Citation: *M. A. v. Canada Employment Insurance Commission*, 2014 SSTGDEI 103

Appeal #: GE-14-1814

BETWEEN:

M. A.

Appellant
Claimant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance

SOCIAL SECURITY TRIBUNAL MEMBER:	Eleni Palantzas
HEARING DATE:	July 21, 2014
TYPE OF HEARING:	Teleconference
DECISION:	Appeal is dismissed

PERSONS IN ATTENDANCE

The Claimant, Mr. M. A., attended the hearing by teleconference.

DECISION

[1] The Member finds that the initial claim for benefits cannot be antedated to April 28, 2013 as the Claimant failed to demonstrate good cause throughout the period of the delay.

[2] The Member finds that the Claimant had insufficient insurable hours to establish a claim.

INTRODUCTION

[3] On February 6, 2014 the Claimant applied for regular employment insurance benefits.

[4] On March 13, 2014, the Canada Employment Insurance Commission (Commission) denied the Claimant's application for benefits because it was determined that the Claimant did not have sufficient hours to qualify for benefits. He was advised that he had accumulated only 466 hours of insurable employment between February 3, 2013 and February 1, 2014 whereas he required 595 hours to qualify for benefits. The Commission also denied the Claimant's request for an antedate finding that he did not have good cause between April 28, 2013 and February 1, 2014 to have his initial claim for benefits considered as being made on April 28, 2013.

[5] On March 24, 2014, the Claimant requested that the Commission reconsider its decisions however on April 22, 2014, the Commission maintained its decisions. On May 1, 2014, the Claimant appealed to the General Division of the Social Security Tribunal (Tribunal).

FORM OF HEARING

[6] After reviewing the evidence and submissions of the parties to the appeal, the Member decided to hold the hearing by way of videoconference for the reasons provided in the Notice of Hearing dated June 27, 2014.

ISSUES

[7] Whether the Claimant's initial claim for benefits can be considered to have been made on an earlier day pursuant to subsection 10(4) of the *Employment Insurance Act* (EI Act).

[8] Whether the Claimant has sufficient hours to qualify for regular benefits pursuant to section 7 of the EI Act.

THE LAW

Antedate

[9] Subsection 10(4) of the EI Act sets out the requirements to allow a claimant's initial claim for benefits to be considered as having been made on an earlier day. For an initial claim for benefits to be antedated to an earlier date, claimants must show that:

> (a) they qualified to receive benefits on the earlier day; and
>
> (b) there was good cause for the delay throughout the period, starting on the earlier day and ending on the day when the initial claim was actually made.

Required Hours

[10] Section 7 of the EI Act sets out the requirements that a claimant must meet in order for benefits to be payable.

[11] Subsection 7(2) states that in order for a claimant, that is not a new entrant or a re-entrant to the labour force, to qualify for benefits, they must show that:

> (i) they have had an interruption of earnings from employment; and
>
> (ii) they have acquired, during their qualifying period, at least the number of insurable hours of employment set out in the table provided in the subsection, in relation to their regional rate of unemployment where the claimant normally resides.

TABLE

Regional Rate of Unemployment	Required Number of Hours of Insurable Employment in Qualifying Period
6% and under	700
more than 6% but not more than 7%	665
more than 7% but not more than 8%	630
more than 8% but not more than 9%	595
more than 9% but not more than 10%	560
more than 10% but not more than 11%	525
more than 11% but not more than 12%	490
more than 12% but not more than 13%	455
more than 13%	420

[12] Subsection 7(3) of the EI Act stipulates that an insured person who is a new entrant or a re-entrant to the labour force qualifies to receive benefit if the person

(a) has had an interruption of earnings from employment; and

(b) has had 910 or more hours of insurable employment in their qualifying period.

[13] Subsection 7(4) of the EI Act stipulates that a new entrant or re-entrant to the labour force is a claimant that, during the last 52 weeks before their qualifying period, had fewer than 490

(a) hours of insurable employment;

(b) hours for which benefits have been paid or were payable to the person, calculated on the basis of 35 hours for each week of benefits;

(c) prescribed hours that relate to the employment in the labour force; or

(d) hours comprised of any combination of those hours.

