



Citation: *MB v Canada Employment Insurance Commission*, 2022 SST 394

Social Security Tribunal of Canada Appeal Division

Decision

Appellant: M. B.
Representative: S. B.

Respondent: Canada Employment Insurance Commission
Representative: Isabelle Thiffault

Decision under appeal: General Division decision dated November 3, 2021
(GE-21-1855)

Tribunal member: Janet Lew

Type of hearing: Teleconference
Hearing date: May 3, 2022
Hearing participants: Appellant
Appellant's representative
Respondent's representative

Decision date: May 16, 2022
File number: AD-21-418

Decision

[1] The appeal is allowed in part.

[2] The General Division did not make any factual errors.

[3] However, the General Division did not determine whether the Appellant, M. B. (Claimant), was eligible for benefits after June 24, 2021, although the issue was the subject of her reconsideration request. I am returning this matter to the General Division on this issue alone.

Overview

[4] This is an appeal of the General Division decision. The General Division found that the Appellant, M. B. (Claimant), did not have good cause for her delay when she applied for Employment Insurance benefits on June 24, 2021. As a result, the General Division decided that it could not antedate the Claimant's application to September 27, 2020, as if she had made her application on that date.

[5] The Claimant argues that the General Division made jurisdictional, procedural, and factual errors. In particular, the Claimant argues that the General Division ignored evidence that showed she had good cause for her delay. The Claimant also argues that the General Division failed to address the issue regarding her eligibility for benefits after June 24, 2021.

[6] The Respondent, Canada Employment Insurance Commission (Commission), argues that the General Division did not make any factual or procedural errors. However, the Commission acknowledges that the issue regarding the Claimant's eligibility for benefits after June 24, 2021 remains outstanding and that I should therefore return this matter to the General Division.

Issues

[7] The issues in this appeal are as follows:

- (a) Did the General Division ignore the Claimant's evidence about her efforts to find out about her entitlement to benefits?
- (b) Did the General Division refuse to let the Claimant argue whether she was eligible to receive Employment Insurance benefits?
- (c) Did the General Division fail to consider whether she was eligible to receive Employment Insurance benefits after June 24, 2021?

Analysis

[8] The Appeal Division may intervene in General Division decisions if there are jurisdictional, procedural, legal, or certain types of factual errors.¹

Did the General Division ignore the Claimant's evidence about her efforts to find out about her entitlement to benefits?

[9] The Claimant argues that the General Division ignored her evidence that she took reasonably prompt steps to find out about her entitlement to benefits. She argues that, if the General Division had not ignored this evidence, it would have accepted that she acted as a reasonable and prudent person would have acted in similar circumstances. And, she says that the General Division would have accepted that she had good cause for the delay in applying for benefits.

[10] The Claimant also argues that, by ignoring this evidence, the General Division assumed that she was not credible.

[11] The Claimant had been receiving the Canada Emergency Response Benefit. The Claimant says that when these benefits ended in September 2020, she contacted

¹ See section 58(1) of the *Department of Employment and Social Development Act*.

Canada Revenue Agency (CRA) about any available benefits. She says that CRA directed her to a website. But, she found the website misleading, or confusing at best.

[12] The Claimant states that she contacted the Commission in January 2021 and again in April 2021. The Claimant relies on phone records to prove that she contacted Service Canada. The phone records show that the Claimant placed an 18-minute phone call to the Commission at 1-800-206-7218 on April 16, 2021.

[13] The Claimant also relies on the phone records to dispel any credibility findings that the General Division made against her.

[14] The Claimant states that she can obtain additional phone records that pre-date April 2021 to show that she made earlier enquiries.

– **New evidence**

[15] The General Division did not have a copy of the Claimant's phone records. The Claimant did not produce any of these phone records at the General Division. She did not expect that her credibility would become an issue. She thought the General Division would accept her oral evidence.

