



Citation: *TS v Canada Employment Insurance Commission*, 2024 SST 1675

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant: T. S.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission
reconsideration decision (643034) dated February 14, 2024
(issued by Service Canada)

Tribunal member: John Rattray

Type of hearing: Teleconference

Hearing date: April 19, 2024

Hearing participant: Appellant

Decision date: May 1, 2024

File number: GE-24-1078

Decision

[1] The appeal is allowed.

[2] I find that the Appellant's reconsideration request was late. I also find that the Canada Employment Insurance Commission (Commission) made its decision unfairly when it refused to reconsider its original decision of March 16, 2023.

[3] This means the Commission must reconsider its original decision.

Overview

[4] The Appellant applied for Employment Insurance (EI) benefits on October 13, 2020.

[5] On November 4, 2022, a request for clarification of employment information was sent to the Appellant.¹

[6] On March 16, 2023, the Commission issued a decision adjusting the Appellant's earnings based on information from the employer and this resulted in an overpayment.²

[7] The Appellant submitted information which could change the decision on April 2, 2023.³ The Appellant contacted the Commission on multiple occasions.⁴ On one call, he asked about the status of his reconsideration request, and three months later the Commission responded by advising him to submit a formal request for reconsideration form.⁵

[8] Normally, you must ask the Commission to reconsider a decision within 30 days of when you received the decision. The Appellant didn't formally ask it to reconsider its decisions until more than 277 days late.⁶

¹ See GD3-24.

² See GD3-19.

³ See GD3-24 to GD3-34.

⁴ See GD5-1 to GD5-9.

⁵ See GD3-36 to GD3-40.

⁶ See GD3-36.

[9] The Commission decided not to give the Appellant more time to ask it to reconsider. It decided the reasons he gave to justify the delay didn't meet the requirements of the law.⁷

[10] The Appellant disagrees because he says he was instructed that he didn't need to send in his response to the request for clarification. He also says that he responded to the decision of March 16, 2023, as requested by the Commission by sending in documents and information not previously submitted.

Matters I have to consider first

[11] At the hearing the Appellant said he would request telephone records to show when he contacted the Commission. I agreed to accept this evidence after the hearing if it was provided in a timely manner.

[12] The Appellant submitted additional information as requested and I accept it. I gave the Commission the opportunity to make additional submissions. It didn't.

Issues

[13] I have to decide whether the Commission should accept the Appellant's reconsideration request. To make this decision, I have to consider several questions.

[14] First, I must decide whether the Appellant's reconsideration request was late.

[15] Then, I must decide whether the Commission made its decision fairly when it refused to accept his request to reconsider.

[16] **If** I decide that the Commission didn't make its decision fairly, then I can look at all the factors described by the law. This will allow me to make my own decision about whether the Commission should accept the Appellant's request to reconsider.

⁷ See GD3-41 and GD3-42.

Analysis

[17] When the Commission makes a decision about your EI benefits, you have 30 days to ask it to reconsider its decision. This is called a reconsideration request.⁸

[18] If you wait more than 30 days to ask it to reconsider, your request is late. The Commission has to decide whether it will accept your late reconsideration request.

[19] The Commission has to tell you what it decides about your claim. The Commission has to prove that you received this information.⁹

[20] The Commission may decide to give you more time to ask it to reconsider. When it looks at a late reconsideration request, the Commission has to ask two questions:¹⁰

- Do you have a reasonable explanation for being late?
- Have you shown that you always meant to ask the Commission to reconsider?

[21] The Commission has the discretion to give you more time to make your request.¹¹ Although it has this discretion, it has to make its decision fairly.¹² The Commission has to look at all of the information when it makes a decision. This means that the Commission has to consider all the relevant information about why you were late, and ignore things that aren't relevant.¹³

[22] I must respect the Commission's discretionary decision. This means that I can't change the Commission's decision unless I think it didn't make the decision fairly. If I

⁸ See section 112(1) of the *Employment Insurance Act*.

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

¹⁰ See section 1(1) of the *Reconsideration Request Regulations* (Regulations). The Commission must consider whether a claimant has a reasonable explanation for the delay and whether the claimant demonstrated a continuing intention to request a reconsideration.

¹¹ *Daley v Canada (Attorney General)*, 2017 FC 297.

¹² The law refers to this as the Commission exercising its discretion judicially.

