



Citation: *MJ v Canada Employment Insurance Commission*, 2022 SST 278

**Social Security Tribunal of Canada
General Division – Employment Insurance Section**

Decision

Appellant: M. J.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (445200) dated December 24, 2021 (issued by Service Canada)

Tribunal member: Leanne Bourassa

Type of hearing: Teleconference

Hearing date: February 14, 2022

Hearing participants: Appellant

Decision date: February 24, 2022

File number: GE-22-168

Decision

[1] The appeal is dismissed. The Tribunal disagrees with the Claimant.

[2] The Claimant has not shown he would have qualified for benefits at the earlier date. He also hasn't shown that he had good cause for the delay in applying for benefits. In other words, the Claimant hasn't given an explanation that the law accepts. This means that the Claimant's application can't be treated as though it was made earlier.¹

Overview

[3] The Claimant applied for Employment Insurance (EI) benefits on October 13, 2021. He is now asking that the application be treated as though it was made earlier, on September 27, 2020. The Canada Employment Insurance Commission (Commission) has already refused this request.

[4] I have to decide whether the Claimant has proven that he had good cause for not applying for benefits earlier and that he qualified for benefits on the earlier day.

[5] In its original decision, the Commission said that the Claimant didn't have good cause because he relied on an assumption that he did not have enough hours to apply and did not make any enquiries to find out whether he should apply or might qualify.

[6] The Commission is now also saying that the Claimant would not have qualified for benefits at the earlier date.

[7] The Claimant disagrees and says that the delay was because of his employer's delay in uploading Records of Employment (ROE) to his Service Canada account. The COVID-19 pandemic had made it difficult to contact someone at his employer who could help him sort out the situation.

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

Matter I have to consider first

I will accept the documents sent in after the hearing

[8] The hearing in this case was originally scheduled for February 9, 2022. The Claimant did not appear at the hearing. After being contacted by the Tribunal, it was clear that the Claimant had not received the Notice of Hearing due to a mistake in his email address. I adjourned the hearing and a new hearing was scheduled for February 14, 2022.

[9] At the start of the hearing, it was clear to me that the Claimant had not received all the documentation usually sent by the Tribunal. In particular, he had not received the Commission's argumentation. Since the Commission had argued different reasons for refusing to antedate his claim then they had explained to him previously, I offered to adjourn the hearing again to allow him to see the arguments. The Claimant preferred to go ahead with the hearing. To ensure he had a fair chance to respond to the arguments, I ensured the documents were sent to him and allowed him until February 22, 2022 to provide a written rebuttal to the Commission's arguments.

[10] The Claimant sent in additional arguments. The Commission was given a chance to respond but chose not to. I will be considering the Claimant's additional arguments in this decision. They are directly related to the question of whether he qualified for benefits on the earlier day, which is an important element in the test for antedate.

Issue

[11] Can the Claimant's application for benefits be treated as though it was made on September 27, 2020? This is called antedating (or, backdating) the application.

Analysis

[12] To get your application for benefits antedated, you have to prove these two things:²

² See section 10(4) of the EI Act.

- a) 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.
- b) You qualified for benefits on the earlier day (that is, the day you want your application antedated to).

[13] The Commission originally refused to antedate the claim because they did not think the Claimant had good cause for the delay. In their arguments to the Tribunal, they have now said that the Claimant also did not qualify for benefits at the earlier date.

[14] If the Claimant would not have qualified for benefits on September 27, 2020, it would not matter if he had good cause for the delay in making the claim.

Could the Claimant have qualified for benefits on September 27, 2020?

[15] The Claimant would not have qualified for benefits on September 27, 2020.

[16] To qualify for benefits, a claimant has to have had an interruption of earnings and a specific number of hours of insurable employment in their qualifying period.³

[17] The qualifying period is generally the 52-week period before your benefit period would start.⁴

[18] The Government of Canada introduced temporary measures to help people access benefits during the COVID-19 pandemic. Because of these special measures, claimants who would have benefit periods established between September 27, 2020 and September 25, 2021, could have their qualifying period extended by 28 weeks, if they had received Canada Emergency Response Benefits (CERB) or Employment Insurance Emergency Response Benefits (EI-ERB).⁵

[19] In the Claimant's case, he confirms that he had received CERB, so he could benefit from this qualifying period extension. This would mean that his qualifying period

³ Subsection 7(2) of the Employment Insurance Act.

⁴ See section 8 of the Employment Insurance Act.

⁵ See section 153.18 of the Employment Insurance Act.

for a claim made on September 27, 2020, would be from March 17, 2019 to September 26, 2020.

[20] Next, because of the temporary measures, claimants could get a one-time credit of 300 hours of insurable employment. A minimum regional rate of unemployment of 13.1% was also put in place.⁶ Since a claim could be established with 420 hours of insurable employment, and there was a 300 hour credit applied, a claimant could qualify for benefits if they could show that they had 120 hours in their qualifying period.

[21] There are two ROEs in this file:

- a) The first shows that from July 29, 2019 to September 27, 2019, the Claimant had 81 hours of insurable employment.
- b) The second shows that from January 7, 2019 to April 13, 2019, the Claimant had 53 hours of insurable employment.

[22] Since the second ROE covers a period that extends outside the Claimant's qualifying period, not all the hours reported on this record count towards his claim.

