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

Citation: *S. G. v Canada Employment Insurance Commission*, 2019 SST 95

Tribunal File Number: AD-18-597

BETWEEN:

S. G.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Stephen Bergen

DATE OF DECISION: February 9. 2019

Canada

DECISION AND REASONS

DECISION

[1] The appeal is allowed.

OVERVIEW

[1] The Appellant, S. G. (Claimant), was filing her reports and collecting Employment Insurance benefits without any problems until she tried to change her address in the online filing system in July 2017. From that point on, the online system would not allow her to file reports. Although she sought in-person assistance from Service Canada agents, they were unable to help. In September 2017, she was referred to a 1-800 number because it was too late for her to file her report. Due to various personal circumstances, she did not return to Service Canada until mid-November 2017, when she was advised to file an antedate request.

[2] The Respondent, the Canada Employment Insurance Commission (Commission), denied her antedate request on the basis that she did not have good cause for the delay, and it maintained that decision when she asked it to reconsider. The Claimant appealed to the General Division of the Social Security Tribunal, which found that she had good cause for her delay but only to the end of August. It dismissed her claim because she did not have good cause throughout the entire period of the delay. The Claimant is now appealing to the Appeal Division.

[3] The appeal is allowed. The General Division based its finding—that the Claimant did not have good cause for delaying her application after August 2017—on a misunderstanding of the Claimant's evidence regarding her efforts to communicate with Service Canada in September 2017 and on a misunderstanding of the Claimant's circumstances from October to the date she filed her reports.

[4] I have made the decision the General Division should have made, and I have found that the Claimant made her application in time.

ISSUES

[2] Did the General Division base its decision on a misunderstanding of the Claimant's evidence related to her efforts in September to contact the Commission?

[3] Did the General Division find that the Claimant did not have good cause for her delay after September without regard for the Claimant's fear of personal attack and her displacement from her home?

ANALYSIS

[4] The Appeal Division cannot intervene in a General Division decision unless it can find that the General Division has made one of the types of errors described by the grounds of appeal in section 58(1) of the *Department of Employment and Social Development Act* (DESD Act) and set out below:

a) The General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;

b) The General Division erred in law in making its decision, whether or not the error appears on the face of the record; or

c) The General Division based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

Issue 1: Did the General Division base its decision on a misunderstanding of the Claimant's evidence related to her efforts in September to contact the Commission?

[5] The Commission's written representations concede that the General Division may have based its decision on a misunderstanding of the claimant's evidence about her and her representative's additional efforts to call the Commission in September.

[6] The General Division justified its decision that the Claimant did not have good cause beyond September 1 on the basis that the Claimant did not follow up on her September visit to Service Canada by calling the 1-800 number that was given to her at that visit. However, there was no evidence on which the General Division could find that the Claimant's visit had been on

September 1, 2017, as opposed to any other day in September—including the last day of September. The Claimant provided the only evidence as to the date that she visited Service Canada in September, and she was unable to say on what date she visited.

[7] Therefore, the General Division's finding that she did not have good cause starting on September 1 because she did not call the 1-800 number does not follow from the evidence and is perverse or capricious.

[8] The General Division's finding also ignored evidence that the Claimant's husband did make attempts to call the Commission in September on the Claimant's behalf (whether at the 1-800 number or otherwise). During the General Division hearing, the Claimant's husband stated that they had tried phoning the Service Canada office in August and September but could only reach a recorded message that instructed them to call again later due to the high volume of calls. He said that the recording provided no opportunity to leave a message.

[9] The General Division rejected this evidence because it considered it to be in conflict with the Claimant's evidence that the Claimant herself had not tried the 1-800 number, but I do not accept that there is a conflict between the Claimant's denial that she had called the 1-800 number and her husband's evidence that they had made repeated calls. The finding that the evidence was in conflict was perverse or capricious, and it resulted in the General Division failing to consider that the Claimant had, through her husband, continued to make efforts to contact the Commission in September 2017.

[10] The General Division's finding that the Claimant did not have good cause for the delay in September was made in a perverse or capricious manner or without regard for the material before it. This is an error under section 58(1)(c) of the DESD Act.

Issue 2: Did the General Division find that the Claimant did not have good cause for her delay after September, without regard for the Claimant's fear of personal attack and displacement from her home?

[11] The Commission's written representations also concede that the General Division may have misapprehended the Claimant's evidence by considering her broken window in October 2017 an issue with her home in the same category as other maintenance and repair issues with which she had been occupied in August 2017.

[12] The General Division listed having "rocks thrown through her window" as one of the "issues with her home". It noted that, in August, the Claimant had been able to deal with "issues with her home" and, at the same time, visit Service Canada, so she should also have been able to visit Service Canada from September 1, 2017, to November 27, 2017.

