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

Citation: *MC v Canada Employment Insurance Commission*, 2021 SST 312

Tribunal File Number: AD-21-124

BETWEEN:

M. C.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Stephen Bergen

DATE OF DECISION: July 2, 2021

Canada

DECISION AND REASONS

DECISION

[1] I am allowing the appeal. I have made the decision that the General Division should have made. I have found that the Claimant is entitled to an antedate of his claim to October 25, 2020.

OVERVIEW

[2] The Appellant, M. C. (Claimant), worked as a hair stylist in the film and television industry. He had difficulty obtaining contracts in the summer of 2020 and was on the Canada Emergency Response Benefit for a time. However, he obtained a few weeks of work in September and October of 2020. On November 30, 2020, the Claimant applied for Employment Insurance benefits (EI) under the relaxed qualification requirements. He asked the Canada Employment Insurance Commission (Commission) to antedate his claim to October 25, 2020, but it refused. The Commission told the Claimant that he did not have good cause for the delay in filing his application for benefits. The Commission would not change its decision when the Claimant asked it to reconsider.

[3] The Claimant appealed to the General Division of the Social Security Tribunal, which dismissed his appeal. He is now appealing to the Appeal Division.

[4] I am allowing the appeal because the General Division made errors of fact and law. I have made the decision that the General Division should have made. The Claimant had good cause for the delay throughout the period from October 25, 2020, to November 28, 2020, and he would have qualified for benefits on October 25, 2020. He is entitled to an antedate to the later of October 25, 2020.

ISSUES

[5] Did the General Division interfere with the Claimant's right to be heard by failing to inquire about his efforts to contact the Commission before he applied for benefits?

[6] Did the General Division make an error of fact or law by presuming the effects of COVID-19 on hairstylists in the film and TV industry?

[7] Did the General Division make an error of law by failing to consider the relevance of the length of the Claimant's delay?

[8] Did the General Division make a legal error in how it interpreted "exceptional circumstances"?

WHAT GROUNDS OF APPEAL CAN I CONSIDER?

[9] "Grounds of appeal" are the reasons for the appeal. To allow the appeal, I must find that the General Division made one of these types of errors:[1]

1. The General Division hearing process was not fair in some way.
2. The General Division did not decide an issue that it should have decided. Or, it decided something it did not have the power to decide.
3. The General Division based its decision on an important error of fact.
4. The General Division made an error of law when making its decision.

ANALYSIS

[10] According to section 10(1) of the *Employment Insurance Act* (EI Act), a claimant's benefit period normally starts on the Sunday of the week in which an interruption of earnings occurs or the Sunday of the week in which the claimant makes an initial claim for benefits, whichever is the later date.

[11] However, a claimant may apply to have "their" claim established at an earlier date (I will use the plural "they, their, and them" to refer to "he or she / his or her), if they can show that they had good cause for the delay in filing their applications, throughout the entire period of the delay.

[12] At the same time, it is not enough for a claimant to assert that they did not apply earlier because they did not know that they could. To have good cause for the delay, a claimant must

[1] This is a plain-language version of the three grounds. The full text is in section 58(1) of the *Department of Employment and Social Development Act* (DESD Act).

show that they did what a reasonable and prudent person would do to inform themselves of their rights and obligations under the EI Act.[2]

[13] However, there may be exceptional circumstances in which a claimant, who delayed their application because they did not know they could apply, could still show good cause—even though the claimant did not take steps to inform themselves of their rights and obligations. Even a claimant's inaction may sometimes be justified by exceptional circumstances.[3]

Issue 1: Failure to Inquire and Natural Justice Rights

[14] The Claimant stated that he tried to contact Service Canada repeatedly before he finally applied for benefits, but that he had not been able to speak to someone. He said that is why he said he had not contacted the Commission.

[15] As the Commission pointed out at the Appeal Division hearing, there was no evidence before the General Division of these repeated efforts. The manner in which the Claimant has now clarified and expanded on his prior statements to the Commission is new evidence. Therefore, I cannot consider it.[4]

[16] However, I understand the Claimant's argument that he could have told the General Division about these efforts, if only the General Division had asked him what he meant by his statements to the Commission. The Claimant argued that the General Division made an error of law because it failed to inquire about whether the Claimant called or tried to call Service Canada or the Commission.[5]

[17] The Claimant is correct that the General Division did not question the Claimant about his attempts to contact the Commission. However, this was not an error of law. The General Division hearing is not an inquiry and the Tribunal does not have an obligation to investigate.

