



Citation: *JJ v Canada Employment Insurance Commission*, 2024 SST 1372

Social Security Tribunal of Canada Appeal Division

Decision

Appellant: J. J.

Respondent: Canada Employment Insurance Commission
Representative: Louis Gravel

Decision under appeal: General Division decision dated
August 1, 2024 (GE-24-1686)

Tribunal member: Glenn Betteridge

Type of hearing: Teleconference

Hearing date: November 5, 2024

Hearing participants: Appellant
Respondent's representative

Decision date: November 7, 2024

File number: AD-24-517

Decision

[1] I am dismissing J. J.'s appeal.

[2] The General Division made legal errors. I remedied (fixed) the errors by making the decision it should have made. My decision doesn't change the outcome.

[3] J. J. appealed more than one year after the Canada Employment Insurance Commission (Commission) communicated its reconsideration decision to him. The law says I can't extend the time for him to file his appeal. This means the General Division can't consider his appeal.

Overview

[4] J. J. is the Claimant. He made a claim for Employment Insurance (EI) benefits.

[5] This appeal is about whether he appealed the Commission's reconsideration decision on time. It's not about the underlying issue—the overpayment and debt from the \$2,000 EI Emergency Response Benefit (EI ERB) advance payment.

[6] The Commission's reconsideration decision letter is dated August 31, 2021.¹

[7] The Claimant spoke to the Commission on October 28, 2022. He said he never got the reconsideration decision letter. The Commission re-sent it by registered mail. The letter was returned to the Commission. The Commission sent it again. He says he didn't get it. He says he finally got the letter in December 2022.

[8] The Tribunal received the Claimant's appeal to the General Division on December 15, 2023.

¹ See GD3-47.

[9] The General Division decided he filed his appeal late, but less than one year after he got the reconsideration decision letter.² It refused to extend the 30-day deadline for him to file his appeal. It found he didn't give a reasonable explanation for being late.

[10] I gave the Claimant permission to appeal. The Claimant says the General Division made all four types of errors the law lets me consider.³ The Commission says the General Division made a legal error and an important factual error. The parties agreed if I found an error, I should make the decision.

Issues

[11] There are three issues in this appeal.

- Did the General Division make legal errors by misinterpreting or using the wrong legal test?
- Did the Claimant file his appeal late—and if so, how late?
- Can I extend the time for him to file his appeal?

Analysis

[12] 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 error where it used an unfair process, or made a legal error, a jurisdictional error, or an important factual error.⁴

[13] If the General Division didn't make an error, I have to dismiss the Commission's appeal.

[14] In the Claimant's appeal, the General Division had to decide:

² See the General Division decision in GE-24-1686 (Gary Conrad; August 1, 2024).

³ See ADN1-4.

⁴ Section 58(1) of the *Department of Employment and Social Development Act* (DESD Act) calls these the "grounds of appeal." I call them errors. Section 59(1) of the DESD Act gives the Appeal Division the power to fix General Division errors.

- The date when the Commission communicated its decision to the Claimant.
- Whether the Claimant filed his appeal to the General Division late, and if so, how late?
- Whether it should extend the time for the Claimant to file his appeal?

The General Division made two legal errors

– The law the General Division had to apply

[15] A person has to appeal the Commission's decision no more than 30 days after the Commission communicated its decision to them.⁵ If they file their appeal with the General Division after 30 days, it's late.

[16] The Commission has to show it effectively communicated its decision to the person.⁶

[17] The *Department of Employment and Social Development Act* (DESD Act) and *Employment Insurance Act* (EI Act) don't say what it means for the Commission to "communicate a decision" to someone. And the courts haven't decided what this means under these Acts.

[18] The Federal Courts have decided what it means under another federal law with a deadline 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.

⁵ See section 52(1)(a) of the *Department of Employment and Social Development Act* (DESD Act).

⁶ See paragraph 39 in *Bartlett v Canada (Attorney General)*, 2012 FCA 230, citing *Atlantic Coast Scallop Fishermen's Assn v Canada (Minister of Fisheries and Oceans)* (1995), 189 NR 220 (FCA).

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 [...]."

- 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 reconsideration.⁸

[19] The courts have said a person can't justify their delay in appealing by arguing they were waiting for written reasons or more information about the decision.⁹

[20] The Tribunal has decided the Commission can communicate a decision by calling and telling the person about its decision.¹⁰ The Tribunal's reasoning in this decision is sound and persuasive.

[21] Based on these court decisions and the Tribunal decision, I find the Commission can communicate its reconsideration decision to a person in a phone call.

[22] When a person is late filing their appeal, the General Division will extend the time if the person gives a reasonable explanation for filing late.¹¹ But the General Division can't extend the time if the person waited more than a year to file their appeal after the Commission communicated its decision to them.¹²

– **The General Division misinterpreted the legal test for getting an extension of time**

[23] I gave the Claimant permission to appeal based on an arguable case the General Division made a legal error when it decided whether to extend the time for the Claimant to file his appeal.

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 section 59(2) of DESD Act and section 27(2) of the *Social Security Tribunal Rules of Procedure* (Tribunal Rules).

¹² See section 59(2) of DESD Act.

[24] The Commission conceded the General Division made a legal error.¹³ The Claimant said he didn't know enough about the law to say whether this was a legal error.

[25] I agree with the Commission.

[26] The General Division decided the Claimant's appeal was late but denied his request to extend the time. It found that none of his reasons showed, "a reasonable explanation for **the entire period of the delay**."¹⁴

[27] The General Division had to use the legal test from section 27(2) of the Tribunal's Rules. The words "entire period of the delay" don't appear in that section. And no court decision has added those words. So they aren't part of the legal test.