[13] The General Division was correct that, since August, the Claimant had been occupied with a number of issues with her house, including bed bugs, cleaning, and shingle replacement. However, she had not had to deal with rocks thrown through her windows before October 3, 2017, and she said this was the main reason she did not apply in October.[1] The Claimant testified that three of her windows were smashed on that night, including the window of the room in which she and her daughter were sleeping. She testified that she and her daughter had to move out of their home to stay with a friend because they were so scared.[2] Not only does the Claimant's October 4, 2017, witness statement confirm that she reported this incident to the police, but it also mentions that the previous home owner had earlier threatened the Claimant's property in person and that she had been forced to call 911 to get him to leave.

[14] The broken windows were not a mere "issue with her home", in the same category as the issues with which she had been occupied in August. The Claimant was afraid for her and her daughter's safety and for her property. The General Division found that the Claimant did not have good cause for the delay in October without appreciating the difference between issues of house maintenance and repair, on the one hand, and the Claimant's concern for herself and her daughter and having to leave her home for temporary accommodations on the other.

[15] I find that the General Division member misunderstood the nature of this evidence and erred under section 58(1)(c) of the DESD Act.

CONCLUSION

[16] The appeal is allowed.

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[1] General Division Audio recording at 00:34:30.
[2] General Division Audio recording at 00:35:00.

REMEDY

[17] Having allowed the appeal, I have the authority under section 59(1) of the DESD Act to refer the matter back to the General Division for reconsideration, as requested by the Commission. However, I also have the authority to give the decision that the General Division should have given or to confirm, rescind, or vary the General Division decision in whole or in part.

[18] I consider the record to be complete. Therefore, I will give the decision that the General Division should have given.

[19] Taken together, section 50(4) of the *Employment Insurance Act* (EI Act) and section 26(1) of the *Employment Insurance Regulations* require that a claim for benefits for a week of unemployment in a benefit period be made within three weeks after the week for which benefits are claimed.

[20] The Claimant's claim reports for the weeks of July 2, 2017, and July 15, 2017, should have been made by August 12, 2017, but, according to the General Division, the claim was not made until November 3, 2017[3] (which is the date the Claimant once again failed to have her report processed online[4]). Therefore, the General Division found the Claimant's reports to be late. Section 10(5) of the EI Act allows a claimant to antedate a claim for benefits if the claimant can show good cause for the delay throughout the period of the delay. However, before I can even consider the issue of good cause, I must determine whether the claim was late, which requires me to determine what it means to "make a claim".

[21] The General Division reasoned that *attempting* to make a claim is not sufficient because the Regulations require that a claim shall be made. In my view, this does not address the question of what it means to make a claim or whether "making a claim" is synonymous with "successfully making a claim"[5]—which I take to mean a claim that is acknowledged by the Commission as received and in proper order.

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[3] General Division decision at para 7.
[4] GD4-1.
[5] General Division decision at para 9.

[22] There is little jurisprudence that would assist me to define what it means to make a claim. In *Mason v Canada (Employment and Social Development)*,[6] the Federal Court considered the meaning of "making" an application in the context of *Canada Pension Plan* benefits. In that case, the Appeal Division had found the claim was made on the date that it was date-stamped as received by the Commission. The Court found that "the application must be considered against the purpose of the provision and the legislation [which it said] is to be given a fair and generous reading." Before returning that case to the Appeal Division, the Federal Court stated that the Appeal Division did not consider the claimant's actions and timing in mailing the application well before the due date. This suggests that the Federal Court considered that the conduct of the claimant, even before the application was delivered or received, may be relevant to deciding when the application is made. This would mean that a claim could be "made" before it was acknowledged or accepted.

[23] In another *Canada Pension Plan* decision, *Canada (Attorney General) v Vinet-Proulx*,[7] the Federal Court made its decision on other grounds, but it referred to—and did not disapprove of—the Review Tribunal's finding that "the applicant had done what she had to do to make an application for benefits" by posting her application.

[24] Like the *Canada Pension Plan*, the EI Act is legislation that grants a social benefit. Just as the Federal Court found that the *Canada Pension Plan* should be given a "fair and generous reading" in the *Mason* decision, so has the Supreme Court of Canada determined in *Abrahams v Attorney General of Canada* [8] that, "[s]ince the overall purpose of [what was then the *Unemployment Insurance Act*] is to make benefits available to the unemployed, [the Justice] would favour a liberal interpretation [… and] any doubt arising from the difficulties of the language should be resolved in favour of the claimant."

