



Citation: *DY v Canada Employment Insurance Commission*, 2024 SST 603

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

Decision

Appellant:	D. Y.
Respondent:	Canada Employment Insurance Commission
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Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (0) dated February 19, 2024 (issued by Service Canada)
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Tribunal member:	Marc St-Jules
Type of hearing:	Teleconference
Hearing date:	May 7, 2024
Hearing participant:	Appellant
Decision date:	May 27, 2024
File number:	GE-24-732

Decision

[1] The appeal is dismissed.

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

[3] The Commission has the discretion to allow or deny appellants an extension of time to file a request for reconsideration. I find that the Commission did not exercise its discretion judicially. This means that I can look at the requirements to allow extra time to submit a request for reconsideration.

[4] 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 that the Commission does not need to reconsider their February 7, 2019, decision.

Overview

[6] The Appellant applied for regular benefits on May 13, 2017.¹

[7] On September 18, 2018, a letter was sent to the Appellant. The Commission was questioning information from his 2017 claim for benefits.

[8] On February 7, 2019, the Commission made a decision. It decided the Appellant's claim would be allocated earnings. It also decided the Appellant could not be paid benefits starting July 30, 2017. This was because the Appellant was found to have voluntarily left his employment without just cause.

[9] Other sanctions were added as well. This involved monetary penalties and notice of violation. This decision was communicated to the Appellant in a letter dated February 7, 2019.²

¹ See GD03 page 3 to page 13.

² See GD03 page 14 to page 16.

[10] This letter included the next steps the Appellant would have to take if he did not agree with the decision. The last page of this letter informed the Appellant he had 30 days in which to request a formal reconsideration.

[11] On February 1, 2023, the Commission received a request for reconsideration from the Appellant.³

[12] On June 22, 2023, the Appellant was advised that the Commission would not accept the Appellant's appeal. It found that the reasons given did not allow it to accept his late appeal. This means the February 7, 2019, decision would not be reconsidered.

[13] The only issue I can decide is if the decision not to accept his late appeal was done judicially (fairly). There are two possible outcomes:

- a) If I find it was done judicially, I cannot change anything. This is what the law says, or
- b) If I find that the decision was not done judicially, I can then decide if the Commission must reconsider (review) its 2019 decision.

Matters I have to consider first

The Appellant's appeal was returned to the General Division

[14] The Appellant first appealed to the General Division in July 2023. This was concerning the Commission's June 22, 2023, decision not to accept the Appellant's late request for a reconsideration.

[15] The Appellant requested a written hearing. Because of this, the General Division sent a letter to the Appellant. The General Division had questions for the Appellant. The deadline to reply was August 21, 2023. The General Division found it was satisfied the appellant had received the questions. The General Division then proceeded to decide

³ See GD03 starting at page 17.

the appeal without the Appellant's response to the questions. The General Division had not received a response by the deadline.

[16] The decision was not in the Appellant's favour. The Appellant then proceeded to appeal this decision to the Appeal Division.

[17] The Appeal Division found that proceeding to the decision without the Appellant's submissions was unfair to him.

[18] Because of this, the Appeal Division returned the matter back to the General Division before a different member.

I will accept the document sent in after the hearing.

[19] In the interest of natural justice, I offered the Appellant a chance to respond to the questions the previous member had sent him.⁴ This would allow him to take his time and respond to the questions in his own words.

[20] During the hearing, I agreed to accept this document. I did this for two reasons.

- The Appellant spoke about these answers during the hearing. These answers are pertinent to the issue I must decide.
- I would give the Commission an opportunity to reply to this document. The Commission would therefore not be prejudiced by my decision to accept this document.

[21] I did receive his answers. I will consider his answers in my decision. His answers were sent to the Commission on May 14, 2024. The deadline to reply was May 21, 2024. As of the decision date, no further submissions have been received.

Issues

[22] Was the Appellant's request for reconsideration late?

⁴ See GD05.

[23] If yes, did the Commission exercise its discretion judicially when it denied the Appellant more time to file a request for reconsideration?

