



Citation: *CM v Canada Employment Insurance Commission*, 2021 SST 815

Social Security Tribunal of Canada General Division – Employment Insurance Section

Decision

Appellant:

C. M.

Respondent:

Canada Employment Insurance Commission

Decision under appeal:

Canada Employment Insurance Commission
reconsideration decision (436282) dated October 7, 2021
(issued by Service Canada)

Tribunal member:

Linda Bell

Type of hearing:

Teleconference

Hearing date:

December 10, 2021

Hearing participants:

Appellant (Claimant)

Decision date:

December 17, 2021

File number:

GE-21-2179

Decision

[1] I am dismissing the appeal.

[2] The Claimant doesn't qualify for Employment Insurance (EI) benefits in the week of March 14, 2021. This means the Claimant's application can't be treated as though it was made earlier on March 14, 2021.¹

Overview

[3] The Claimant applied for Employment Insurance (EI) benefits on March 30, 2021. The Commission determined that her application (initial claim) for benefits would start on Sunday, March 28, 2021.

[4] The Claimant is now asking that her application be treated as though it was made earlier, on March 14, 2021. This is called antedating (or, backdating) the application. The Canada Employment Insurance Commission (Commission) has already refused this request.

[5] The Claimant appeals to the Social Security Tribunal. She says her employer spreads out her earnings over a 10-month period, for 9 months of work, to average her income. She says she didn't work between March 15, 2021, and March 26, 2021, so her ROE should show no hours of work and no income for this period. She feels it is unfair that the Commission determined that she didn't show good cause for applying late.

Issue

[6] Does the Claimant meet the requirements to antedate her application to the earlier date of March 14, 2021?²

¹ Section 10(4) of the *Employment Insurance Act* (EI Act) uses the term "initial claim" when talking about an application.

² Section 10 of the Act states that the start date of an application (claim) begins on the Sunday of the week in which the interruption of earnings occurs, or on the Sunday of the week in which the initial claim for benefits is made, whichever is later.

Analysis

[7] To get your application for benefits antedated, you have to prove these two things:³

- a) You qualified for benefits on the earlier day (that is, the day you want your application antedated to).
- b) You had good cause for the delay during the entire period of the delay. In other words, you have an explanation that the law accepts.

[8] The main arguments in this case are about whether the Claimant qualifies for benefits on the earlier day. So, I will start with that.

Qualifying for benefits

[9] Not everyone who stops work can receive EI benefits. You have to prove that you qualify for benefits.⁴ The Claimant has to prove this on a balance of probabilities. This means that she has to show that it is more likely than not that she qualifies for benefits.

[10] To qualify for benefits, a claimant must have a period of seven or more consecutive days of unemployment. This means the Claimant was laid off or separated from their employment and has a period of seven or more consecutive days with no work and no earnings arising from that employment. This is called an interruption of earnings.⁵

[11] The law says that a claimant does **not** have a week of unemployment if he or she is:

- a) On a period of leave in agreement with their employer;
- b) Continues to be an employee during the period of leave; and

³ See section 10(4) of the Act.

⁴ See section 48 of the Act.

⁵ See section 14(1) of the *Employment Insurance Regulations* (Regulations).

- c) Receives earnings that were set aside during a period of work, regardless of when it is paid.⁶

[12] I find that the Claimant doesn't qualify for regular benefits as of March 14, 2021. This is because she was not unemployed and did not suffer an interruption of earnings for the period from March 14, 2021, to March 27, 2021. During this period she was on leave (spring break), she continued to be employed, and she was in receipt of deferred earnings.

[13] The Commission says that the Claimant doesn't meet the qualifying conditions as of March 14, 2021. It says she didn't have an interruption of earnings because she was still being paid by her employer during spring break.

[14] The Claimant agrees that her initial Record of Employment (ROE) shows the same amount of earnings in each pay period.⁷ She says this is because she entered into an agreement with her employer to have income averaging. She says she wanted her salary averaged over the entire school year. This is where her employer pays her for the school year (September to June) in an equal amount for every semimonthly pay period. This means a portion of her earnings are deferred, so she receives the same amount of earnings every pay period, even during periods of leave such as spring break and Christmas Break.

[15] The Claimant says that the payroll company who issued her initial ROE refused to amend it. So, her employer issued a manual ROE showing that actual hours worked and what her earnings would have been for each pay period if she didn't receive her earnings through the income averaging agreement. She admits that this amended ROE doesn't list the actual amount of earnings she received in each pay period.⁸ Specifically, the Claimant says she received gross earnings of \$1,826.65 in every pay period, as shown on her initial ROE.⁹

⁶ See section 11(3) of the Act.

⁷ See the ROE at page GD3-17.

⁸ See the ROE at page GD3-32.

⁹ See the ROE at page GD3-17.

[16] In this case, the Claimant says she works for a private independent school as an educational assistant and as an instructor for English Language Learning. She says she is not a teacher. She usually knows in June whether she will be offered a contract in September for that school year. She says that her job offer is not certain until each September. This is when she accepts the offer of employment listing her hours and salary for the school year.

[17] At the hearing, the Claimant said that a Service Canada Agent told her she qualifies for benefits during school breaks. She says this is the only reason why she applied for benefits during spring break.

[18] The Claimant also said that she was not actively seeking suitable employment during the period from March 15, 2021, to March 26, 2021. She says that if someone offered her a job, to tutor a student or do some other type of work she would have accepted the work. But she admits that she wasn't actively looking for work during this time because she was still recovering from the recent passing of her mother.

[19] The evidence, as set out above, supports a finding that the Claimant doesn't meet the qualifying requirements for benefits as of March 14, 2021. This is because she didn't suffer an interruption of earnings.

[20] Even if the Claimant did qualify (which she doesn't, as stated above), she wouldn't be entitled to benefits. This is because she readily admits that she was not actively seeking suitable employment during the period from March 15, 2021, to March 26, 2021. So, she would not meet the availability requirements to be entitled to benefits for this period.¹⁰

¹⁰ The Claimant has to prove three things to show she was available under this section. (a) A desire to return to the labour market as soon as a suitable job is available; (b) That desire is expressed through efforts to find a suitable job; and (c) No personal conditions that might unduly limit their chances of returning to the labour market (*Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96).

[21] I sympathize with the Claimant given the circumstances she presented during the hearing. However, the law says that incorrect information that may be provided by an agent regarding a claimant's particular situation can't be upheld if it is contrary to the Act.¹¹

[22] I wish to add that my decision is not based on fairness. Rather, my decision is based on the facts before me and the application of the law. There are no exceptions and no room for discretion. I can't interpret or rewrite the Act in a manner that is contrary to its plain meaning, even in the interest of compassion.¹²

[23] In this case, I don't need to consider whether the Claimant has shown good cause for the delay in applying for benefits. This is because if she doesn't qualify for benefits on the earlier day, her application can't be treated as though it was made on the earlier day.

Conclusion

[24] The appeal is dismissed.

Linda Bell

Member, General Division – Employment Insurance Section

¹¹ *Granger v. Canada (Attorney General)*, A-684-85

¹² *Canada (Attorney General) v Knee*, 2011 FCA 301