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

Citation: *D. L. v Canada Employment Insurance Commission*, 2020 SST 34

Tribunal File Number: AD-19-563

BETWEEN:

D. L.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Janet Lew

DATE OF DECISION: January 22, 2020

Canada

DECISION AND REASONS

DECISION

[1] The appeal is dismissed.

OVERVIEW

[2] The Appellant, D. L. (Claimant), appeals the General Division's decision. The General Division found that the Claimant did not have good cause for being late in making a claim for Employment Insurance regular benefits. Because of this, the General Division decided that it could not antedate[1] his claim for benefits and treat it as if he had made his claim at an earlier date. The General Division decided that the Claimant could not receive regular benefits.

[3] The Claimant argues that the General Division made both legal and factual errors, upon which it based its decision. He claims that the General Division overlooked evidence, namely, that he had an outstanding claim for benefits with another program. He also claims that the Commission gave him erroneous advice. He asserts that because of these two considerations, he had good cause for the delay.

[4] For the reasons that follow, I am dismissing the appeal.

ISSUES

[5] The Claimant identified three issues. I find that there is overlap between two of them, so I will consider them together. Thus, the following issues are before me:

- Did the General Division fail to consider the fact that the Claimant had an outstanding claim for Workplace Safety and Insurance Board (WSIB) benefits?

- Did the General Division err in law when it said that the Claimant could not rely on any erroneous advice to support his claim for antedating?

[1] Antedating is also known as backdating.

ANALYSIS

(a) Background history

[6] In April 2018, the Claimant went on a medical leave of absence because of a poisoned work environment. He contacted the Respondent, the Canada Employment Insurance Commission (Commission). He explained that he was not working at that time because of a poisoned work environment.

[7] The Service Canada agent told the Claimant that his best option was to apply for Employment Insurance sickness benefits. The Claimant applied for sickness benefits in July 2018. The Claimant made several visits to Service Canada throughout this time.

[8] There were unresolved issues over his claim for sickness benefits. The Claimant gave the Commission more information to support his claim. The Claimant also informed the Commission that he was applying for WSIB benefits.

[9] Sometime after August 28, 2018, the Claimant received a cheque for sickness benefits. The Claimant then set up a meeting with Service Canada sometime in early to mid-September 2018.

[10] During the mid-September meeting, the Claimant asked the Service Canada agent what his options were "for a person in [his] predicament."[2] The agent informed him that "there was no other help available through EI" and she was hopeful that WSIB would be able to assist the Claimant. The Claimant understood from this that Employment Insurance represented a "closed door."[3] He believed that there were no extra Employment Insurance benefits available.

[11] The Claimant relied on the information that he got from the Service Canada agent. As a result, the Claimant focused on his WSIB claim and an investigation that the Ministry of Labour

[2] See Claimant's letter to Social Security Tribunal, dated July 11, 2019, at GD5-3.
[3] See Claimant's further submissions to the Social Security Tribunal, dated October 25, 2019, at AD3-5. The Claimant wrote that a "reasonable prudent person would understand the advice given by Service Canada as a closed door."

had started on his employer. He did not have any further contact with Service Canada for several months.

[12] The Ministry of Labour finished its investigation into the Claimant's workplace. This did not lead to any improvement in the work environment. The poisoned work atmosphere still existed. This forced the Claimant to leave his job.

[13] The Claimant set up another meeting with Service Canada. This meeting took place in February 2019. This was several months after he had last met with the Commission.

[14] The Claimant says that the Service Canada agent told him during the meeting that he should apply for regular benefits. The agent also suggested that he ask for an antedate to August 5, 2018. This would have the effect of treating his application for regular benefits as if he had filed it on that date.

[15] The Claimant advises that the agent recommended that he also get a doctor's note. The note would say that he had been able to work as of August 5, 2018. It would also say that the Claimant could not return to his old job because of the poisoned work environment. The agent also told the Claimant that he should write a letter to the Commission explaining why he could not return to his former job.[4]

[16] The Claimant applied for regular benefits on March 8, 2019.[5] A month later, he filed an application to antedate his claim for benefits.[6]

[17] The Claimant maintains that he relied on the Commission's 2018 advice to his detriment. He argues that if the Commission had given him the correct advice to begin with, he would have applied for regular benefits by August 5, 2018. For this reason, he argues that the Commission should let him backdate his claim for regular benefits to August 5, 2018. He argues that the General Division made mistakes in denying his request to backdate his claim.