[24] If its discretionary decision was not done judicially, should the Appellant be granted an extension of time to request a reconsideration?

Analysis

[25] When the Commission makes a decision about your EI benefits, the law allows a claimant to ask for reconsideration of that decision. The claimant's request for reconsideration to the Commission has to be made within 30 days of that decision being communicated to them.⁵ Over 30 days, it is considered late. The requirements the Commission must consider when a request is late are in the Reconsideration Request Regulations (Reconsideration Regulations).

[26] The Commission has the discretion to allow more time to file a request for reconsideration. If the request for reconsideration is received over 30 days but within 365 days, there are two requirements to meet.⁶ They are as follows:

- 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?

[27] When a request for reconsideration is received over 365 days from when the decision was communicated to them, there are two **additional** requirements.⁷ The requirements that the Commission must also consider are below:

- If the request for reconsideration has a reasonable chance of success.
- Will any prejudice be caused if the Commission allowed this longer period to make a request?

⁵ See Reconsideration Request Regulations (Reconsideration Regulations) section 1(1).

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

⁷ See Reconsideration Request Regulations (Reconsideration Regulations) section 1(2).

[28] The decision to deny additional time to file a reconsideration is a discretionary decision. Courts have said that the Tribunal can only decide to change the decision **if** the Commission did not exercise this discretionary decision judicially.⁸ In other words, if the decision was done judicially, the Tribunal cannot interfere (change) the decision.

[29] If the Commission didn't properly exercise its discretion judicially, I can make the decision the Commission should have based on the requirements set out in the Reconsideration Regulations.

Was the Appellant's request for reconsideration late?

[30] Yes. There is no dispute there. It was late. I will explain.

[31] The Federal Court of Appeal has said the decision maker has the burden of proving that their decision was communicated.⁹ That means the Commission must show that their decision was communicated to the Appellant.

[32] In this case, the Commission sent a letter to the Appellant on February 7, 2019.¹⁰ This was about the Appellant's 2017 claim. The exact date the Appellant received this decision is not known. I will review the evidence before me to decide when the decision was communicated to him.

[33] The Appellant says he received the letter. This has been consistent. He told the Commission and the Tribunal that he received the letter. He says he put the letter in a drawer and avoided reading it.

[34] I find that allowing for 10 business days for Canada Post to deliver the letter to be reasonable. I find that this would mean he would have received the letter by February 18, 2019.

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

⁹ See *Bartlett v Attorney General (Canada)*, 2012 FCA 230.

¹⁰ See GD03 page 14.

[35] The Commission stamped the request for reconsideration as received on February 1, 2023.¹¹ I find this is feasible as the form is signed January 24, 2023.

[36] Based on the evidence before me, I find the request for reconsideration was late. It was both over 30 days and over 365 days late. The Commission says the Appellant was 1425 days late.¹² Because I also considered Canada Post Delivery times, I find the appeal was 1415 days late. For the remainder of this decision, I will say the Appeal was over 1400 days late.

[37] Because he was over 365 days late means all four factors mentioned above must be met.

Did the Commission exercise its discretion judicially?

[38] No, it did not. I will explain.

[39] As discussed above, because this appeal is over 365 days, the Commission must consider all four factors above.

[40] I find that the Commission only considered the first two factors. This is found in the Commission's Record of Decision.¹³ For some reason, unknown to the Tribunal, the Commission decided only the first two factors needed to be reviewed. The Commission argued in their submissions that, since the Appellant didn't meet the first two factors, it wasn't necessary to assess the additional two factors.¹⁴

[41] As discussed above, I can only interfere with their decision if the Commission did not act 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.¹⁵

¹¹ See GD03 page 17.

¹² See GD03 pages 25 and 26.

¹³ See the Commission's Record of Decision available at GD3-25 and GD3-26.

¹⁴ See GD4-3.

¹⁵ See *Attorney General (Canada) v Purcell*, [1996] 1 FCR 644.

[42] I will now have a heading for the different factors the courts have said need to be considered if a decision is judicial.