[14] Subsection 8(2) of the EI Act stipulates that a qualifying period mentioned in paragraph (1)(a) is extended by the aggregate of any weeks during the qualifying period for which the person proves, in such manner as the Commission may direct, that throughout the week the person was not employed in insurable employment because the person was

(a) incapable of work because of a prescribed illness, injury, quarantine or pregnancy;

(b) confined in a jail, penitentiary or other similar institution and was not found guilty of the offence for which the person was being held or any other offence arising out of the same transaction;

(c) receiving assistance under employment benefits; or

(d) receiving payments under a provincial law on the basis of having ceased to work because continuing to work would have resulted in danger to the person, her unborn child or a child whom she was breast-feeding

[15] Subsection 112 (1) of the EI Act stipulates that a claimant or other person who is the subject of a decision of the Commission, or the employer of the claimant, may make a request to the Commission in the prescribed form and manner for a reconsideration of that decision at any time within (a) 30 days after the day on which a decision is communicated to them; or (b) any further time that the Commission may allow.

[16] Subsection 112(2) of the EI Act stipulates that the Commission must reconsider its decision if a request is made under subsection (1).

[17] Section 113 of the EI Act stipulates that a party who is dissatisfied with a decision of the Commission made under section 112, including a decision in relation to further time to make a request, may appeal the decision to the Social Security Tribunal established under section 44 of the *Department of Employment and Social Development Act.*

EVIDENCE

[18] On February 6, 2014 the Claimant applied for regular employment insurance benefits.

[19] The record of employment indicates that the Claimant had accumulated 1469 hours of insurable employment while he worked for the University Of Ontario Institute Of Technology from August 7, 2012 until May 3, 2013 (GD3-13).

[20] On March 13, 2014, the Commission denied the Claimant's application for benefits because it was determined that the Claimant had accumulated only 466 hours of insurable employment between February 3, 2013 and February 1, 2014 whereas he required 595 hours to qualify for benefits given the region in which he resides (GD3-15). The Commission also denied the Claimant's request for an antedate finding that he did not have good cause between April 28, 2013 and February 1, 2014 to have his initial claim for benefits considered as being made on April 28, 2013 (GD3-17 to GD3-19).

[21] In his request for an antedate and in his request for reconsideration, the Claimant writes that he delayed in his application because "This was my first job in Canada and as a foreign worker, I didn't know that I can apply for it" and again, that "I did not know I am eligible to apply for EI …" (GD3-16 and GD3-20).

[22] To the Commission the Claimant stated that he did not apply for benefits earlier because he did not know that he could apply until a friend was filing an application for employment insurance benefits and he enquired into his own eligibility and filed his own application for benefits. He stated to the Commission that he had not enquired about his eligibility for benefits until February 2014 and confirmed that there were no other factors to consider (GD3-21and GD3-22).

[23] The Commission confirmed with the employer that the Claimant worked 38.89 hours/week from February 3, 2013 until his last day of work on May 3, 2013(GD3-23).

[24] On April 22, 2014, the Commission maintained its decisions to deny the antedate and establishment of a benefit period due to insufficient hours (GD3-24 and GD3-25).

[25] In his notice of appeal, the Claimant indicates that this was his first job in Canada and as a newcomer, foreign workers' rights were not clear enough to him. He writes "I mistakenly assumed that only Canadian citizens are eligible to apply for EI benefits. That's because on the EI website, it is stated that …" (see below). He notes that he found the word 'Canadians' confusing and did not apply earlier because he was not a Canadian citizen yet. The Claimant further adds that at the time that he became unemployed he depended on his own resources believing that he would secure employment immediately given his

qualifications and experience. He writes that it took him almost a year to find out that security clearance legislation prevents any company from hiring him in his field of Nuclear Engineering unless he has resided in Canada for five years and hold a permanent residence status or Canadian citizenship (GD2-6).

[26] At the hearing, the Claimant testified that the reason that he delayed in submitting his application was not due to ignorance of the law but because he was mislead by the information on the Service Canada website. He stated that the word "Canadians" is mentioned three times on the website (GD5-3 to GD5-5). Secondly, the Claimant stated that using the word "Canadians" is inconsistent with the law and with the Social Employment Development Canada website that uses the word "individuals" when defining/referring to employment insurance program which is accurate and correct (GD5- 7). Thirdly, the Claimant states that the application for benefits specifically refers to "Canadians" and notes that every applicant must sign the form whether they are a Canadian or not (GD5-6). Finally, the Claimant stated that the Commission had indicated that had he continued to look, he would have found that there was more information regarding new comers to Canada. He stated that the fact is that the website is not well-organized. He questions how long one would have to look to find this information. He agrees that the website should provide general information (and not specific to his situation) for everyone consistent with the law however, the information provided fails to provide a general definition, is misleading and incorrect. In his written submission, the Claimant admits that the Service Canada website does refer to 'individuals' instead of 'Canadians' in the EI definition however, at the time, he did not find that page (GD5-1 and GD5-2).