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[4] See Claimant's letter to Social Security Tribunal, dated July 11, 2019, at GD5-4.
[5] See application for Employment Insurance regular benefits, filed on March 8, 2019, at GD3-13.
[6] See Claimant's application to antedate claim for benefits, filed on April 11, 2019, at GD3-14.

(b) Did the General Division fail to consider the fact that he had an outstanding claim for Workplace Safety and Insurance Board benefits?

[18] The Claimant applied for WSIB benefits in August 2018. He told the Commission that he had applied for WSIB benefits. The Claimant also mentioned his outstanding WSIB claim to the General Division.[7] There was also an outstanding investigation by the Ministry of Labour into the employer's workplace. The Claimant was trying to resolve issues with his employer. He was hopeful that the poisonous work environment would be rectified. He was also hopeful that he could resume working at his old workplace.[8]

[19] The Claimant argues that he had good cause for the delay in applying for Employment Insurance regular benefits. One of his reasons was because he had an active WSIB claim. He says that the Appeal Division concluded in *D.C. v. Canada Employment Insurance Commission* that the claimant there had good cause for the delay because of an ongoing workers' compensation claim.[9]

[20] In *D.C.*, the claimant was dismissed from his employment in February 2016. But, he did not apply for Employment Insurance benefits until July 2017 because he had been waiting for outstanding worker's compensation benefits and for a resolution to a human rights complaint. The Appeal Division ultimately allowed D.C.'s appeal to antedate his claim for Employment Insurance benefits.

[21] The Claimant argues that *D.C.* is similar to his own case and that it is therefore applicable. The Claimant argues that the General Division erred in law in his case when it assessed whether he had good cause for his delay. It erred because it failed to apply the principles in *D.C.* to his own situation although he too had an outstanding claim for WSIB benefits. He argues that because he had an outstanding WSIB claim, the General Division should have also antedated his application.

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[7] See Claimant's letter to Social Security Tribunal, dated July 11, 2019, at GD5.
[8] See Supplementary Record of Claim, dated May 6, 2019, at GD3-17.
[9] *D.C. v. Canada Employment Insurance Commission*, 2018 SST 977.

[22] The General Division did not mention the fact that the Claimant had an outstanding WSIB claim.[10] The General Division also did not mention that the Claimant had applied for short-and long-term disability benefits through his insurer. The General Division also did not address the Claimant's arguments that he had good cause for the delay because he had an ongoing WSIB claim.

[23] The Commission argues that the General Division did not err, even if it did not refer to *D.C.* or mention the fact that the Claimant had a WSIB claim. The Commission argues that the facts in the Claimant's case do not support an antedate.

[24] In *D.C.*, the Appeal Division found that the evidence showed the following:

(a) Commission representatives advised D.C. to hold off on filing an application for Employment Insurance benefits until he settled his workers' compensation claim;

(b) Because of this advice, D.C. did not immediately apply for Employment Insurance benefits;

(c) From time to time, D.C. gave updates to the Commission about the progress of his workers' compensation claim and human rights complaint; and,

(d) The Commission never told D.C. (until his final visit) that he should apply for Employment Insurance benefits.

[25] Despite the Claimant's arguments, I do not find that *D.C.* means a claimant has good cause for delay if they have an outstanding WSIB (or other) claim.

[26] The Appeal Division found that good cause arose in *D.C.* because the Claimant had relied on erroneous advice from the Commission that he should hold off on applying for Employment Insurance benefits until his workers' compensation claim settled. D.C. spoke with several agents. The advice from each was consistent. Each of the agents told D.C. to hold off on applying for

[10] At approximately 28:30 of the General Division hearing, the Claimant testified that he had an outstanding WSIB claim.

benefits. (The Appeal Division also found that D.C. did not have good cause for the delay before his initial visit to Service Canada.)