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[2] *Canada (Attorney General) v. Somwaru*, 2010 GFCA 336.
[3] *Canada (Attorney General) v. Caron* (1986), 69 N.R. 132 (F.C.A.); *De Jesus v. Canada (Attorney General)*, 2013 FCA 264.
[4] *Parchment v. Canada (Attorney General)*, 2017 FC 354
[5] AD3-6.

Rather, the Claimant had an obligation to bring to the General Division the evidence on which he intended to rely.

[18] At the same time, natural justice requires that the General Division give the Claimant a fair opportunity to be heard and to answer the case against him. To determine whether the Claimant had good cause for the delay, the Tribunal had to evaluate whether the Claimant did what a reasonable and prudent person would do in the circumstances. The deciding factor for the General Division was that the Claimant did not look into his eligibility for EI benefits until November 30, 2020. The General Division said that nothing prevented the Claimant from calling Service Canada *but that he made no attempt to do so*.[6] It concluded that the Claimant had not taken reasonably prompt steps to inform himself of his rights and obligations to claim EI benefits.[7]

[19] I accept that the evidence of the Claimant's efforts to contact the Commission was highly relevant, if not the deciding factor, in the General Division's decision. However, the record includes unambiguous evidence that the Claimant did not attempt to contact Service Canada. According to the Commission's notes, the Claimant stated that he did not contact the Commission to determine if he qualified.[8] Later notes say that the Claimant did not **try** to call in or **research** employment insurance.[9]

[20] The Tribunal disclosed all of this evidence to the Claimant in advance of the hearing. The General Division member also told the Claimant that he had to show good cause for his delay. It told him that he would have to show that he had acted as a reasonable and prudent person in his position would have acted. With this understanding, the Claimant should have known the importance of explaining any unsuccessful efforts to contact Service Canada that he may have made (by which he intended to clarify his entitlement or the application process). If the Claimant disagreed with the way the Commission represented his earlier statements, it was up to him to point out those errors to the General Division and correct the record. A fair process does not

[6] General Division decision, para 23 and para 27.
[7] General Division decision, para 24.
[8] GD3-14.
[9] GD3-30.

require the General Division to ask the Claimant about everything he is reported to have said and to ask him if it was really true, or if he actually said or meant something else.

[21] The General Division did not interfere with the Claimant's right to be heard or otherwise make an error of natural justice by failing to challenge the Claimant on his own statements from the record.

Issue 2: Improper judicial notice and mischaracterization of evidence

[22] The Claimant argued that the General Division made an error by taking judicial notice of how "personal services such as hair salons and barbershops would be among the first businesses to be shut down for public health reasons [i.e., COVID-19]". The Claimant stated that the General Division should only take judicial notice of facts that are "so notorious or generally accepted as not to the subject of debate among reasonable persons."[10]

[23] The Claimant has correctly stated the test for judicial notice. However, the General Division did not make an error when it took notice that personal services would be among the first businesses to be shut down because of COVID-19. In my view, this was widely known and generally accepted among reasonable persons.

[24] However, the Claimant made a second point about the General Division's assertion that COVID-19 public health restrictions had a severe impact on hair stylists in his own industry. I agree that the impact of COVID-19 on hair stylists in the film and television industry was not a notorious nor a generally accepted fact.

[25] However, I do not agree that the General Division took judicial notice of this fact. Instead, the General Division misunderstood a letter from the Claimant's union. The General Division said that the letter said that COVID-19 had a "severe impact on hair stylists in his own industry. This was inaccurate. The union letter does not speak of a "severe" impact or about the particular impact of COVID-19 restrictions on union hair stylists. It says only "film and television productions have had to reduce the number of crew members hired, which has resulted in limited work opportunities for our Members."

[10] R. v Fine 2001 SCC 32.

[26] The General Division misunderstood the union letter evidence. However, to be an "error of fact" as described in the "grounds of appeal," it must be an error that the General Division relied on to reach its decision. In this case, the General Division did not accept that the Claimant's intention to look for work or avoid going on EI benefits could have been good cause for the delay.[11] Therefore, its finding that the Claimant did not have good cause for the delay did not depend on its view of employment opportunities for hairstylists in the film and TV industry.

