

²⁰ See the Commission’s position at GD4-3.

- the Commission's notes of conversations with the Appellant after she filed her reconsideration request
- the Commission's **record** of why it denied her request to extend time²¹

[45] The Commission's **record** in this case is brief. The Commission only truly considered one of the four things it had to consider. The facts it reviewed were almost all about whether the Appellant had a **reasonable explanation** for the delay.

[46] The Commission says in its record, "Furthermore, the claimant has not demonstrated a **reasonable chance of succeeding** on the substantive issues." It's not clear how the Commission arrived at that conclusion. This is the only sentence about this part of the test.

[47] The Commission didn't consider the other two parts of the test: **continuous intention** to request a reconsideration and it **wouldn't be unfair** to the Commission.

[48] So I find the Commission overlooked three relevant factors. And I find it reached its decision in a perverse or capricious manner without regard to the material before it.

[49] But I find the Appellant hasn't shown it's more likely than not the Commission acted in bad faith or in a discriminatory way. The Commission spoke to her twice after she filed her reconsideration request. It spoke to her a second time after she told the agent she was finding the telephone interview overwhelming and asked to continue to conversation three days later. The agent provided her with a summary of the first conversation. And the agent explained the law about getting an extension of time, his decision, and the Appellant's right to appeal the Commission's decision to the Tribunal.

[50] I accept the agent's notes of those calls. I find the agent allowed the Appellant to speak to the relevant issues. And I find the agent allowed the Appellant two opportunities to do that. In these circumstances, I find the Appellant's experience of

²¹ See her reconsideration request at GD3-14 to GD3-17. See the Commission's notes of its call with the Appellant at GD3-18 and GD3-19. And see the Commission's record of its reconsideration decision at GD3-25.

what the agent said and how he treated her, which she described as “not in so many words,” doesn’t show the agent discriminated against her.

[51] I have also considered the context of those calls. The Commission had decided the Appellant violated the EI Act and should get a penalty. There was a significant amount of money at stake. She had been out of the country repeatedly over the space of two years while she got benefits but didn’t tell the Commission. And she admitted that she had a friend send in her biweekly reports when she was out of the country. All of these factors probably raised the agent’s suspicion and likely led him to ask the questions he did, in the manner he did. So it seems more likely the agent was responding to Appellant’s actions, rather than her identity as an Arab woman.

– **Summary of my findings**

[52] The Commission didn’t act judicially when it decided the Appellant’s request to extend time to file her reconsideration. It ignored two parts of the four-part test. And although it said the Appellant’s reconsideration had no reasonable chance of success, it didn’t do an analysis to show how it arrived at that conclusion. Finally, I find the Commission acted in a perverse or capricious manner without regard to the material before it when it refused the Appellant an extension of time.

[53] Because I have found the Commission didn’t act judicially, I have to decide whether I should extend the time for the Appellant to make her reconsideration request.

The Appellant hasn’t met the test to get an extension of time

[54] Above, I found that the Commission’s agent (the CRA) communicated the Commission’s decision to the Appellant on November 12, 2019. I also found she made her reconsideration request on May 17, 2022.

[55] So I will focus on the period between these two dates when I consider the four-part test to get an extension of time.

– **No reasonable explanation for being late**

[56] The Appellant testified she was having medical problems, including when she was in Egypt. She returned to Canada in early November 2020. She started looking for work in 2020 and did so when her health allowed. She said her health problems would have prevented her from working at times. Then she started part-time work at a bank in March 2022.

[57] I have reviewed the Appellant's medical records.²² For the relevant time period, her records show:²³

- chest x-ray; no active intrathoracic disease (November 2019)
- coronary angioplasty in Egypt in late 2019 and was not fit to travel until January 10, 2020
- COVID infection
- urinary tract infection; mixed urinary incontinence as well as stage II uterine and anterior wall prolapse (January 2021)
- ER visits presenting with epigastric pain, nausea and vomiting (May 2020; March 2021; March 2022); deflation of gastric band performed once
- history of moderate chronic gastritis, with a diagnosis of gastric ulcer, and chronic pain related to laparoscopic gastric banding (ongoing to May 2022)
- medication: ASA 81 mg daily (ongoing to May 2022)

[58] The Appellant testified that after she spoke to the CRA in November 2019, she called EI (Service Canada or the Commission) but wasn't able to get through or didn't get a reply.

²² See GD8 and GD9.

²³ Over 1/3 of the medical records the Appellant submitted was for services after she filed her reconsideration request.

[59] It took the Appellant approximately 30 months to go to a Service Canada Centre and get details about why she owed money to the Commission.

[60] I find the Appellant has no reasonable explanation for being that late filing her reconsideration request. Her health challenges didn't stop her from applying, interviewing, and then starting a job in March 2022. So her challenges shouldn't have stopped her from contacting Service Canada for all of 2020, 2021, and up to May 17, 2022. They weren't so serious that she could not call or go to a Service Canada.

– **No continuous intention to ask for a reconsideration**

[61] The Appellant testified she didn't file her reconsideration request until May 17, 2022 because she didn't know she could do that. And she didn't know about the tribunal appeal. She says it was only when she went to a Service Canada Centre she learned that. An agent told her and gave her the form. She didn't do anything about the debt because she didn't know she could. She continued to pay off the debt because she does what the CRA tells her.