[27] If anything, *D.C.* can be interpreted to mean that good cause may exist where claimants rely on erroneous advice from Service Canada or the Commission. That advice could include holding off on applying for Employment Insurance benefits.

[28] D.C.'s delay in applying for benefits did not relate to the fact that he had an active workers' compensation claim. The delay arose because the Claimant relied on the Commission's erroneous advice. The Commission recommended that he hold off on filing for benefits until the outcome of his workers' compensation claim. If D.C. had relied solely on the fact that he had an active workers' compensation claim, he would not have had good cause for his delay. In other words, if he had not had any contact with the Commission, having an active claim alone would not be enough to justify the delay. He would have still been required to act as a reasonable person and inform himself about his rights.

[29] Similarly, the Claimant cannot rely on the fact that he had an ongoing WSIB claim to explain his delay.

[30] The factual circumstances in *D.C.* do not exist here. The Claimant was in contact with the Commission. But, unlike *D.C.*, the Claimant does not allege that the Commission ever advised him to hold off on applying for Employment Insurance benefits.

[31] Instead, the Claimant argues that the Commission should have advised him to apply for regular benefits much earlier. However, this presupposes that the Commission was fully aware of the Claimant's situation.

[32] The fact that the Claimant had a WSIB claim and a human rights complaint was immaterial to the Commission. The Commission based its advice on its understanding that the Claimant was unable to work because of medical reasons.

[33] If claimants are seen as unable to work for medical reasons, the Commission generally does not recommend that they apply for Employment Insurance regular benefits. Such claimants

would not be entitled to receive regular benefits. They would be limited to Employment Insurance sickness benefits. This was the situation facing the Claimant.

[34] The Claimant submitted an initial application for sickness benefits on July 19, 2018. The Commission processed his claim for 15 weeks of sickness benefits.[11] The Claimant testified that he told the Commission around September 29, 2018 that he was not medically fit to return to work.[12] He had yet to receive medical clearance to return to work.

[35] The Claimant would not have been entitled to regular benefits if he were unavailable for work for medical reasons.

[36] The Commission's advice was based on information that the Claimant provided. When it met the Claimant in late August or early September 2018, Service Canada and the Commission claim that they were unaware that the Claimant had the capacity to return to work. It would have made no sense for the Commission to suggest to the Claimant that he apply for regular benefits when it understood that the Claimant remained medically unfit to return to work. Its advice was appropriate at the time, based on its understanding of the Claimant's medical status. The Commission could not have anticipated that the Claimant would later produce a medical certificate that said he could return to work by August 5, 2018.[13]

[37] In *D.C.*, the Commission's advice was faulty. D.C.'s entitlement to Employment Insurance regular benefits did not hinge on the outcome of his workers' compensation claim. So, the Commission was mistaken when it suggested to D.C. that he had to wait for his workers' compensation claim to settle before he should apply for Employment Insurance benefits.

[38] The difference from *D.C.* is that the Claimant was receiving sickness benefits. Until the Claimant informed the Commission that he was fit to return to work, the Commission could not have recommended that he apply for Employment Insurance regular benefits.

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[11] See Supplementary Record of Claim dated June 10, 2019, at GD3-22 to GD3-23.
[12] See General Division decision at para. 13 and 26:45 to 28:07 and at 41:35 of the audio recording of the General Division hearing. The audio recording of the General Division hearing suggests that this meeting may have in fact taken place on August 29, 2018, or sometime in early September 2018.
[13] See medical certificate dated April 10, 2019, at GD3-16.

[39] I agree that the General Division could have acknowledged the Claimant's arguments relating to his active WSIB claim. However, having an active WSIB claim would not have helped the Claimant show that he had good cause for the delay in applying for regular benefits.

(c) Did the General Division err in law when it said that the Claimant could not rely on any erroneous advice to support his claim for antedating?

[40] The General Division wrote:

> The advice that the Commission gave the Claimant in August 2018 was not subject to a reconsideration decision, so I do not have authority to assess whether it was correct. In any event, advice given by the Commission which is inconsistent with the *Employment Insurance Act*, whether made in good faith or bad faith, is absolutely void. I therefore find that even if the Commission gave the Claimant wrong advice in August 2018, he cannot rely on that error to support his claim for antedating.[14]

[41] The Claimant maintains that he received erroneous advice from the Commission. He argues that he had good cause for being late because he relied on that erroneous advice.