[27] The General Division did not make an important error of fact by presuming the effect of COVID-19 restrictions on hair stylists in the Claimant's industry.

Issue 3: Failure to Consider the Length of the Delay

Application of Commission policy

[28] The Claimant applied for benefits on November 30, 2020, and asked the Commission to antedate his claim to October 25, 2020. He told the Commission that he had not worked or earned wages after October 25.[12]

[29] As a result, the General Division stated that the period of delay was from October 25, 2020, to November 30, 2020.[13] The General Division initially stated that his last day of work was in late-October 2020.[14] Later in the decision, the General Division said that the Claimant's contract of employment ended on October 25, 2020.[15] I have no reason to interfere with the General Division's finding that October 25, 2020, was the Claimant's last day.

[30] The Commission's policy allows claimants to take a reasonable period to submit the application for benefits. The policy says that claimants are deemed to have filed their claim in a "timely manner" when the application for benefits is made no later than four calendar weeks

[11] General Division decision, para 26.
[12] GD3-12.
[13] General Division decision, para 17.
[14] General Division decision, para 3.
[15] General Division decision, para 30.

following the calendar week in which the interruption of earnings occurs or the claimant's last paid day.[16]

[31] The first day that the Claimant's benefit period could have begun would have been the Sunday of the week in which the Claimant's interruption of earnings occurred.[17] October 25 was a Sunday. According to Commission policy, the Claimant should have had an additional four weeks **beyond** the week of October 25. In other words, the week of October 25 – October 31 would not count as one of the four weeks. This would mean that the Claimant's grace period would extend until November 28, 2020. The Claimant applied for benefits on November 30, 2020.[18]

[32] November 30 was two days outside the grace period established by Commission policy.

Relevance of length of delay

[33] I cannot be certain if the General Division understood that the Claimant was only two days late according to Commission policy. However, what does seem clear is that it did not matter to the General Division.

[34] The General Division acknowledged that the Claimant's delay was "relatively short" at 36 days,[19] but denied the antedate because it found that the Claimant did not act "reasonably or carefully."[20] In support of its decision, the General Division wrote this: "While the length of the delay is a relevant factor, the more important consideration is the reason for the delay." It cited *Canada (Attorney General) v Burke*, a decision of the Federal Court of Appeal, as support for this principle.

[35] In the *Burke* decision, the Federal Court of Appeal dismissed the Commission's application for judicial review of an Umpire decision in which the Umpire found a 121-day delay

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[16] Digest of Benefit Entitlement Principles, Policy 3.1.1, accessed at 16:05, Eastern Time at https://www.canada.ca/en/employment-social-development/programs/ei/ei-list/reports/digest/chapter-3/antedate.html#a3_1_1
[17] Section 10(1) of the EI Act.
[18] GD3-10.
[19] General Division, para 18.
[20] General Division, para 19.

to be reasonable.[21] The Commission had argued that the Umpire decision was unreasonable because the Umpire had miscalculated the period of delay to be 90 days. The Court rejected the Commission's argument that this miscalculation of the period of the delay had been significant to the Umpire's decision.

[36] In *Burke*, the claimant apparently had a good enough reason for his delay and the Court upheld the antedate of his claim. The reason was the most important thing—*despite* the fact that the delay in that case was *substantial*.

[37] *Burke* does not address the effect of a delay that is minimal. Nor does it say that the length of the delay is never important, or that it should be given little weight.

[38] One would expect that good cause might more readily be found to exist over a very short delay, even though a long delay (such as the delay in *Burke*) would not necessarily exclude "good cause."

[39] Like the General Division, I accept that the delay was 36 days in this case. However, the Commission will generally accept a claim as having been made as soon as it could have been made if it is within the policy grace period. In this case, a 36-day delay meant that that the Claimant only exceeded the grace period by two days. In other words, the Commission would not antedate his claim because he was two days too late. This is a minimal delay under any circumstances.

[40] The General Division member did not explain why it gave no weight, or so little weight, to the length of the delay. In fact, despite the General Division's reference to *Burke*, I am not satisfied that the General Division considered the length of the delay at all.