[27] The Claimant confirmed that this was the only reason he did not apply immediately.

[28] Regarding the hours of insurable employment, the Claimant was referred to Exhibit GD3-23, which he confirmed to be correct. The Claimant however, requests that he be considered for an extension of the qualifying period under section 8(2) of the EI Act claiming "incapacity to work" and refers to Exhibit GD5-8. The Claimant reiterated what he had already stated to the Commission regarding the legislative restrictions placed on

employers that will not permit them to hire him until he meets the requirements as in Exhibit GD2-8. He noted that this is 'huge' restriction beyond his control. He stated that he spoke to the Commission and to employers in the industry regarding his inability to obtain a single interview since his applications are being rejected at the outset because of these restrictions. He was advised by the Commission that in the meantime, he should consider applying to other engineering positions and/or change or upgrade his skills.

[29] The Claimant submitted the following documentary evidence:

- A screenshot of the Service Canada website that states "Employment insurance (EI) provides temporary financial assistance to unemployed Canadians who have lost their job through no fault of their own …" and further, "Canadians who are sick…" and "There are several types of benefits available to Canadians …". Under the heading 'What is Employment Insurance?' it states "The Employment Insurance (EI) program provides temporary financial assistance to Canadians." (GD2-7 and GD5-3to GD5-5).

- A copy of the online application that indicates under the heading 'Employment Insurance and You: A Shared Responsibility it states' that "The Employment Insurance (EI) program provides Canadians with temporary financial assistance …" (GD5-6).

- A screenshot of the Employment and Social Development Canada website under 'What is the EI Program?' indicates "The EI program provides temporary financial assistance for individuals between jobs…" (GD5-7).

- A copy of the Treasury Board's Personnel Security Standard that outlines the security screening/clearance requirements depending on the level of clearance required for an employer (GD2-8, GD5-9 to GD5-12).

- A copy of the Service Canada Digest of Benefit Entitlement Principles page that outlines the four grounds for an extension of the qualifying period (GD5- 8).

SUBMISSIONS

[30] The Claimant submitted that:

a) he did not delay in applying for employment insurance benefits because of ignorance rather, he delayed because he was mislead by the incorrect information provided by the Commission on its website (in several places) and its application form

b) the general information that the Commission provides should be correct and consistent with the law, which it is not; he points to the Employment and Social Development Canada website that correctly refers to 'individuals' and not 'Canadians' regarding the EI program

c) his qualifying period should be extended to a period of 104 weeks pursuant to section 8(2) of the EI Act due to 'incapacity to work' due to circumstances beyond his control; he argues that because he is not a permanent resident of Canada, he cannot be granted security clearance to work in the nuclear industry as per Federal Government requirements and has therefore, been denied an opportunity for employment.

[31] The Respondent submitted that:

a) the Claimant has stated that he was not aware and that he did not know he could apply for benefits and specifically argues that as a foreign worker who is not a Canadian citizen yet, he was not aware of his rights. However, the Claimant was able to apply for a work permit, obtain a Social Insurance number, complete his Master's degree in Nuclear Engineering and apply for work after losing his employment. The Claimant did not take measures to inform himself for over 10 month period which cannot be said to represent what a reasonable person would have done in his circumstances. Moreover, it has been long held in jurisprudence ignorance of the law is not sufficient to establish good cause.

b) the website only provides general information and does not outline specific circumstances had he continued his search, there is information available on the Service Canada website for New Comers to Canada which directs them to information on the Employment Insurance program and when you should apply for benefits; a reasonable person in his situation who has paid into the Employment Insurance program should have contacted Service Canada given his unemployment situation.

c) the minimum requirement for the Claimant to qualify to receive employment insurance benefits is 595 hours based on the rate of unemployment of 8.4% in the region where he resided however, the claimant accumulated only 466 hours of insurable employment in his qualifying period; the claimant failed to demonstrate that he qualified to receive employment insurance benefits pursuant to subsection 7(2) of the Act.

ANALYSIS

Antedate

[32] According to subsection 10(4) of the EI Act, in order for the Claimant's initial claim for benefits to be antedated to July 11, 2011, the burden of proof rests with the Claimant to prove that (a) he qualified for benefits on April 28, 2013 and (b) he had good cause, throughout the entire period for the delay, in making the initial claim for benefits.

[33] Whether there is good cause to antedate a claim for benefits is a question of mixed fact and law (Burke 2012 FCA 139; Innes 2010 FCA 341; Albrecht A-172-85).