[42] The Claimant argues that the General Division misinterpreted the law when it said that he could not rely on any erroneous advice to support his claim for antedating. The Claimant relies on *Pirotte v. Unemployment Insurance Commission et al.*[15] There, the Federal Court of Appeal held that good cause may exist where a mistake induced by the Commission's advice is the cause for the delay, and the delay is not attributable to a claimant. (The Federal Court of Appeal did not apply the principle on the facts in that case.)

[43] The Commission does not disagree with the general legal principle that good cause may exist where an applicant has relied on erroneous advice. In that regard, the General Division erred in stating claimants can never rely on erroneous advice for an antedate.

[44] However, the Commission argues that the facts in the Claimant's case are different from those in *Pirotte*, so the principles in *Pirotte* do not apply. The Commission denies that it gave any erroneous advice to the Claimant. It claims that it based its advice on information that the

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[14] General Division decision at para. 18.
[15] See *Pirotte v. Unemployment Insurance Commission*, A-108-76.

Claimant provided at the time. Because its advice was accurate, the Commission argues that the Claimant is not entitled to an antedate.

[45] If the Claimant hopes to be able to rely on *Pirotte*, he needs to show that the Commission made a mistake in the first place. The Claimant argues that the Commission's mistake was to advise him to apply for sickness benefits instead of regular benefits.

[46] The Claimant asserts that the Commission should have advised him from the very beginning to apply for Employment Insurance regular benefits, rather than for sickness benefits. He suggests that he was always fully capable of working, or at least since August 5, 2018, as long as it was not at his former workplace where he found the environment poisonous. He argues that the Commission should have recognized that he was capable of working as long as he was not back at his old job.

[47] The Claimant argues that the Commission should have recommended to him by at least mid-September 2018 that he could have applied for regular benefits, instead of saying that there was no other help available. That way, he could have asked for an antedate to August 5, 2018. He claims that if the Commission had advised him to apply for regular benefits, he would have applied for regular benefits immediately. He would have also taken whatever steps were necessary to qualify for benefits, including looking for work.

[48] The Claimant's arguments essentially center around three timeframes:

i. At the very beginning – the Claimant argues that the Commission should have recommended that he apply for regular benefits,

ii. Between August 5 and September 2018 – the Claimant argues that he was ready to return to work, other than to his old workplace, and

iii. In September 2018 – the Claimant argues that the Commission should have recommended then that he apply for regular benefits and request an antedate to August 5, 2018.

Applying for regular benefits at the very beginning

[49] Although I do not have a copy of the file relating to the Claimant's application for sickness benefits, he must have had some supporting medical documentation, such as a medical certificate. The medical certificate would have resembled the certificate at page GD3-16 of the hearing file. His physician would have provided an opinion that the Claimant was unable to work due to medical conditions.

[50] The Claimant produced a medical certificate from his family physician, in support of his claim for regular benefits. The certificate is dated April 10, 2019. His doctor was of the opinion that the Claimant was unable to work for medical reasons between April 9, 2018 and August 5, 2018.

[51] The Claimant cannot now say that he was medically fit to work even before August 5, 2018, when the Claimant's family physician says that he was unable to work between April 9, 2018 and August 5, 2018.

[52] I do not see any evidence in the hearing file that should have alerted the Commission to recognize that the Claimant was medically fit to work after he took a leave of absence from his employment in April 2018 up to August 5, 2018. The Claimant argues that the Commission should have recommended that he apply for regular benefits. But, in light of the medical evidence that says he was unfit to work between April and August 2018, that argument cannot succeed.

Applying for regular benefits between August 5 and September 2018

[53] The Claimant says that he was able to work during this timeframe, as long as it was not at his old workplace because the environment was poisonous. However, the Claimant was pursuing his claim for Employment Insurance sickness benefits. I do not see any evidence that he ever alerted the Commission to the possibility that he was now capable of returning to work.