– **Did the Commission act in bad faith or acted for an improper purpose or motive?**

[43] No, it did not. I will explain.

[44] The Appellant says the Commission should have shown compassion when it denied him extra time to file a request for reconsideration. The Appellant testified that he lost his daughter almost 10 years before when she was 24. Since then, both him and his wife suffer from depression. He also has health issues, and the family income is low as well.

[45] He also argued the Commission took too much time to review his request and then did not give it careful enough consideration.

[46] The Commission says it did act judicially. It argues it did consider all the information that the Appellant told them. I find this means they did consider everything Appellant told them. It argues the Appellant was aware of the debt. He was aware of the February 2019 decision but waited until February 2023 to file a request for reconsideration.¹⁶ The Appellant chose not to open it out of fear. The Appellant believes he spoke to a Canada Revenue Agent (CRA) in 2021.

[47] The Appellant did not know the majority of the debt was due to the voluntary leaving decision. The Appellant argues he did not leave his job. The Appellant thought the CRA agent would help. He discussed the debt in 2021 with CRA. The Appellant had two conversations with Canada Revenue Agency employees. He testified that he had a payment arrangement which proved too difficult for him to honour.

[48] I sympathize with the Appellant. I agree that the Appellant's explanation provided would require leniency but not over 1400 days late. In making this decision, the

¹⁶ See GD04 page 2.

Commission would also consider the fact that the Appellant was able to make payment arrangements with CRA.¹⁷

[49] I also agree that it took over 3 months for the Commission to communicate with the Appellant to ask for additional information on his late request. I also agree that it took over a month to then advise the Appellant of its decision. This does not lead me to believe it was in bad faith. Quite the opposite. A quick decision made the same day the Commission spoke to him on May 8, 2023, would lead me to come to this conclusion.

[50] In this case, the Commission spoke to him on May 8 and 9, 2023. It waited over a full month to issue a decision. I agree that this delay was no doubt stressful, but it does not show bad faith or that it acted for an improper purpose or motive.

[51] The law says the Commission must look at:

- 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?

[52] I find that a discretionary decision not to allow more time when the appeal was over 1400 days late is not acting in bad faith. In other words, there was no improper purpose or motive.

– **Did the Commission consider an irrelevant factor or ignored a relevant factor?**

[53] Yes, it did. I will explain. The Commission needed to consider all four requirements as the appeal was over 365 days late. It only considered the first two requirements. The Commission agrees that it should have considered these two additional requirements.

¹⁷ See GD03 page 25 and page 26.

– **Did the Commission act in a discriminatory manner?**

[54] The Appellant says the Commission discriminated against him because there have been others where the Commission extended the deadline.

[55] I find this does not prove discrimination. This is because every case is different. The Appellant waited over 1400 days to request a reconsideration. I find that without knowing the facts of other cases, one cannot say the Commission acted in a discriminatory fashion. When I make a finding, I am considering the delay of over 1400 days. This is a significant amount of time over the 30 days required by the law.

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

[56] I found that the Commission did not act judicially. That means that I can look at the four requirements to allow more time to request a reconsideration. The four requirements need to be reviewed because it is not disputed that the request was received more than 365 days after he was communicated the decision.

– **Does the Appellant have a reasonable explanation for being late?**

[57] This requirement is there for all late appeals.

[58] The Appellant says that there are several reasons to explain the late appeal.

[59] Both he and his wife suffered and still suffer from depression. They lost their daughter to cancer when she was 24 and they have not recovered from this tragic event. He tried to make payment arrangements with CRA. He also could not visit a Service Canada office as the pandemic restricted access. He was also concerned for his own health to visit a Service Canada office.

[60] I find the Appellant has not provided a reasonable explanation for being over 1400 days late. There are a few reasons. He knew he had received the letter. He had it in a drawer.

[61] I find that his explanations do warrant serious consideration. However, he was still able to make payment arrangements with CRA. He also wanted to pay the full balance with an inheritance. He also managed to continue working.

