Social Security Tribunal of Canada | Tribunal de la sécurité sociale du Canada

Citation: *M.M. v. Canada Employment Insurance Commission*, 2018 SST 336

Tribunal File Number: GE-17-3569

BETWEEN:

M. M.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Catherine Shaw

HEARD ON: March 22, 2018

DATE OF DECISION: April 11, 2018

Canada

DECISION AND REASONS

DECISION

[1] The appeal is dismissed. The Appellant's claim cannot be antedated because she failed to show she had good cause throughout the entire period of the delay in making her initial claim for benefits.

OVERVIEW

[2] The Appellant worked as server at a restaurant when her employer stopped scheduling her for shifts in November 2016. During frequent contact with her employer he refused to say that she was terminated. She waited to be put back on the schedule, which never occurred. The Appellant made her initial claim for benefits in July 2017 and the Respondent determined she did not have enough hours of insurable employment to establish a benefit period. The Appellant requested the Respondent to antedate her claim to November 21, 2016, as that was the last day she worked. The Respondent denied her request to antedate as it determined she did not have good cause for the delay in making her initial claim. The Tribunal must decide whether her claim can be antedated.

ISSUES

[3] Issue 1: Did the Appellant show she had good cause throughout the entire period of the delay in making her initial claim for benefits?

[4] Issue 2: If the Appellant had good cause for the delay, would she have qualified to receive benefits on November 21, 2016?

ANALYSIS

[5] Antedate, the backdating of initial claims, is explained in subsection 10(4) of the *Employment Insurance Act* (Act). The Act states that an initial claim for benefits made after the day when the Appellant was first qualified to make the claim shall be regarded as having been made on an earlier day if the Appellant shows that (a) there was good cause for the delay

throughout the period beginning on the earlier day and ending on the day when the initial claim was made, and (b) she qualified to receive benefits on the earlier day.

Issue 1: Did the Appellant show she had good cause throughout the entire period of the delay in making her initial claim for benefits?

[6] No. The Tribunal finds the Appellant did not show that she had good cause throughout the entire period of the delay.

[7] The Appellant must show she had good cause for failing to make a claim for benefits throughout the entire period of the delay, which is from November 21, 2016, the day the Appellant last worked, to June 17, 2017, the day she made a claim for benefits.

[8] Good cause is not the same as having a good reason, or a justification for the delay. In order to establish good cause the Appellant must show that she did what a reasonable and prudent person in the same circumstances would have done to satisfy himself as to her rights and obligations under the Act (*Canada (Attorney General) v. Mauchel*, 2012 FCA 202).

[9] The Appellant submits that she worked at the restaurant for seven years and would typically be scheduled for shifts three or four days per week. Her manager would determine the schedule and she had no control over which days or shift she was given. She testified that she suffered a marital breakdown in the Fall of 2016 and took three days off of work to move her belongings out of her family home and into her son's home. After this, she phoned her manager to find out her schedule for the next week and he told her that it was not busy and he did not need to schedule her. She testified that she continued calling once or twice per week to find out if she had been added back to the schedule and was given the same answer. She asked if she had been terminated and her manager told her that she had not been terminated, it just was not busy enough to schedule her.

[10] The Appellant submitted schedule information produced by her employer that shows she was still on the weekly schedule until at least April 2017, with all of her shifts marked as "OFF". The Appellant stated that she believed her manager was punishing her by keeping her waiting to be added to the schedule and that he had done this once before in the year prior. She stated that he had left her off the schedule for three weeks in the year prior, and when asked if he was

terminating her position, he replied no and added her back to the schedule. She submits that she believed this time would be the same, since her manager repeatedly told her that she was not terminated.

[11] The Respondent submitted interviews with the Appellant in which she states that her weekly calls continued until February 2017, when she gave up hope that she would be re-scheduled and stopped calling. In later interviews, the Appellant states that she stopped calling her employer in March 2017. The Appellant testified at the hearing that she stopped calling in May 2017 and finally realized in June 2017 that she would never be called back to work in this position. When asked about the difference in her answers to this question, the Appellant agreed that she could not remember the exact timeline and did not have phone records readily available to verify. She stated that her memory of the events may have been correct during the earlier interviews, as it was fresher in her mind back then. The Tribunal accepts this explanation and favours the statements the Appellant provided to the Respondent that she stopped contact with her former employer in March 2017.

[12] The Tribunal considers that the employer's refusal to inform the Appellant that she had been terminated, even when directly questioned, severely hindered the Appellant from taking reasonably prompt steps to find out and understand her rights and obligations regarding EI benefits. The Appellant believed the employer when he told her she was not terminated and thought she was still employed during this time period. It is evident that the Appellant realized in March 2017 that her employer would not call her back to work, as that is when she stopped contacting her employer on a regular basis. Based on the Appellant's testimony and written submissions, the Tribunal finds that the Appellant held a reasonable belief that she would be called back to work from November 2016 to March 2017 and, therefore, had good cause for the delay in making her initial claim for benefits during this time.