[54] At about this time, the Claimant also advised the Commission that he was also applying for WSIB benefits. The Commission argues that applying for WSIB benefits was consistent with the Claimant's application for sickness benefits. The Commission argues that learning about the Claimant's WSIB application would confirm for it that the Claimant unavailable for work due to sickness.

[55] Throughout August 2018, the Commission believed the Claimant was unable to return to work because of medical reasons. For that reason, there was no failing on its part when it did not suggest that the Claimant could apply for regular benefits.

Applying for regular benefits in September 2018

[56] As I noted above, around September 29, 2018, the Claimant reported to the Commission that he was not medically fit to return to work. The Claimant did not have any contact with the Commission again until after the Ministry of Labour concluded its investigation in 2019.

[57] So, based on this update from the Claimant, the Commission continued to believe that the Claimant was not medically fit to return to work. The Commission was unaware that the Claimant was able to return to work after August 5, 2018, until 2019.

[58] I appreciate that the Claimant may very well have been able to return to the workforce–provided it was not to his former workplace—but the Commission does not medically diagnose claimants. The Commission cannot determine whether a claimant is capable of returning to the workforce in any capacity in the absence of supporting medical records. It was wholly incumbent on the Claimant to produce any information or records to show that he was able to return to the workforce and to alert the Commission of any change in his circumstances. As it was, the Claimant continued to be employed by his company and hoped to return to work there. He was of course unable to return to his company because he found the environment toxic.

[59] The Commission's advice to the Claimant clearly was not as comprehensive as he would have liked or expected. In hindsight, the Commission could have clarified the Claimant's medical status and work capacity. It could have also let the Claimant know that if he improved and if his physician cleared him for a return to work—any work—the Claimant could then consider making a claim for regular benefits. He would also have to meet other requirements too. But, the Commission's advice was based on the facts before it. Hence, while the Claimant is critical about the quality of advice that he received from the Commission, I do not see that that advice was erroneous at the time it was given, based on the information and the understanding that the Commission had about the Claimant's medical status.

Good cause for the delay during the complete period of the delay

[60] I am mindful that the Claimant might have pointed out to the Commission in September 2018 that he could not return to his old workplace. Under such a scenario, the Commission could have realized that the Claimant could have worked elsewhere, not just at his old job. With this, the Commission could have then suggested the Claimant could consider applying for regular benefits.

[61] But, by then, several weeks had passed since August 5, 2018, when the Claimant says he could have resumed doing some work.

[62] For an antedate to occur, the Claimant would have to show that there was good cause for the delay **throughout** the period of delay. After all, the *Employment Insurance Act* says that there has to be good cause for the delay "throughout the period beginning on the earlier day and ending on the day when the initial claim was made."[16]

[63] This would cover the period from August 5, 2018 to March 8, 2019. (August 5, 2018 is the date that the Claimant says he was able to return to the workforce and March 8, 2019, is when the Claimant applied for Employment Insurance regular benefits.)

[64] The Claimant says that his delay was caused by the Commission when it told him that there was nothing further available to him under the Employment Insurance scheme. Yet, the Claimant received this advice in September 2018. In other words, there is nothing to account for the delay between August and September 2018, when he received that advice. So, even if the Commission had given erroneous advice in September 2018, the Claimant's request for an antedate would not have succeeded. He had not shown good cause for the delay between August 2018 and September 2018.

[65] While the General Division erred by misstating the law, ultimately the Commission did not give him erroneous advice. Or, if it gave him erroneous advice, the Claimant was still unable to show that he had good cause throughout the period of delay so antedating would have been unavailable to him in any event.

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[16] See subsection 10(4) of the *Employment Insurance Act.* The subsection deals with late initial claims.

CONCLUSION

[66] The Claimant did not have good cause to delay making an application for Employment Insurance regular benefits on the basis that he had an active WSIB claim, or on the basis that he relied on erroneous advice from the Commission. I have determined that the Commission's advice was appropriate at the time that it was given. Furthermore, the Claimant did not have good cause throughout the period. For these reasons, the appeal is dismissed.

Janet Lew
Member, Appeal Division

HEARD ON:	November 13, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	D. L., Appellant Angèle Fricker, Representative for the Respondent