



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: V. D. v Canada Employment Insurance Commission, 2019 SST 906

Tribunal File Number: GE-18-3177

BETWEEN:

V. D.

Appellant/Claimant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Catherine Shaw

HEARD ON: May 7, 2019

DATE OF DECISION: May 8, 2019

DECISION

[1] The appeal is allowed. The result is the Claimant's initial claim for benefits shall be antedated to November 1, 2015, because she qualified for benefits on the earlier date and has shown good cause for the delay in making her claim.

OVERVIEW

[2] The Claimant experienced a stroke in November 2015, and had to leave her employment to return home and recuperate. She contacted the Canada Employment Insurance Commission (Commission) about her entitlement to benefits and was informed she did not qualify for benefits because she had been self-employed and had not contributed to the self-employment insurance program. As her former employer had told her she was considered self-employed in that job, she did not question the Commission's information. The Claimant recovered her health and began seeking other work. While filing her income taxes several years later, she was advised by a friend that her former job may not be considered self-employment and that she may be entitled to employment insurance benefits, if that was the case. The Claimant inquired with the Commission about this possibility and was advised to make an initial claim for benefits while pursuing an appeal of her employment status with the Canada Revenue Agency (CRA). The Claimant did so and requested her claim be antedated to when she first became unemployed in November 2015.

[3] The Commission denied her request to antedate as it said she had not shown good cause for the delay in making her claim for benefits and because she had not proven she was qualified for benefits on the earlier date. The Claimant requested a reconsideration and the Commission upheld its decision. The Claimant now appeals to the Social Security Tribunal (Tribunal).

PRELIMINARY MATTERS

[4] The Claimant filed her notice of appeal with the Tribunal on October 9, 2018, and advised she was waiting for a ruling from CRA regarding the insurability of her employment. The file was placed in abeyance while awaiting this decision, as the insurability of the Claimant's employment is material to the issue under appeal. On November 27, 2018, the Claimant provided the CRA's decision to the Tribunal which stated that her employment was insurable. A hearing was scheduled for January 9, 2019. On January 4, 2019, the Claimant's

representative requested the file remain in abeyance as the former employer had stated his intention to appeal the CRA ruling. The file was placed back into abeyance and the hearing was adjourned. The representative informed the Tribunal on February 6, 2019, that the former employer had abandoned the appeal to CRA and requested the file remain in abeyance while they confirmed the Claimant's record of employment (ROE) and T4 were accurate.

[5] A pre-hearing conference was held on April 5, 2019, at the representative's request to confirm the issue under appeal and that all necessary documents had been received. After consultation with the representative, the hearing was scheduled for May 7, 2019, to allow both parties an opportunity to provide additional submissions.

ISSUE

[6] Was the Claimant qualified for benefits on the earlier date?

[7] Did the Claimant show good cause for the entire period of the delay?

ANALYSIS

[8] An initial claim for benefits may be antedated, or backdated, to an earlier date.¹ To be eligible for an antedate, claimants must show that they had good cause for the delay in making their claim throughout the entire period of the delay. They must also show that they would have qualified for benefits on the earlier date.

[9] Claimants have the burden of proving, on a balance of probabilities, that they did what a reasonable and prudent person in the same circumstances would have done to find out about their rights and obligations.² Only "exceptional circumstances" can excuse a claimant from acting as a reasonable person in the same situation would have done.³

¹ The antedating of a claim is allowed for under subsection 10(4) of the *Employer Insurance Act*

² *Canada (Attorney General) v. Kaler*, 2011 FCA 266

³ *Canada (Attorney General) v. Somwaru*, 2010 FCA 336

Was the Claimant qualified for benefits on November 1, 2015?

[10] Yes. Based on the evidence provided by both parties, the Claimant was qualified for employment insurance benefits on November 1, 2015.

[11] On November 27, 2018, the Claimant provided a decision from CRA stating her employment from July 8, 2015 to October 31, 2015, was insurable. On February 7, 2019, the Claimant's former employer provided an ROE which states she had 744 insurable hours of employment during this period.

[12] On April 5, 2019, I requested the Commission provide its submissions regarding the Claimant's qualifications for benefits on November 1, 2015, with consideration given to the CRA ruling and the Claimant's ROE. On April 9, 2019, the Commission submitted that the Claimant required 600 hours of insurable employment to qualify for sickness benefits and 700 hours of insurable employment to qualify for regular benefits, based on the regional rate of unemployment at the applicable time.

[13] The Claimant made her initial claim for sickness benefits on June 20, 2018, and has requested that claim be antedated to November 1, 2015. As such, the question before me is whether the Claimant was qualified for sickness benefits on November 1, 2015. The Claimant had 744 hours of insurable employment from July 8, 2015 to October 31, 2015, and she required 600 hours of insurable employment to qualify for sickness benefits; accordingly, I find she was qualified for sickness benefits on November 1, 2015.

Did the Claimant show good cause for the entire period of the delay?

[14] The Claimant made an initial claim for employment insurance sickness benefits on June 20, 2018. She requested her claim be antedated to November 1, 2015, when she first left her employment due to illness. As such, the period of the delay is from November 1, 2015 to June 20, 2018.

[15] The Claimant submits the delay in making her initial claim for benefits was due to her belief she was considered "self-employed" in her former job and was, therefore, not eligible for

employment insurance benefits. She also stated that her ability to correct this mistaken belief was hindered by her mental and physical health limitations following her stroke in November 2015.