[13] In interviews with the Respondent, the Appellant stated that she wanted to find other work and did not want to go on EI. She also believed that she could not apply for EI without the Record of Employment (ROE) from her employer, which had not been issued. The Appellant agrees that she began looking for other employment in May 2017 and that she had hoped to find a new job quickly, without having to rely on EI benefits. Based on the Respondent's submission

and the Appellant's testimony, the Tribunal concludes that the Appellant began looking for work by May 2017 and her delay in making her claim was due to her hope that she would secure new employment and her mistaken assumption that she required her ROE to make a claim for benefits.

[14] The Respondent submits the Appellant's lack of knowledge about the EI process is not a justification for delaying her initial claim for benefits and that, even after realizing that she would not be recalled to her position, the Appellant took no positive steps to enquire about her rights and obligations regarding her EI benefit entitlement. The Appellant agrees that she did not contact the Respondent to enquire about EI until June 20, 2017, when she made her initial claim by telephone.

[15] The Tribunal finds that the Appellant's mistaken assumption that she could not apply for benefits without a copy of her ROE cannot be relied on to prove good cause as she took no steps to verify her belief throughout the period of her delay in making a claim for benefits. A reasonable person in her situation would have enquired about her benefit entitlement, and it is not reasonable to have failed to do this when there are so many channels – phone, in person, internet – available.

[16] The Respondent provided the Tribunal with a note from her mental health counsellor dated November 1, 2017 that stated the Appellant has experienced health challenges as well as life transitions over the past year that made it difficult for her to focus and move through the process of applying for EI in a timely manner. The Appellant testified that her parent had passed away in Fall 2016 and she was occupied in the clean-up of her parent's house and estate for several months. Shortly before she lost her employment, she separated from her spouse after thirty-seven years of marriage. Her spouse sold the family home, which necessitated her to move in with one of her children. She testified that it was a very emotional time and that she suffered from depression, but admits she did not seek medical attention beyond meeting with her mental health counsellor.

[17] Absent exceptional circumstances, a reasonable person is expected to take reasonably prompt steps to understand her rights and obligations under the Act (*Canada (Attorney General) v. Somwaru*, 2010 FCA 336).

[18] The Appellant argues that her mental state was impaired by the psychological stresses she was experiencing which affected her decision-making and ability to cope. The Tribunal accepts the Appellant's testimony and the note from her mental health counsellor that she was suffering from an overwhelming amount of stress at the time of her separation from employment, but finds there is no evidence to show that the circumstances occurred throughout the entire period of the delay, or that the health challenges and life transitions prevented the Appellant from contacting the Respondent. The Appellant also testified that her performance at work did not suffer due to the upheaval in her personal life and that she was absent from work only three days because of her separation and phoned her employer to inquire about her work schedule immediately afterward.

[19] The Tribunal sympathizes with the challenges the Appellant endured in the past year; however, the Tribunal finds that if these circumstances did not affect her ability to function in her day to day life, then her circumstances were not so exceptional as to prevent her from making enquiries regarding her benefit entitlement after she accepted the loss of her employment in March 2017. The Tribunal finds there is no evidence to support her challenges prevented her from contacting the Respondent if she was capable of maintaining contact with her former employer before and looking for alternate employment during the delay.

[20] The Tribunal finds that the Appellant did not act as a reasonable and prudent person would have done in the same situation to satisfy herself of her rights and obligations after she realized that she would not be called back to work in March 2017. Accordingly, the Tribunal finds that the Appellant did not have good cause for the period of delay from April 2017 to June 20, 2017. As such, the Tribunal concludes that the Appellant did not meet the burden of proof to show good cause for the delay throughout the entire period.

Issue 2: If the Appellant had good cause for the delay, would she have qualified to receive benefits on November 21, 2016?

[21] Since the Tribunal has found that the Appellant did not show good cause for the delay in filing her initial claim throughout the entire period, from November 21, 2016 to June 17, 2017, the question of whether she would have qualified for benefits on the earlier date does not need to

be considered as the appeal cannot succeed without both factors met. For that reason, the Tribunal will not make a further finding about her qualification for benefits on the earlier date.

CONCLUSION

[22] The claim cannot be antedated because the Appellant did not show that, throughout the entire period of delay, she did what a reasonable person in her situation would have done to satisfy herself as to her rights and obligations. It was unnecessary to consider whether the Appellant would have qualified on the earlier date.

[23] The appeal is dismissed.

Catherine Shaw
Member, General Division - Employment Insurance Section

METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	M. M, Appellant

ANNEX

THE LAW

Employment Insurance Act

10 (4) An initial claim for benefits made after the day when the claimant was first qualified to make the claim shall be regarded as having been made on an earlier day if the claimant shows that the claimant qualified to receive benefits on the earlier day and that there was good cause for the delay throughout the period beginning on the earlier day and ending on the day when the initial claim was made.

Employment Insurance Regulations