[16] The Claimant argues that the General Division made an error when it found that she was not credible and that she had not made any enquiries before June 2021. She argues that I should accept the phone records as they support what she says. She says they prove that she made enquiries before June 2021.

[17] The Commission objects to the admissibility of these phone records. The Commission argues that the Appeal Division cannot accept new evidence.

[18] Generally, the Appeal Division does not accept new evidence. As the Federal Court wrote, "New evidence is not admissible at the Appeal Division as it is limited to the grounds in subsection 58(1) [of the *Department of Employment and Social Development Act*] and does not constitute a hearing *de novo*."²

² See *Marcia v Canada (Attorney General)*, 2016 FC 1367 at para 34.

[19] Given what the Federal Court decided about new evidence, I cannot accept the phone records into evidence at this stage.

– **Conflicting evidence before the General Division**

[20] The General Division noted the Claimant's evidence regarding her efforts to find out about her entitlements:

- At paragraph 11c). the General Division noted that during her reconsideration interview, the Claimant stated her first enquiry was made in June 2021
- At paragraph 14, the General Division noted that the Claimant stated in her Notice of Appeal that since October 2020, she had tried to contact CRA and access "CRA/EI website" for information about her eligibility
- Also at paragraph 14, the General Division noted that the Claimant also stated in her Notice of Appeal that she spoke with an "EI Rep." in April and again in May 2021. She also gave this evidence at the General Division hearing.
- At paragraph 15, the General Division noted the Claimant's testimony that she "tr[ie]d to get CRA on the phone" in October [2020]. She reached an automated response directing her to its website.

[21] The General Division was aware of the Claimant's evidence that she had made enquiries about her eligibility, dating back to October 2020. The General Division did not ignore this evidence.

[22] The General Division simply did not accept the Claimant's testimony at the hearing because it found there was no supporting evidence to confirm that the Claimant had made any enquiries early on.

[23] The General Division had to make a decision based on the evidence before it. Unfortunately for the Claimant, she gave conflicting statements to the Commission about when she made enquiries. The General Division had to choose what evidence it

accepted. It was entitled to prefer some and reject other pieces of the Claimant's evidence, as long as there was a reasonable basis for its decision.

[24] The General Division explained why it gave "greatest weight"³ to the Claimant's initial statements. The General Division explained that the Claimant gave the statements spontaneously. The statements were the first she gave about any steps she took.

[25] By contrast, the General Division found that the Claimant made her later statements after the Commission had refused her antedate request. It found the Claimant's later statements "tailored and self-serving."⁴

[26] The General Division was entitled to draw these conclusions, based on the evidence before it.

– **Claimant had to act as a reasonable and prudent person for the entire period of the delay**

[27] The Commission argues that, even if the General Division had the phone records or if I were to accept them, they still do not show that the Claimant acted as a reasonable and prudent person would have acted in similar circumstances.

[28] The Commission argues that, even with the phone records, that still leaves a gap between September 2020 and April 2021 during which the Claimant failed to make any direct enquiries with the Commission. The Commission argues that it was unreasonable that the Claimant did not call the Employment Insurance Commission or Service Canada, if she was seeking Employment Insurance benefits. Instead, she called another government agency.⁵

[29] The Commission argues that the Claimant still had to show that she acted as a reasonable and prudent person would have done in similar circumstances to verify her

³ General Division decision, at para 27.

⁴ General Division decision, at para 28.

⁵ Service Canada delivers services on behalf of the Canada Employment Insurance Commission.

rights and obligations under the *Employment Insurance Act* – **for the entire period of the delay.**

[30] The Claimant now states that she contacted CRA on January 4 or 14, 2021. This evidence did not arise at the General Division. But, even if it had, that would still leave gaps between October 2020 and January 2021, and between January 2021 and April 2021, during which the Claimant made no enquiries at all, whether to the Commission or anyone else.

[31] There is also the gap between May 2021 and June 24, 2021. The Claimant testified that she contacted Service Canada sometime in May 2021. But, that still left at least several weeks before she applied for Employment Insurance benefits.