[23] The 53 hours of employment must be divided by the 14 weeks that are reported on the ROE.⁷ Then, the number of hours per weeks is multiplied by the 4 weeks that fall into the extended qualifying period. This results in a total of 16 hours⁸ available to establish the Claimant's claim.

[24] The Claimant argues that all of the hours from this ROE should be used to show he qualifies for benefits. He says that as long as the ROE end date is within the active period of time, the total amount of hours insurable are used when calculating an application.

⁶ See sections 153.16 and 153.17 of the Employment Insurance Act

⁷ This would be 53 divided by 14 = 3.79 hours per week.

⁸ This is rounded up from 4 weeks times 3.79 hours per week = 15.16 hours.

[25] This is not the case. Hours accumulated outside of the qualifying period can not be used to qualify for benefits.⁹

[26] Considering the eligible hours of insurable employment on the two ROEs the Claimant would have had 97 hours of insurable employment in his qualifying period.¹⁰ With the added 300 hour credit, the Claimant would then have a total of 397 hours in his qualifying period. This is short of the 420 hours of insurable employment he would need to qualify for benefits on September 27, 2020.

[27] Since the Claimant did not have enough hours to qualify for benefits on September 27, 2020, his claim can't be antedated to that day.

[28] Even if I were to conclude that the Claimant had good cause for his delay, since he would not qualify for benefits, the antedate could not be allowed. Although the claim can't be antedated, I will still address the question of whether there was good cause for the delay.

Did the Claimant have good cause for the delay?

[29] To show good cause, the Claimant has to prove that he acted as a reasonable and prudent person would have acted in similar circumstances.¹¹ In other words, he has to show that he acted reasonably and carefully just as anyone else would have if they were in a similar situation.

[30] The Claimant has to show that he acted this way for the entire period of the delay.¹² That period is from the day he wants his application antedated to until the day he actually applied. So, for the Claimant, the period of the delay is from September 27, 2020 to October 13, 2021.

⁹ See the decision in *Haile v. Canada (Attorney General)*, 2008 FCA 193

¹⁰ This would be 81 hours plus 16 hours.

¹¹ See *Canada (Attorney General) v Burke*, 2012 FCA 139.

¹² See *Canada (Attorney General) v Burke*, 2012 FCA 139.

[31] The Claimant also has to show that he took reasonably prompt steps to understand his entitlement to benefits and obligations under the law.¹³ This means that the Claimant has to show that he tried to learn about his rights and responsibilities as soon as possible and as best he could. If the Claimant didn't take these steps, then he must show that there were exceptional circumstances that explain why he didn't do so.¹⁴

[32] The Claimant has to prove this on a balance of probabilities. This means that he has to show that it is more likely than not that he had good cause for the delay.

[33] The Claimant says that he had good cause for the delay because his pay stubs were not uploaded to his My Service Canada account by his employer. This created for him a false belief that he was not entitled to benefits. This was also based on a previous claim that was rejected because he did not have enough hours of insurable employment. The Claimant argues that his employer should be responsible for part of the delay.

[34] The Commission did not address this point in its argumentation before the Tribunal. From the evidence they provided, I see that when the claim was reconsidered, they told the Claimant he did not have good cause for the delay because when his Emergency Response benefits ended, he waited a year before filing his claim. He did not take any steps to find out if he should apply or if he might qualify. Relying on an assumption that he did not have enough hours based on a previous application was not good cause. He also could have applied without his records being uploaded.

[35] I find that the Claimant hasn't proven that he had good cause for the delay in applying for benefits because he did not take any steps to validate his assumption that he did not qualify for benefits.

[36] The Claimant explains that he had made a claim in March 2020 that had been refused because he did not have enough hours of insurable employment. At that time,

¹³ See *Canada (Attorney General) v Somwaru*, 2010 FCA 336; and *Canada (Attorney General) v Kaler*, 2011 FCA 266.

¹⁴ See *Canada (Attorney General) v Somwaru*, 2010 FCA 336; and *Canada (Attorney General) v Kaler*, 2011 FCA 266.

his ROEs had not been uploaded by his employer. He says that it was only in September 2021 that he realized the ROEs had not been uploaded. He argues that if the ROEs had been uploaded in March 2020, he would not have had the false impression that he did not have enough hours to qualify.

[37] I understand that the Claimant holds his employer responsible for the delay in uploading the ROEs. However, it is possible for a Claimant to file an application for benefits without an ROE. The application form says that you can. The fact that his ROEs were not uploaded would not have prevented the Claimant from applying for benefits.

[38] The Claimant has also not shown that he took any steps with the Commission to try and resolve the situation. While I see he did put in a lot of effort to get his ROEs into his Service Canada account, I do not see any evidence that he contacted Service Canada to ask about applying without the ROEs or what to do if his employer couldn't provide them.

[39] The employer's delay in uploading the documents was unfortunate. But the Claimant has not shown that until the summer of 2021 he had taken any steps with the Commission to find out why he did not have enough hours to qualify, or if there was anything that could be done to correct it. It was his responsibility to do so.

Conclusion

[40] The Claimant hasn't proven that he qualified for benefit on the earlier day. He has also not shown that he had good cause for the delay in applying for benefits throughout the entire period of the delay.

[41] The appeal is dismissed.

Leanne Bourassa
Member, General Division – Employment Insurance Section