[25] I do not accept that Parliament intended that a claimant's claim for a social benefit might be defeated by a technically obstructive online system, an impenetrable telephone switchboard, and unhelpful agents at Service Canada. A claimant should not be expected to prioritize the filing

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[6] *Mason v Canada (Employment and Social Development)*, 2017 FC 358.
[7] *Canada (Attorney General) v Vinet-Proulx*, 2007 FC 99.
[8] *Abrahams v Attorney General of Canada*, [1983] 1 SCR 2, 1983 CanLII 17.

of a claim over every other circumstance in the claimant's life, and to overcome a challenging process through perseverance and force of will.

[26] I accept that the Claimant did not "make a claim" when her first online claim attempt failed due to technical difficulties, because the Claimant would have been aware that the Commission could not know that she had even attempted to file. Likewise, her efforts to reach the Commission by telephone could not have brought her claim to the Commission's attention, because she was not able to speak to anyone and could not leave a message.

[27] However, I accept that these other efforts were punctuated by three visits that the Claimant made to Service Canada in which she spoke to an agent about her difficulties filing her report. On two of those occasions, she was redirected to the same online filing system that had already failed her, and which continued to defeat her purpose. On her third visit to Service Canada in September, she was told that she was too late to make a claim, and she was given another phone number to call.

[28] Sections 50(2), 50(3), and 50(5) of the EI Act identify what the Commission considers to be a claim, including the appropriate form of the claim. At the same time, section 50(6) provides a mechanism by which the Commission may require that the claim be made in person, and section 50(10) gives the Commission the discretion to waive or vary any of the usual conditions or requirements of section 50. There is nothing in the legislation to prevent the Commission from accepting an in-person report from the Claimant on any one of her visits.

[29] The Commission, through its Service Canada agents, was either aware—or ought to have been aware—that the Claimant had attempted and still intended to make a claim for weeks of benefits as early as her first visit to Service Canada in July, after her first failure to file her claim online. This would have been before her claim could have been late.

[30] I consider the Claimant to have "made a claim" when she communicated to the Commission that she wished to make a claim but had been unable to use the Commission's default method for claim report filing. This was sometime in July and therefore still within the time set by section 26(1) of the Regulations. I therefore find that the Claimant was not late in making a claim.

[31] If I am wrong in finding that the Claimant made a claim within the set time, I nonetheless find that she had good cause for her delay throughout the period of the delay. In its written submissions, the Commission agreed that the General Division had erred, but it also suggested that I make the decision the General Division should have made to find that the Claimant had good cause for her delay.

[32] I agree with the General Division that the Claimant did what a reasonable and prudent person would have done throughout July and August. According to the reasoning of the General Division, the Claimant acted reasonably and prudently up to her September visit to Service Canada. The General Division apparently took this date to be September 1 but the only evidence is that it was in September.

[33] I must consider what a reasonable and prudent person would have done in the Claimant's circumstances after her September visit to Service Canada. To put this "reasonable and prudent person" in the Claimant's place, I must consider that this person had the same experiences attempting to file that the Claimant did: From the Claimant's first attempt to file online in July until her visit to Service Canada in September, she was frustrated in every online, telephone, and in-person attempt to have her claim accepted by the Commission. These previous efforts would undoubtedly have required substantial time and energy. All of this occurred at a time when the Claimant was also working full-time, dealing with some chronic back and shoulder pain from a motor vehicle accident, and arranging for some significant clean-up and repairs to a recently purchased home.

[34] In addition, on the night of October 3, someone threw rocks at the Claimant's home, smashing three of her windows including the window of the room in which the Claimant and her daughter were sleeping. The Claimant had previously been threatened by the former owner of the house and was fearful for the safety of her family, so she and her daughter moved in with a friend.[9]

[35] The Claimant apparently tried to file online once again on November 3, 2017. On this occasion, the claim failed because the deadline had passed. She did not visit Service Canada in-person again until November 13, 2017.

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[9] Audio recording of General Division hearing at 00:34:30.

[36] Regardless of whether the Claimant or her husband actually called a particular 1-800 line after the Claimant's September visit to Service Canada, I am persuaded that her actions were reasonable and prudent, given her experience with Service Canada and everything else that she was dealing with, including the concerning attack on her house and security in October 2017. I accept that a reasonable and prudent person in her circumstances would not have pursued the filing of claim reports with any more diligence that demonstrated by the Claimant.

[37] I find that the Claimant had good cause throughout the period of the delay as required by section 10(5) of the EI Act.

Stephen Bergen
Member, Appeal Division

HEARD ON:	January 31, 2019
METHOD OF PROCEEDING:	Videoconference
APPEARANCES:	M. T., Representative for the Appellant
SUBMISSION ONLY:	C. Richard, for the Respondent