[62] I also find that the restricted access to Service Canada offices is not something I can consider. I agree that there were restrictions in 2020 and 2021 but the Appellant was sent this letter in February 2019 which was 1 year before the pandemic. In addition, there were alternatives to visit a Service Canada Centre. The Appellant could have called the toll-free number available in the letter.

[63] I find that his explanation would allow for an extension of time to file an appeal. But not over 1400 days late. He was sent a letter which explained the overpayment and did not open it. He was able to send a breakdown of his finances to CRA. He was able to continue working. I find that if he was able to do all of that, he could have taken the step to find out what caused the overpayment and request a reconsideration if he disagreed with the decision.

[64] In making this finding, I also considered that the even with depression, the Appellant was able to continue working and negotiate payment arrangements with CRA.

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

[65] This requirement is there for all late appeals.

[66] The Appellant testified that he was aware of the overpayment. He was aware of the balance owing. He negotiated repayment arrangements with CRA and was hoping to pay the balance in full with an inheritance he was expecting.

[67] This shows that he did not always mean to request a reconsideration. However, I do acknowledge that he says that he was not aware he could. He only looked into it once there was a threat to garnish his wages. Until then, he did not know he could have requested an appeal.

[68] I find that it is unfortunate that the Appellant did not read the letter. This would have given him his rights to file an appeal. However, he has not proven that he always wanted to ask for a reconsideration.

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

[69] The law adds this requirement when a request for appeal is over 365 days late.

[70] I find that the earnings portion does not have a reasonable chance of success. This is because he agrees with the earnings. The earnings would also be supported by forms completed by the employer and/or the record of employment.

[71] The voluntary leaving portion would have a reasonable chance of success. I find this because every situation has two sides. In this case, the employer would have arguments to support the Appellant quit. The Appellant says he did not quit.

[72] The Commission made the decision based on the facts it had at the time. However, the Appellant says that he did not leave his job. He thought he was let go.

[73] I find that there is not enough information to determine for certain the chance of success when it comes to voluntary leaving.

[74] The responsibility to determine entitlement to benefits is delegated to adjudicators working for the Commission. Statements from the employer are no more or less valid than those from the claimant. Adjudicators need to evaluate statements from employers and claimants. The claimant must prove just cause if he left. The Commission must prove misconduct if he was dismissed. Courts have said that when faced with equally credible versions of the facts, the benefit of the doubt will be given to the claimant.¹⁸

[75] Based on the above, I find the request for reconsideration has a reasonable chance of success for the voluntary leaving decision.

¹⁸ See *Alcuietas v Canada (Attorney General)*, 2004 FCA 185.

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

[76] The law adds this requirement when a request for appeal is over 365 days late.

[77] There is a reason for this requirement. As time passes, evidence and statements from parties becomes more difficult to obtain and may not even be available.

[78] The Commission argues that it would be prejudiced because it no longer has access to the claimant reports. In addition, the employer may no longer have records.¹⁹ The decision is to deny benefits is from facts in 2017.

[79] I agree with the Commission that allowing a delay of over 1400 days would prejudice the Commission. As time passes, the employer's records, including employer statements become harder to obtain.

Summary

[80] I have reviewed the four requirements to allow additional time to file a request for reconsideration. My findings are unfortunate for the Appellant. His situation is certainly very sad. He lost his daughter, suffers from depression and helping the family cope by being the main family earner. Unfortunately, I must apply the law.

[81] Although the Appellant may perceive this as an unjust result, my decision is not based on fairness. Instead, my decision is based on the facts before me and the application of the law. There are no exceptions and no room for discretion. I can't interpret or rewrite the Act in a manner that is contrary to its plain meaning, even in the interest of compassion.

¹⁹ See GD04 page 3.

Conclusion

[82] I found that the Commission failed to consider all four requirements that were required by the law. It did not act judicially. This means that I can make the decision it should have made.

[83] I reviewed the four requirements that must be considered to allow more time to file a request for reconsideration. Unfortunately, all four conditions must be met, and they were not.

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

Marc St-Jules
Member, General Division – Employment Insurance Section