[34] In the case at hand, the Member first considered whether the Claimant would qualify for benefits on the earlier date of April 28, 2013. The Commission had determined that the Claimant would qualify on this earlier date (GD3-13and GD3-17).

[35] The Member next considered the Claimant's reasons for the delay. The Member noted that the onus on the Claimant is not simply to act in a reasonable manner or to have 'good reason' for the delay. According to the Federal Court of Appeal (FCA), the onus on

the Claimant is to show 'good cause' for the delay in making an initial claim for benefits by showing that he acted as a reasonable and prudent person would have done in the same situation to satisfy himself of his rights and obligations under the EI Act (Mauchel 2012 FCA 202; Bradford 2012 FCA 120; Albrecht A-172-85).

[36] In this case, the Member considered that the Claimant delayed approximately 9 months, from April 28, 2013 until February 6, 2014, to submit an application for benefits. Initially, the Claimant stated to the Commission and indicated in two of his written submissions that the reason he delayed in applying on the earlier date was because he did not know that he was eligible to apply for employment insurance benefits. He stated to the Commission that he did not know that he could apply until a friend was filing an application and he enquired into his own eligibility and filed his own application for benefits. He stated to the Commission that he had not enquired about his eligibility for benefits until February 2014 (GD3-16, GD3-20 to GD3-22). In his notice of appeal, the Claimant indicates that this was his first job in Canada and as a newcomer, foreign workers' rights were not clear enough to him and he "mistakenly assumed" that only Canadian citizens are eligible to apply for employment insurance benefits because of the use of the word "Canadians" on the Service Canada website. At the hearing, the Claimant testified that he delayed in submitting his application because he was mislead by the information on the Service Canada website and not because of ignorance of the law. In support of his submission, the Claimant provided examples of references made to "Canadians" on the Service Canada website and the online application, while on the Employment and Social Development Canada website it correctly refers to "individuals" (GD5-3 to GD5-7).

[37] The Member considered all of the Claimant's reasons for the delay in making his application for benefits however, placed more weight on the Claimant's consistent, initial response/reason provided in his written submissions and to his statements to the Commission, than on the reasons he provided after a decision was rendered and communicated to him. It wasn't until he submitted his notice of appeal and testified at the hearing, that the Claimant indicated that he had mistakenly assumed that only Canadian citizens are eligible to apply for employment insurance benefits because he was mislead by the information provided by Service Canada. The Member therefore, finds that the

Claimant he did not know that he was eligible to apply for employment insurance benefits until he enquired further into his eligibility for benefits in February 2014. However, the Member gave the Claimant benefit of the doubt, and also considered his submission that he did make enquiries on the earlier date of April 28, 2013 but was mislead by the information on the Service Canada website.

[38] The Member's consideration is supported by case law that states that:

> "An abundant and uniform case law has clearly established that a Board of Referees must attach more weight to the initial, spontaneous statements made by the persons concerned before the Commission's decision is rendered, than to the subsequent statements that are offered in an attempt to justify or put a better face on the claimant's position when the Commission renders an unfavourable decision." (CUB 25154)

[39] The Member considered the Claimant's submission that in fact, he did look into his eligibility prior to making an application on February 6, 2014. The Member considered his adamant testimony and documentary evidence that he delayed in applying for benefits, not because of ignorance, but due to the misleading references made to "Canadians" on the Service Canada website and application form. The Member noted however, that even if the Claimant was mislead by the Service Canada information on the website, the Claimant would still have to demonstrate 'good cause' for the entire period of the delay. That is, he would have to show that he acted as a reasonable and prudent person would have done in the same situation to satisfy himself of his rights and obligations under the EI Act. In other words, even if the Member agreed with the Claimant that the information on the Service Canada website is misleading and inconsistent, to show good cause for the delay, the Claimant must show that he took reasonable steps to protect his right to benefits. The Claimant submitted evidence to show that there were inconsistencies between the Service Canada and the Employment and Social Development Canada websites, yet the Claimant did not make any further enquiries as to the difference between the references to "Canadians" and "individuals" and assumed he was not eligible. The Member finds that the Claimant is well-educated and resourceful and because he was in an unemployment situation, with foreign worker status and restricted access to employment in his field of study; it is reasonable to expect that he should have enquired further as to whether he was

entitled to benefits from the employment insurance system into which he had just contributed. The Member notes that if the Claimant was confused as he submits, then there were several other sources he could have consulted including contacting Service Canada directly, as he ultimately discovered when he applied on February 6, 2014. The Member finds that the Claimant did not acted as a reasonable and prudent person would have done in the same situation to satisfy himself of his rights and obligations and taken the steps required to protect his claim for benefits under the EI Act.

