



Citation: *AK v Canada Employment Insurance Commission*, 2022 SST 544

## **Social Security Tribunal of Canada Appeal Division**

# **Decision**

**Appellant:** A. K.

**Respondent:** Canada Employment Insurance Commission  
**Representative:**

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**Decision under appeal:** General Division decision dated March 3, 2022  
(GE-22-293)

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**Tribunal member:** Charlotte McQuade

**Type of hearing:** On the record

**Decision date:** June 22, 2022

**File number:** AD-22-174

## Decision

[1] The appeal is allowed. The General Division erred in law by misapplying the test for backdating an initial claim for benefits (antedate). I am substituting my decision for that of the General Division. The Claimant's initial claim can start on July 14, 2019.

## Overview

[2] A. K. is the Claimant. She applied for Employment Insurance (EI) regular benefits on December 19, 2019. Her application was late. She asked the Canada Employment Insurance Commission (Commission) to treat her claim as though it was made earlier, on July 14, 2019. The Commission decided the Claimant hadn't shown good cause for the delay, and refused her request.

[3] The Claimant appealed the Commission's decision to the Tribunal's General Division. The General Division decided the Claimant couldn't start her claim on July 14, 2019, because she hadn't shown good cause for the delay. The Claimant disagreed with the General Division's decision and is now appealing to the Appeal Division.

[4] The parties agree that the General Division erred in law by misapplying the legal test for backdating her initial claim. Both parties agree that I should fix this error by giving the decision the General Division should have given: the Claimant's initial claim can start on July 14, 2019.<sup>1</sup>

[5] The appeal is allowed. The General Division erred in law. I am substituting my decision for that of the General Division and finding that the Claimant's initial claim can start on July 14, 2019.<sup>2</sup>

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<sup>1</sup> See documents AD4 and AD5.

<sup>2</sup> See Section 58(1) of the *Department of Employment and Social Development Act* (DESD Act), which says that I can intervene in the General Division's decision when it makes an error of law.

## **The parties agree on the outcome of the appeal**

[6] Prior to the hearing of the appeal, the Commission provided submissions conceding that the General Division had erred in law by misapplying the test for antedate.

[7] Both parties agree that I should allow the appeal, substitute my decision for that of the General Division, and find that the Claimant's initial claim is to start on July 14, 2019.<sup>3</sup>

## **I accept the proposed outcome**

[8] I accept that the General Division misapplied the legal test for backdating an initial claim.

[9] When a person makes an initial claim for benefits after the date that they were first qualified to make the claim, they may request to have their claim backdated to start on an earlier date.

[10] To have the claim start earlier, the person must show that they qualified for benefits on the earlier date and that there was good cause for the delay throughout the period of the delay.<sup>4</sup>

[11] To show good cause, a person must show they acted as a reasonable and prudent person would have acted in similar circumstances.<sup>5</sup> They must also show that they took reasonably prompt steps to understand their entitlement to benefits and obligations under the law.<sup>6</sup> If the person didn't do so, they have to show that there were exceptional circumstances.<sup>7</sup>

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<sup>3</sup> See documents AD4 and A5.

<sup>4</sup> See section 10(4) of the *Employment Insurance Act* (EI Act).

<sup>5</sup> See *Canada (Attorney General) v Burke*, 2012 FCA 139.

<sup>6</sup> See *Canada (Attorney General) v Somwaru*, 2010 FCA 336; and *Canada (Attorney General) v Kaler*, 2011 FCA 266.

<sup>7</sup> See *Canada (Attorney General) v Somwaru*, 2010 FCA 336; and *Canada (Attorney General) v Kaler*, 2011 FCA 266.

[12] The General Division decided that the Claimant didn't have good cause for the delay.

[13] The General Division correctly described the legal test for antedate. However, it applied a different test to the facts.

[14] The General Division found that the Claimant had delayed her claim for benefits based on a phone enquiry she had with the Commission when her work ended. The General Division accepted that the Claimant understood from that conversation that she couldn't apply for EI benefits until she had a decision from the Commission des normes, de l'équité, de la santé et de la sécurité du travail (CNESST) that she had been constructively dismissed.<sup>8</sup>

[15] The General Division concluded that the Claimant hadn't shown good cause for the delay. The General Division decided that one reason the Claimant hadn't shown good cause was that, after she made her claim with the CNESST, she did not talk to Service Canada to say she had made a claim with the CNESST, that a hearing date was approaching or that she was looking for other benefit options while she waited.