[32] The Claimant states that she continued to conduct her own research after she called Service Canada in May 2021. That way, she could satisfy herself that she was eligible for benefits.

[33] However, it is clear that the General Division found the Claimant's research efforts insufficient as to what a reasonable and prudent person would have done. Although the General Division did not refer to it its decision, the Commission had noted that the Federal Court of Appeal has determined that a claimant cannot rely on general information on the Service Canada website for their own particular situation.⁶

[34] The Court of Appeal wrote, "Since the [Service Canada] website does not purport to deal with the specifics of every person's particular situation, claimants cannot reasonably treat information on it as if it were personally provided to them by an agent in response to an inquiry about their eligibility and given facts."⁷

[35] In other words, the Claimant did not act as a reasonable and prudent person for the entire period of the delay.

⁶ See Commission's representations to the Social Security Tribunal-Employment Insurance section, at GD4-3, citing *Mauchel v Canada (Attorney General)*, 2012 FCA 202.

⁷ See *Mauchel*, at para 15.

– **Summary**

[36] The General Division did not ignore or overlook the Claimant’s testimony. The General Division simply did not accept some of the Claimant’s evidence. The General Division was entitled to do this.

[37] Even if the Claimant had produced evidence at the General Division that she had made enquiries with CRA or Service Canada since October 2020, it would not have changed the outcome. Gaps remained during which the Claimant did not make any enquiries. This included the gap after May 2021. It is clear that the General Division required the Claimant to show that she acted reasonably—by making enquiries—for the entire period of the delay.

Did the General Division refuse to let the Claimant argue about whether she was eligible to receive Employment Insurance benefits?

[38] The Claimant argues that the hearing at the General Division was unfair. She says that the Commission admitted that she was eligible to receive Employment Insurance benefits. She claims, however, that the General Division “refused to talk about it during the hearing.”⁸ She says the General Division then mentioned the issue in its decision but dismissed her appeal.

[39] The Commission acknowledged that the Claimant qualified for benefits at the earlier date of September 27, 2020.⁹

[40] The General Division also found that the Claimant could qualify for benefits. The General Division wrote:

Since there is no dispute about whether the Claimant in this case could qualify for [Employment Insurance] benefits as of September 27, 2020, I will focus my analysis on whether there was good cause throughout the period of the delay.¹⁰

⁸ See Claimant’s application to the Appeal Division, at AD1-4.

⁹ See Commission’s representations to the Social Security Tribunal-Employment Insurance section, at GD4-2.

¹⁰ See General Division decision, at para 7.

[41] However, the fact that the Claimant **could** qualify for benefits should not be confused with entitlement to receive benefits at the earlier date.

[42] If the Claimant wanted benefits to begin immediately after she stopped working in late September 2020, she would have had to show that she had good cause for the delay in applying for benefits, for the entire period of the delay.

[43] The General Division gave the Claimant a full and fair opportunity to address this issue. She could have filed written arguments. She also had the chance to give evidence and make verbal arguments at the General Division hearing.

[44] I am not satisfied that the General Division refused to let the Claimant argue about whether she was eligible to receive Employment Insurance benefits.

Did the General Division fail to consider whether the Claimant was eligible to receive Employment Insurance benefits after June 24, 2021?

[45] The Claimant argues that the General Division failed to exercise its jurisdiction. The Claimant says that, even if the General Division determined that she was not eligible for Employment Insurance benefits from September 27, 2020, she was still eligible to receive benefits after June 24, 2021. So, she says the General Division should have considered whether she was eligible to receive benefits after June 24, 2021. She argues that it failed to do so, as it only considered whether she could backdate her application to September 27, 2020.

[46] The General Division gets its jurisdiction from sections 112 and 113 of the *Employment Insurance Act*. These sections say a party can appeal a reconsideration decision of the Commission. Typically, the issue in a reconsideration decision is the subject of the appeal at the General Division.