[40] The Member also considered that the Federal Court of Appeal has not found good cause where the Commission may have made an error in informing a claimant that he/she was not entitled to benefits (Labrecque A-690-94).

[41] The Member considered that case law supports that a claimant's reliance on unverified information or unfounded assumptions also does not constitute good cause (Trinh 2010 FCA 335; Rouleau A-4-95).

[42] Further, the Member considered that the Federal Court of Appeal has found that unless there are exceptional circumstances, a reasonable person is expected to take reasonable prompt steps to understand their entitlement to benefits and obligations under the EI Act (Kaler 2011 FCA 266; Innes 2010 FCA 341; Somwaru 2010 FCA 336).

[43] In this case, the Member finds that there is no evidence to support that exceptional circumstances prevented the Claimant from making enquiries about his rights and obligations and/or applying for benefits at any time throughout the period of the delay.

[44] The Member notes that to antedate a claim is an advantage that should be applied exceptionally and with caution (McBride 2009 FCA 1; Scott 2008 FCA 145; Brace 2008 FCA 118).

[45] The Member therefore concludes, that given all the findings that the Claimant failed to meet the onus placed upon him to demonstrate good cause for the entire period of the delay in making the initial claim for benefits from April 28, 2013 to February 6, 2014 pursuant to section 10(4) of the Act.

Required Hours

[46] For the Claimant to qualify for benefits, the burden of proof rests on him to show that he had (i) an interruption of earnings from employment; and (ii) he had acquired, during his qualifying period, at least the number of insurable hours of employment set out in the table provided in subsection 7(2) of the EI Act, in relation to his regional rate of unemployment where he normally resides.

[47] In this case, the evidence shows that the Claimant had an interruption of earnings (GD3-13) on May 3, 2013 however; the Claimant did not make an application for benefits until February 6, 2014. The Commission therefore determined that the qualifying period is from February 3, 2013 to February 1, 2014 (GD3-18). The Claimant was deemed not to be a new entrant or re-entrant pursuant to subsection 7(4) of the EI Act since he had acquired more than 490 hours of insurable employment in the 52 week period prior to his qualifying period. As a result, subsection 7(2) applies to this claim and the Claimant must meet the minimal requirement in the table provided therein.

[48] The evidence shows that during this qualifying period, the Claimant had accumulated 466 hours of insurable employment. The Commission confirmed the hours worked with both the employer (GD3-23) and confirmed with the Claimant that he had no other employment during the qualifying period (GD3-21). This was again confirmed at the hearing. The unemployment rate in the region within which he resides is 8.4% (GD3-15). Accordingly, the Claimant requires 595 hours of insurable employment to qualify for employment insurance benefits pursuant to subsection 7(2) of the EI Act.

[49] At the hearing, the Claimant stated that his qualifying period should be extended to a period of 104 weeks pursuant to section 8(2) of the EI Act due to 'incapacity to work'. He submitted documentary evidence (GD2-8, GD5-9 to GD5-12) and stated that because he is not a permanent resident of Canada, he cannot be granted security clearance to work in the nuclear industry as per the federal government requirements. Therefore, due to circumstances beyond his control, he has been denied an opportunity for employment thus, his 'incapacity to work'. The Member notes however, that since a decision regarding this

matter has not been made by the Commission pursuant to section 112 of the EI Act, it is not within the Member's jurisdiction to consider it pursuant to section 113 of the EI Act.

[50] The Member considered that the onus of proof is on the Claimant to show that he qualified to receive employment insurance benefits pursuant to section 7 of the EI Act. In this case, the Claimant confirmed that he did not have any other insurable hours during the qualifying period. The Member therefore, finds that the Claimant has failed to demonstrate that he has met the minimal requirements as prescribed in subsection 7(2) of the EI Act and therefore, does not qualify to receive employment insurance benefits effective February 6, 2014.

[51] The Member's finding is supported by an abundance of jurisprudence that confirms the principle that the minimal requirements as set out in section 7 of the EI Act are not in the discretion of the decision maker to vary even if a claimant is short one hour of meeting the qualifying conditions (Attorney General of Canada v. Levesque 2001 FCA 304). This principle applies no matter how compelling the circumstances (Pannu v. Attorney General of Canada 2004 FCA 90).

CONCLUSION

[52] The appeal is dismissed.

Eleni Palantzas
Member, General Division

DATED: September 10, 2014