¹³ See *Canada (Attorney General) v Purcell*, A-694-94. In this case, the Federal Court of Appeal says that the Commission must consider all relevant factors, ignore irrelevant factors, act in good faith, and act in a manner that isn't discriminatory.

think the Commission didn't make its decision fairly, then I can step into its role and make the decision whether to give the Appellant more time to ask it to reconsider.

Was the Appellant's reconsideration request late?

[23] Yes, the Appellant's reconsideration request was late.

[24] I find that the Appellant received the decision letter dated March 16, 2023, about the earnings adjustment for the period September 27, 2020, to April 4, 2021.¹⁴ The Appellant testified that he received this decision letter.

[25] He dated his reconsideration request January 12, 2024. The Commission received the reconsideration request on January 17, 2024.¹⁵ I see no evidence to contradict this, so I accept it as fact that he asked the Commission to reconsider on January 17, 2024.

[26] I find that the Commission communicated its decision to the Appellant in March 2023. The Appellant asked it to reconsider its decisions on January 17, 2024. He asked the Commission to reconsider more than 30 days after he received the decisions. The reconsideration request was late.

Did the Commission make its decision fairly?

[27] No, the Commission made its decision unfairly.

[28] The Commission wrote that the Appellant's reasons for the delay, "do not meet the requirements of the *Reconsideration Request Regulations*."¹⁶

¹⁴ See GD3-19.

¹⁵ See GD3-38 to GD3-40.

¹⁶ See GD3-43.

[29] The Commission decided that he hadn't provided a reasonable explanation for being late. Its reasoning and rationale say that:¹⁷

- He delayed sending information to the Commission after speaking with an agent on November 30, 2022.
- He didn't submit information and the case was finalized on March 16, 2023.
- Only after the case was finalized did the Appellant respond to the request for clarification.
- The March 16, 2023, decision letter told the Appellant how to submit a request for reconsideration if he didn't agree.

[30] Also, the Commission decided that the Appellant hadn't shown a continuing intention throughout the entire delay. It says there was no evidence of a continuing intention to ask the Commission to reconsider the decision because:¹⁸

- He was advised to send in a request for reconsideration in the March 16, 2023, decision letter, but didn't do so.
- He replied to the request for clarification after the decision was made.
- He has previously told the Integrity Investigator that he would submit information but delayed until April 2023.
- He made no contact with the Commission after submitting the information until he called October 11, 2023.
- There was no contact from the Appellant between October 11, 2023, and when the Call Back was answered January 9, 2024.
- He didn't follow up on the Call Back.

¹⁷ See GD3-42.

¹⁸ See GD3-41 and GD3-42.

- He didn't want to give his SIN on the phone to the agent.
- After speaking with the Commission on January 9, 2024, he "still" didn't submit a request for reconsideration and contacted the Commission again on January 15, 2024.
- He confirmed he had "never" submitted a request for reconsideration and was again told to submit a request.
- He wasn't prevented from submitting a request for reconsideration in a reasonable time.

[31] I find that the Commission's record of decision shows that it ignored relevant factors and considered irrelevant factors when it made its decision.¹⁹

– **Reasonable explanation for delay**

[32] The Commission ignored that the Appellant did exactly what the decision letter of March 16, 2023, instructed him to do. On receipt of the decision, the Appellant responded to the instruction that "if you have any documents and/or information not previously submitted which could change this (these) decision(s), please forward immediately to the address indicated on the letterhead."²⁰ His response is dated April 2, 2023.²¹

[33] The Commission improperly considered the decision letter instruction to submit a formal request for reconsideration if you disagree. I find this because its decision letter instructed the Appellant to submit a request for reconsideration **if** he had "already submitted all pertinent information."²² He hadn't.

[34] The Commission improperly considered the Appellant's delay in responding to the request for clarification. The Appellant's delay in responding to a November 2022,

¹⁹ See GD3-41 and GD3-42.

²⁰ See GD3-19.

²¹ See GD3-39.

²² See GD3-26.

request for clarification isn't relevant to whether the Appellant has a reasonable explanation for a delay in making a request for reconsideration of the March 16, 2023, decision.

– **Continuing intention**

[35] The Commission ignored the written instructions set out in its decision letter to the Appellant. As noted above, the Appellant was instructed to submit additional information if he had not already done so, and he did. He wasn't told to **also** submit a request for reconsideration.

[36] The Commission ignored that it didn't respond to the information provided by the Appellant and advise him that it would not consider it or his case without receipt of a formal reconsideration request.