[47] The Claimant's Notice of Appeal¹¹ shows that she was appealing the Commission's reconsideration decision of September 14, 2021.¹² The Commission's

¹¹ See Notice of Appeal filed to the General Division, at GD2-5.

¹² See Commission's reconsideration decision, at GD3-23 to GD3-24.

reconsideration decision dealt with whether the Claimant could backdate her application. The Commission did not consider whether the Claimant was eligible to receive benefits after June 24, 2021.

[48] Generally, this would mean the General Division was limited to considering whether the Claimant could backdate her application because this was the only issue arising out of the reconsideration decision.

[49] Even so, the Commission says the General Division should have addressed whether the Claimant could pursue the issue about her eligibility for benefits. After all, when the Claimant asked the Commission to reconsider its initial decision, she stated that she had insurable hours. She noted that she had submitted pay stubs to prove that she had insurable hours.¹³ She submitted pay stubs because her employer had not issued a Record of Employment.

[50] The Claimant clearly expected the Commission to decide whether she was eligible to receive benefits after June 24, 2021. Indeed, the Claimant did not even raise the issue about backdating her application when she asked the Commission to reconsider its decision.

[51] The Commission acknowledges that it has yet to respond to the issue that the Claimant raised in her reconsideration request. In other words, the Commission has not decided one way or the other about whether the Claimant was eligible to receive benefits after June 24, 2021.

[52] The issue about the Claimant's eligibility was not squarely before the General Division. But, the Commission says the General Division should have addressed the issue, since the Claimant had brought it up in her reconsideration request.

[53] The Commission offers a remedy.

¹³ See Claimant's Request for Reconsideration, at GD3-18 to GD3-20.

Remedy

[54] The issue about the Claimant's eligibility for benefits after June 24, 2021, did not properly arise before the General Division, as the Commission had not made a decision on it. The reconsideration decision was solely about whether the Claimant could backdate her application. The Claimant based her appeal to the General Division on the backdating issue too.

[55] Even so, as a practical matter, the Commission proposes that I return this matter to the General Division. It asks me to do this because the General Division did not deal with the issue about whether the Claimant was eligible to receive benefits after June 24, 2021. After all, the Claimant had expected a decision on this issue.

[56] The Commission indicates that it will issue a reconsideration decision that directly responds to the Claimant's reconsideration request for benefits after June 24, 2021. It will issue a reconsideration decision while the matter is being returned to the General Division.

[57] The Commission says that, in the event it denies the Claimant's request for benefits after June 24, 2021, she could then pursue this issue on appeal to the General Division. She could do this without the necessity of having to file another Notice of Appeal with the General Division. The Commission would be prepared to accept the existing Notice of Appeal as an appeal on the eligibility issue.

[58] I agree with the Commission that returning this matter to the General Division is the most practical resolution. It saves the Claimant from having to file another notice of appeal, if it should come to that.

[59] Once the matter has been returned to the General Division, it should wait until the Commission has issued a reconsideration decision. If the Commission decides the Claimant is ineligible for benefits after June 2021, then the General Division should ask the Claimant whether she still wants to go ahead with an appeal at the General Division on the issue of her eligibility for benefits after June 24, 2021. If so, the General Division can then take the appropriate steps to move the matter forward.

Conclusion

[60] The appeal is allowed in part.

[61] I am returning this matter to the General Division on the issue of the Claimant's eligibility for Employment Insurance benefits after June 24, 2021.

[62] The General Division should put this matter aside until after the Commission issues a reconsideration decision on the eligibility issue.

[63] If the Commission decides in the Claimant's favour, there would be no need to proceed with an appeal. However, if the Commission determines that the Claimant is ineligible for benefits after June 24, 2021, then the General Division should verify with the Claimant that she indeed intends to proceed with an appeal of the Commission's reconsideration decision on the eligibility issue. It could then move the matter forward and ensure a complete evidentiary record that addresses the eligibility issue.

Janet Lew
Member, Appeal Division