[62] I find the Appellant didn't have a continuous intention to request a reconsideration, for three reasons. First, she had no intention of asking for a reconsideration for roughly 30 months—until she learned she could request a reconsideration. Second, if she had a continuous intention of challenging the Commission's decision (which created the debt), she could have done that during the 30 months that passed. Third, even after the CRA told her to contact EI because it created the debt, she made at least seven payments to the CRA.²⁴ These three things show me she didn't have a continuous intention to request a reconsideration (or challenge the Commission's decision).

– **No reasonable chance of success**

[63] A reasonable chance of success means the Appellant could argue her case on reconsideration and the Commission would change its decision in her favour. I find the Appellant's reconsideration request doesn't have a reasonable chance of success for the following reasons.

[64] The Commission's initial decision is about four issues:

- Absent from Canada—ineligible for benefits (July 13 to November 19, 2015; January 22 to February 7, 2016)
- Travelling for personal reasons and not available for work—ineligible for benefits (July 13 to November 20, 2015; January 21 to February 8, 2016)

²⁴ See GD3-22.

- Knowingly made false representations (12 times)—penalty of \$2,372
- Knowingly made misrepresentation on EI claim—formal notice of violation²⁵

[65] The Appellant said she was out of Canada travelling for two reasons. Her good friend, who was living in Dubai, got cancer. She went to take care of her friend several times after she had chemo, and stayed one week each time. She went to Egypt after she fractured her pelvic bone, because she needed her mother to take care of her children.

[66] The Appellant said because she didn't have a computer, she trusted another close friend to complete her EI reports for her while she was in Egypt. Another close friend filed out her reports with the same information each time. The Appellant says she was able to apply for jobs using her phone, on the job website Indeed. When she fractured her pelvis and went to Egypt, she didn't know she could convert her EI regular claim to a sickness benefit claim. And she says she was available for work.

[67] The medical reports contradict the Appellant's evidence that she fractured her pelvis. The report from a CT scan of her pelvis done June 21, 2015, says the opposite: "Small punctate fragments in the superior posterior right acetabulum is noted on x-ray likely **secondary to degenerative change. Unlikely to represent acute fracture.** Pelvis otherwise unremarkable and there are **no acute fracture seen.**" [I added the bold.]²⁶

[68] The Appellant testified she was OK with paying back the benefits from when she went to care for her friend. But she wasn't OK with paying back the benefits from when she went to Egypt.

[69] I accept the Appellant's evidence about the purpose of her travels, except for the diagnosis of her pelvic fracture. I find her pelvis wasn't fractured, based on the medical

²⁵ See the Commission's decision letter at GD3-11 to GD3-13.

²⁶ See GD9-4.

report. I find she had problems with her pelvis, and she used crutches to walk.²⁷ She says she couldn't work because of her pelvis and should have been on EI sickness benefit\,s, not regular benefits. And I accept her evidence that she couldn't work. I have no reason to doubt it.

[70] I also accept the Appellant's admission that she had a friend file EI reports for her when she was in Egypt.

[71] Based on the evidence I have accepted and the law, I find the Appellant's reconsideration request doesn't have a reasonable chance of success because:

- She conceded she was ineligible for benefits when she was in Dubai caring for her friend with cancer.
- She admitted she filed (or caused to be filed) false reports—all filled out the same even though her situation changed in legally important ways. In other words, she knowingly made false statements, which are violations subject to penalties under the EI Act.²⁸
- She wasn't eligible for benefits while she was outside Canada.²⁹
- She wasn't available to work during the time she was in Egypt.³⁰

– **An extension of time wouldn't be unfair to the Commission**

[72] The Commission says it would be prejudiced by an extension of time. It can no longer get the evidence it needs to show its decision is correct. It no longer has the Appellant's reports. It may not be able to access customs' (in other words, Canada Border Services Agency) records.

²⁷ At the hearing she showed me a dated cell phone picture of her at the airport—on crutches—leaving for Egypt.

²⁸ See sections 7.1(4) and 38(1) of the EI Act.

²⁹ See section 37(b) of the EI Act and section 55(1) of the *Employment Insurance Regulation*.

³⁰ See section 18 of the EI Act, and the three-factor *Faucher* test.

[73] I don't accept the Commission's argument, for two reasons. First, it's responsible for the fact it no longer has the Appellant's records. Second, it hasn't shown it more likely than not it can't get the customs information.

– **Summary of my findings for refusing the extension of time**

[74] I have considered all four things the Appellant has to show to get an extension of time. Based on the evidence and the law I have found **she hasn't shown**:

- She had a reasonable explanation for filing her reconsideration request late.
- She had a continuous intention—for roughly 30 months—of challenging the Commission's decision.
- Her reconsideration request has a reasonable chance of success.

[75] Because she hasn't shown she meets all four parts of the test, I can't extend the time for her to file her reconsideration request.

Conclusion

[76] The Appellant made her request for reconsideration late—more than 30 days after the Commission communicated its decision to her.

[77] The Commission didn't use its discretion judicially when it refused to extend the time for the Appellant to make her reconsideration request.

[78] But I can't extend the time for the Appellant to file her reconsideration request. She hasn't shown she meets the four-part test that would allow me to extend the time.

[79] So I am dismissing her appeal. This means the Commission doesn't have to reconsider its decision. And the Appellant has no right to appeal the Commission's decision in her EI claim to this tribunal.

Glenn Betteridge
Member, General Division – Employment Insurance Section