[37] The Commission incorrectly concluded that the Appellant didn't contact it until October 11, 2023.²³

[38] The Commission didn't consider the Appellant's explanation for not calling the Commission continually that he had been told that the Commission was short-staffed resulting in delays in processing cases. It didn't consider the Appellant's experience that the Commission had taken over one year to respond on a similar issue.²⁴

[39] The Commission ignored that in October 2023, the Appellant understood that he was waiting on the Commission's decision about his case. The agent described the Appellant as wanting an update on the status of his "RFR" and that follow up [by the Commission] is required.²⁵

[40] The Commission considered the Appellant's reluctance to provide his SIN by telephone. It's an irrelevant factor.

²³ See GD5-1 which lists prior telephone calls to the Commission.

²⁴ See GD3-35. The Commission received information from the Appellant on May 16, 2022, regarding another similar earnings allocation issue, and responded on June 22, 2023.

²⁵ See GD3-36.

[41] The Commission improperly considered the three days the Appellant took to prepare a formal request for reconsideration after being advised to do so on January 9, 2024, as demonstrating a lack of a continuing intention. It characterized the Appellant as “still” not submitting a request for reconsideration.²⁶

[42] The Commission considered an irrelevant factor and misconstrued the test for exercising its discretion as being whether the Appellant has “shown that he was prevented from submitting a request for reconsideration in a reasonable time.”²⁷ The test is whether he has a reasonable explanation for the delay and demonstrated a continuing intention.²⁸

[43] The Commission failed to consider whether the timely submission of additional pertinent information with the heading “Appeal Notification” demonstrated a continuing intention.²⁹

[44] Based on the Commission’s evidence and the testimony of the Appellant, I find that the Commission acted unfairly. This means that I have the authority to reassess the facts and come to my own conclusions.

The Appellant should be given more time to ask for reconsideration

[45] I find that the Appellant testified in a credible, consistent manner at the hearing. His explanation of the reason for his delay was consistent with the evidence. He testified that:

- He has been audited multiple times because of a difference between his employer’s calculation of weekly earnings is from Thursday to Thursday, and the Commission’s is Sunday to Saturday.

²⁶ See GD3-42.

²⁷ See GD3-42.

²⁸ See s.1(1) Regulations.

²⁹ See GD3-28.

- He has provided the clarifications requested multiple times and the issue was always resolved in his favour.
- He knows how to submit a request for reconsideration and could easily have provided it.
- He didn't send in the request for reconsideration because he was instructed that it wasn't necessary to do so because he had previously provided sufficient information about the discrepancy in the calculation of earnings.
- He was surprised to receive the decision dated March 16, 2023, because he thought that the issue had been addressed.
- On receipt of the decision, he sent in additional pertinent information as requested under the heading "Appeal Notification."³⁰
- He understood it would take time for the Commission to process his case and the additional information he provided because agents told him that the Commission was short-staffed.
- He had experience of significant delays by the Commission in processing information submitted to it.
- In June 2023, more than a year after he had provided information on a similar audit about his earnings for the period November 10, 2019, to December 7, 2019, the Commission said his claim was in order.

[46] I find the Appellant's explanation of the delay in submitting the request for reconsideration reasonable and that he demonstrated a continuing intention to request a reconsideration. I find this because the Appellant followed the instructions given by the Commission to provide additional pertinent information if he had not already done

³⁰ See GD3-28.

so. He clearly indicated his intention that this information be used to change the decision of March 16, 2023, by submitting it with the heading "Appeal Notification."

[47] Though he was accustomed to significant delays in the Commission's ability to process information, he followed up with the Commission on multiple occasions. On October 11, 2023, he made clear to the Commission his understanding that the Commission was reconsidering its prior decision because he had provided the requested additional pertinent information. He reasonably waited on the Commission to respond to him.

[48] I accept the Appellant's evidence that he would have submitted the formal request for reconsideration form but for being instructed it wasn't necessary because of prior explanations about the same issue, and the written instructions of the Commission.

Conclusion

[49] I find that the Commission made its decision unfairly when it refused to give the Appellant more time to ask it to reconsider. This means I can come to my own conclusion on whether to grant the Appellant more time to ask for a reconsideration.

[50] I find that the Appellant has provided a reasonable explanation for requesting a longer period to make a request for reconsideration and has demonstrated a continuing intention to request a reconsideration.

[51] The appeal is allowed.

John Rattray

Member, General Division – Employment Insurance Section