[28] This means the General Division misinterpreted section 27(2). This counts as a legal error. And that error made it more difficult for the Claimant to get an extension of time.

– **The General Division didn't consider whether the Commission communicated its decision to the Claimant in a phone call**

[29] The General Division's reasons also show me it didn't use the correct legal test to decide whether the Claimant's appeal was late.

[30] The Commission's written position suggests the General Division made this error. It writes, "It should not be overlooked that on October 28, 2022, clear explanations were provided to the claimant with regard to the reconsideration decision and to the claimant's recourse to appeal the decision to the Social Security Tribunal."¹⁵

[31] Under the legal test, the General Division first had to decide when the Commission **communicated its decision** to the Claimant. Section 52(1)(a) of the

¹³ See ADN7-6.

¹⁴ See paragraph 36 of the General Division decision.

¹⁵ See ADN7-7.

DESD Act says this. The General Division cites that section and uses the plain language phrase, “the Commission told them about the decision.”¹⁶

[32] One way the Commission tells a person about a reconsideration decision is by mailing them a letter. The Commission also tells people about reconsideration decisions in a phone call.

[33] The General Division reasons show me it considered when the Claimant received the Commission’s reconsideration decision letter. It didn’t consider whether the Commission communicated its reconsideration decision to the Claimant in the October 28, 2022 phone call. This means the General Division ignored part of the legal test. This is a legal error.

[34] The General Division’s error could also be seen as an important factual error.

[35] The General Division found the Claimant received the Commission’s reconsideration letter between December 15 and 22, 2022.¹⁷ Based on that finding, it decided the Claimant filed his appeal late, but less than one year after he received the reconsideration decision letter.¹⁸ The General Division ignored the evidence the Commission communicated its decision to the Claimant in the October 28, 2022 phone call.

[36] So, the General Division based its decision on a finding of fact it made by ignoring relevant evidence. That is an important factual error.

Fixing the error by making the decision

[37] The Claimant and the Commission said if I found an error, I should fix it by making the decision the General Division should have made.

¹⁶ See paragraph 12 of the General Division decision.

¹⁷ See paragraph 17 of the General Division decision.

¹⁸ See paragraph 28 of the General Division decision.

[38] I agree. The Claimant and Commission have been through the General Division process twice. They have had a full and fair opportunity to give their evidence and make arguments.

[39] I have to decide three issues.

- When did the Commission communicate its reconsideration decision to the Claimant?
- Was the Claimant late filing his appeal to the General Division, and if he was, did he file it more than one year after the Commission communicated its reconsideration decision to him?
- If the Claimant was late, can I (and should I) extend the time for the Claimant to file his appeal?

– **The Commission communicated its consideration decision to the Claimant in a phone call on October 28, 2022**

[40] I find the Commission communicated its decision to the Claimant in a phone call on October 28, 2022.

[41] Above, I found the law says the Commission can communicate its reconsideration decision to a person in a phone call. The Commission included its notes of the October 28, 2022 phone call in the reconsideration file.¹⁹ During the call, the agent told the Claimant:

- His EI overpayment increased by \$2,000 based on the EI ERB advance payment he received.
- He requested a reconsideration of the Commission's overpayment decision.
- The reconsideration decision didn't go in his favour.

¹⁹ See GD3-66 to GD3-68.

- His recourse was to appeal to the Social Security Tribunal (SST).
- He could not submit a second request for reconsideration. He needed to submit an appeal to the SST. He had to do that—the Commission would not do that for him.

[42] The agent's notes go on to say:

Agent explained that once a decision is rendered at the reconsider level no agent within EI, including the current agent, has the authority to change that decision - that authority lies with the Tribunal. Agent advised the decision letter he would have received would have given him information about filing an appeal to the Tribunal.²⁰

[43] I have no reason to doubt about what the agent's notes say. I find it's more likely than not the agent made the notes during or shortly after the call. And the notes accurately reflect the information the agent communicated to the Claimant during the call.

[44] Based on the evidence I have accepted, I find the Commission communicated its reconsideration decision to the Claimant on **October 28, 2022**. It took positive action to communicate the substance of its decision to him. It also told him about his right to appeal to the Tribunal.

[45] After the call, the Claimant knew or should have known the Commission refused his reconsideration request. And if he didn't agree, his next step was to file an appeal with the Tribunal.

– **The Claimant appealed on December 15, 2023, over one year after the Commission communicated its reconsideration decision to him**

[46] The General Division received the Claimant's appeal on **December 15, 2023**. This is what the SST date stamp at the bottom of each page shows.²¹ I have no reason to doubt this.

²⁰ See GD3-67.

²¹ See GD2.

[47] So, I find the Claimant filed his appeal more than one year after the Commission communicated its reconsideration decision to him.

[48] The law says “in no case may an appeal be brought more than one year after the day on which the decision is communicated” to a claimant.²² This means I don’t have the power to extend the time for the Claimant to make his appeal.

Conclusion

[49] The General Division made legal errors. So, I made the decision it should have made.

[50] I decided the Claimant filed his appeal late—more than one year after the Commission communicated its reconsideration decision to him. The law doesn’t allow me to extend the time. So, I am dismissing his appeal.

[51] This means the General Division doesn’t have the power to consider his appeal of the Commission’s \$2,000 EI ERB overpayment decision.

Glenn Betteridge
Member, Appeal Division

²² See section 52(2) of the DESD Act.