[41] In the course of the hearing, the General Division told the Claimant that the length of the delay doesn't matter once a claimant is outside the four weeks. She said that it would not matter whether it was a one-day delay or five months.

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[21] The Umpire was the decision maker in the second level of appeal in the former administrative appeal system for Unemployment Insurance benefits.

[42] This is incorrect. The reason for the delay may be more important, but the length of the delay is still relevant and may also be important.

[43] I find that the General Division made an important error of law by not considering the relatively short period of delay with the Claimant's reason for the delay.

[44] Alternatively, I find that the General Division made an error of law because its reasons do not explain why it gave such a short delay so little weight.

Issue 4: Error in interpretation of "exceptional circumstances"

[45] The General Division made an error of law in how it interpreted "exceptional circumstances" when it found that the Claimant did not have good cause for the delay.

[46] In the hearing, the General Division explained that exceptional circumstances were those things that "physically prevented" a claimant from applying for benefits.

[47] The General Division dismissed COVID-19 and the changing legal requirements for income support benefits including the Canada Emergency Relief Benefit (CERB), Employment Insurance, and the Emergency Relief Benefit (ERB). It understood that the Claimant had difficulty keeping up with the benefits available but it did not accept this as an exceptional circumstance that could excuse him from taking steps to understand his rights and obligations. The General Division told the Claimant that he didn't have any exceptional circumstance that would justify his late application, saying that his circumstances were no different from other Canadians. The General Division noted that all claimants were subject to the extraordinary exceptional circumstance of COVID-19.

[48] The Federal Court of Appeal does not share the General Division's view of exceptional circumstances. The Court has said that good cause does not require circumstances beyond a claimant's control to **prevent** the claimant from making a claim for benefits in the time permitted.[22] In rejecting this requirement, the Court said that the correct test is "whether the

[22] *Canada (Attorney General) v Ehman*, A-360-95; *Shebib v. Canada (Attorney General)*.

claimant did what a reasonable and prudent person would have done in the same circumstance."[23]

[49] The General Division's explanation to the Claimant suggests that the General Division also understood that an "exceptional circumstance" must necessarily be an exception from what other Canadians were experiencing at the time. It did not consider whether an exceptional circumstance could be a circumstance that is exceptional, relative to the normal practice or normal requirements in normal (non-COVID) times.

[50] The General Division made an error of law by applying an inaccurate definition of exceptional circumstances.

Summary

[51] Because I have found that the General Division made errors in how it reached its decision, I must consider what I should do about the error (remedy).

REMEDY

[52] I have the authority to change the General Division decision or make the decision that the General Division should have made. I could also send the matter back to the General Division for it to reconsider its decision.[24]

[53] The Claimant suggested that I have all the evidence I need to make the decision and that I should make the decision. The Commission had asked that I dismiss the appeal but suggested that it go back to the General Division for a new hearing.

[54] The request to send the matter back to the General Division seems to be based on the fact that the Claimant made an argument based on new evidence. He argued that he had not been able to explain that he had attempted to contact the Commission between his last day and his application. However, I do not need to consider the argument that was based on new evidence to decide this appeal.

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[23] Ibid., *Shebib* at para 32.
[24] My authority is set out in sections 59(1) and 64(1) of the DESD Act.

[55] I accept that the Claimant had a fair opportunity to present evidence at the General Division and that I have everything I need to make the decision that the General Division should have made.

[56] I find that the Claimant was either confused or misled by the shifting benefits and qualification requirements due to the COVID-19 pandemic. I am speaking of the shift from income support delivered through the CERB program back to benefits offered through a new form of EI, under which it was much easier to qualify.

[57] The Claimant had been on Employment Insurance benefits and then on CERB benefits, before he again applied for Employment Insurance in November 2020. Pre-COVID-19, during the time of his recent claim, and right up to September 27, 2020[25], the Claimant could only have qualified for **EI benefits** using his own hours of insurable employment. He testified that he had 20 days of work in September and October. So he was likely correct that he would not have qualified for benefits without the 300 supplemental hours that was only offered to claimants who applied after September 27, 2020.

[58] I think that the Claimant's confusion about his eligibility and his reliance on his experience with EI is understandable in the circumstances. In the circumstances, I accept that it is reasonable for him not to have thought to check his eligibility for EI for about a month. However, the General Division emphasized that he did not do what a **prudent** person would do.