[16] The Claimant was employed as a sales representative with a painting company. The Claimant submits the employer told her she was working as an independent consultant and that he paid her as if she was self-employed. As an example, she stated there were no statutory deductions taken from her account and she did not have any medical benefits from the employer. She was also provided with a company vehicle, which she drove to perform estimating work for the employer.

[17] The Claimant stated to the Commission and the Tribunal that she experienced a stroke on November 1, 2015 and was unable to continue working. She stayed in the hospital for one week and then moved back to her home province to recover her health.

[18] She testified at the hearing that she contacted the Commission in November 2015, to inquire about her entitlement to employment insurance benefits. She stated that she described the circumstances of her employment to the Commission agent and was informed that she was not eligible for benefits because her employment was considered "self-employment." The agent explained that to be eligible for employment insurance benefits as a self-employed person, she would have had to opt into a self-employment insurance program and make payments for one year prior to making her claim for benefits. The Claimant stated that she had not opted into this program and so believed that she was not eligible for benefits. The Claimant also stated that she did not question the Commission's characterization of her employment as self-employment, because her former employer had also told her she was self-employed.

[19] The Claimant stated she pursued rehabilitation and made efforts to re-enter the workforce after being medically cleared to return to work. She stated to the Commission that she received a job offer in October 2016, but was unable to start that employment due to health complications related to her pregnancy. She stated she was put on bed rest at the time and her physical and mental health deteriorated significantly following that period. The Claimant submitted to the Commission and the Tribunal that she experienced a severe depression and was diagnosed with post-traumatic vision syndrome which caused extensive symptoms which interfered with her ability to perform tasks in her daily life, including headaches, blurred vision, inability to read,

and light and noise sensitivities. The Claimant stated she was deemed disabled as of December 2016, and is now receiving disability payments through the Canada Pension Plan.

[20] The Claimant testified that in May 2018, she asked a friend, who was a former bookkeeper, to assist her in filing her income taxes for that past several years. The Claimant stated she described the circumstances of her former employment to her friend and her friend told her that the employment situation did not appear to fit a “self-employment” classification. The Claimant stated it was at that time she realized she may not have been self-employed and contacted the Commission to clarify her entitlement to benefits in that case. She testified that the Commission advised her to make a claim for benefits while she pursued an appeal of the insurability of her employment with the CRA.

[21] The Commission submits the Claimant did not have good cause for the entire period of the delay. While the Commission acknowledges the Claimant’s time in hospital and pursuing rehabilitation should be viewed with leniency regarding whether she had good cause during this period of time, it argues the Claimant’s ability to seek and secure employment in October 2016, demonstrates she was well enough that she could have applied for benefits at that time.

[22] The Commission also states that the Claimant was given correct information when she was told she was not entitled to benefits unless she had paid into the self-employment program, as this information was based on the fact that the Claimant was told she was self-employed and had no deductions taken from her pay.

[23] The Claimant provided a medical note from her doctor dated October 1, 2018, which states she “was unable to apply for EI and CPP benefits from October 31, 2015 to present day” as a result of complications from her stroke. In my view, the Claimant’s physical and health limitations carry significant weight when examining whether exceptional circumstances exist in this case. As the Federal Court of Appeal affirmed in *Somwaru*, exceptional circumstances may excuse a failure to promptly inquire about employment insurance entitlement.⁴ However, I find the evidence supports the Claimant did act promptly when she inquired with the Commission in November 2015. While the Claimant’s health conditions may have been a real and severe

⁴ *Canada (Attorney General) v. Somwaru*, 2010 FCA 366

limitation to her daily living and her job search, I find her mental and physical health conditions were not the cause of the delay in making her claim for benefits.

[24] The Claimant's representative stated that she held a mistaken belief of fact after this conversation and that she acted reasonably in relying on the information the Commission provided as she had no reason to doubt the characterization of her employment as self-employment. I agree with this submission. It is evident from the file and the Claimant's testimony that she made her claim for benefits only when she was given reason to doubt that her former employment was, in fact, self-employment. I acknowledge the Commission's submission that the Claimant was not given *incorrect* information in November 2015, but regardless of whether the information given to the Claimant was incorrect, it is clear the Claimant relied on the Commission's advice that she was not eligible for benefits when she chose not to make her claim for benefits until June 2018.

[25] Based on the Claimant's submissions and testimony, I find the Claimant acted as a reasonable person in her situation would have done to satisfy herself as to her rights and obligations under the *Employment Insurance Act*. The Claimant made a direct inquiry to the Commission regarding her benefit entitlement in November 2015, and was told she was not eligible for benefits. It was reasonable of her to rely on this information and not pursue her entitlement to benefits any further at that time. When the Claimant was given an indication from a trusted and reliable source, that the Commission's information may have been mistaken, she pursued that possibility immediately by contacting the Commission and appealing her employment status with the CRA. This was also a reasonable action and demonstrated the Claimant's diligent pursuit of her entitlement to benefits.

[26] For these reasons, I find the Claimant's actions meet the legal test for good cause throughout the entire period of the delay, as she showed that she acted as a reasonable and prudent person would have in similar circumstances.

CONCLUSION

[27] The Claimant has met her burden of proving she was qualified for benefits and had good cause for the entire period of the delay in making her claim. Therefore, the Claimant's request for an antedate of her claim for sickness benefits to November 1, 2015, is allowed.

Catherine Shaw

Member, General Division - Employment Insurance Section

HEARD ON:	May 7, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	V. D., Appellant/Claimant Tammy Wohler, Representative for the Appellant