[59] I agree that a reasonable **and prudent** person might *eventually* think to check for significant changes to EI after CERB ended. However, I do not think even a "prudent person," **in the Claimant's circumstances**, would have thought to confirm that he or she qualified for benefits within about a month of the end of the last contract.

[60] The evidence confirmed that members of the Claimant's industry work on a contract basis for multiple employers. The Claimant is accustomed to contract work, and to looking for the next contract following the end of each contract. He was also sophisticated to the

[25] See: section 153.17 of the EI Act: The legislative changes only offered the 300-hour supplement to claimants making an initial claim after September 27, 2020.

Employment Insurance scheme, and he had an accurate conception of what it took to qualify for EI in ordinary times.

[61] When the Claimant was out of work earlier in the year, he had explored the availability of other benefits because of COVID-19. He had been on CERB, which the government created for those who could not qualify for EI benefits. Eventually, the Claimant went off CERB and found some short-term contract work. When the contract work completed, CERB had expired. The Claimant knew from experience that he would not qualify for EI.

[62] The government made a decision to shift delivery of benefits back to EI effective September 27, 2020, but this was after it had extended the original CERB program at least once. The Claimant did not immediately think to check whether the government had decided to continue a form of exceptional income support because of COVID by some other method than another extension to COVID. He did not think to check if the regular EI program had been changed.

[63] In ordinary times, a claimant must show good cause for delay only after about four weeks has lapsed from the time they could have applied. The Claimant applied for EI within two days of the time that the Commission ordinarily allows claimants to apply without prejudice.

[64] However, these are not ordinary times. These are confusing times. The Commission allows claimants four weeks to figure out what they are supposed to do in *ordinary times*. In ordinary times, a claimant is apparently presumed by policy to be acting as a reasonable and prudent person when he or she applies within four weeks. Four weeks is considered a reasonable period of delay during a time of stable and predictable benefit programs, benefit delivery, and benefit qualifications.

[65] In my view, a claimant should have more than two extra days to check for recent changes to EI benefits or qualification requirements during the extraordinary circumstances of COVID-19.

[66] I find that the Claimant acted as a reasonable and prudent person by applying for benefits within 36 days of the end of his contract.

[67] If I am wrong about this, then I still find that the Claimant had good cause because his circumstances were exceptional. The Claimant should not have been expected to take additional steps to verify his understanding of his rights and obligations under the act.

[68] These exceptional circumstances include the reason for his delay. I agree with the Claimant that the COVID-19 pandemic and the government's very recent change to the EI qualification criteria are a part of what causes his circumstances to be exceptional. The Claimant's delay resulted from his recent experience with the requirements of EI, and his understanding of EI requirements. That understanding would have been accurate even a month before the end of his last contract.

[69] I am not persuaded that the Claimant must show that his circumstances are exceptional, compared to all other applicants for EI benefits in the midst of the COVID-19 pandemic. Section 10(4) of the EI Act was not drafted in the COVID-19 environment, nor was the Commission's four week grace policy 3.1.1. The Claimant must show that his circumstances are exceptional relative to the ordinary circumstances of ordinary times.

[70] I have considered that the length of the delay was only 2 days beyond what is generally acceptable. What a Claimant should be expected to do to ensure that he understands his rights and obligations depends in part on the length of the delay.

[71] The Claimant applied for benefits as soon as he learned that he could qualify. Therefore, the Claimant's reason for delaying his application applied (which I have found to be good cause) applied throughout the entire period of the delay. That means he had good cause throughout the period of the delay.

[72] The General Division stated that there was no dispute about whether the Claimant would have had sufficient hours to qualify for EI benefits as of October 25, 2020, and the Commission did not challenge this statement. Therefore, I also accept that the Claimant would have qualified for benefits as of October 25, 2020.

[73] Therefore, the Claimant is entitled to an antedate of his claim to October 25, 2020.

CONCLUSION

[74] I am allowing the appeal. The Claimant is entitled to have his claim antedated to the later of October 25, 2020.

Stephen Bergen
Member, Appeal Division

HEARD ON:	June 21, 2021
METHOD OF PROCEEDING:	Videoconference
APPEARANCES:	M. C., Appellant Josée Lachance, Representative for the Respondent