[16] The General Division decided that all of those steps would have been reasonable and would have demonstrated that the Claimant still intended to make a claim for benefits. These steps could also have permitted Service Canada to explain that she might still be able to file for benefits while she awaited the outcome of her CNESST claim.<sup>9</sup>

[17] In asking itself whether the Claimant's actions were reasonable and demonstrated that she still intended to make a claim for benefits, the General Division misapplied the legal test for whether the Claimant had shown "good cause for the delay." The General Division should have asked itself whether the Claimant acted as a reasonable and prudent person would have acted in similar circumstances.

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<sup>8</sup> See paragraphs 17 to 19 of the General Division decision.

<sup>9</sup> See paragraph 20 of the General Division decision.

[18] Because the General Division erred in law, I can intervene in this case.

## **Remedy**

[19] Both the Claimant and the Commission agree that I should make the decision that the General Division should have made.<sup>10</sup> They also agree on what that decision should be. The parties agree that the Claimant had good cause for the delay and that her claim should be antedated to July 14, 2019.

[20] The Claimant had a fair opportunity to provide evidence at the General Division hearing and the record is complete. So, I will substitute my decision for that of the General Division.

[21] The parties' agreement that the Claimant's initial claim should be backdated to start on July 14, 2019, is an outcome that is consistent with law and facts on file.

[22] The Claimant's last day of work was July 18, 2019.<sup>11</sup> Based on a conversation with the Commission on July 18, 2019, the Claimant understood she couldn't apply for EI benefits until she had a decision from the CNESST.

[23] The Claimant followed the Commission's instruction and filed a claim with the CNESST on July 18, 2019. She signed a settlement agreement with her employer for that CNESST claim on November 12, 2019, and then applied for EI benefits on December 19, 2019.

[24] The Claimant testified about the reason for the delay between November 12, 2019, and December 19, 2019. She said she had contacted the Commission when she had the settlement agreement from the CNESST and was told it was too late to file her EI claim. She then was emailing the CNESST back and forth trying to reach someone there. She also contacted her lawyer who contacted the Commission and was told it was too late for her to apply. Her lawyer told her to apply anyway, which is what she did.

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<sup>10</sup> Section 59(1) of the DESD Act gives me this authority.

<sup>11</sup> See page GD3-24.

Also during this period, her father was very ill with cancer and passed away in December 2019.<sup>12</sup>

[25] The Claimant acted as a reasonable and prudent person would have in her circumstances. She also took reasonably prompt steps to understand her entitlement to benefits and obligations under the law.

[26] I find that a reasonable and prudent person who had been told to delay her EI application until she had a decision from the CNESST would do the same as the Claimant did and follow that instruction.

[27] The Claimant continued to act as a reasonable and prudent person would have in her circumstances, for the period from November 12, 2019, to December 19, 2019. A reasonable and prudent person in her circumstances would have done as the Claimant did and contacted the Commission once she had the settlement agreement on November 12, 2019, and then contacted her lawyer when she was unable to resolve the situation on her own. A reasonable and prudent person in the Claimant's situation would have done as the Claimant did and followed the lawyer's advice to file the EI claim even though the Commission had said it was too late.

[28] I find the Claimant took reasonably prompt steps to understand her entitlement to benefits and obligations under the law. She contacted the Commission right away after her job ended and followed the Commission's instructions to file a claim with the CNESST. She then promptly contacted the Commission once she had the settlement agreement relating to the CNESST claim and tried to file her EI claim. When told it was too late, she called her lawyer for help and promptly followed his advice to file an EI claim.

[29] The Claimant has shown good cause for the delay between July 14, 2019, and December 19, 2019.

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<sup>12</sup> I heard this on the audio recording from the General Division hearing at approximately 00:17:00.

[30] The Commission hasn't provided any submissions stating that the Claimant does not qualify for benefits as of July 14, 2019. Rather, it submits that the Claimant meets the test for antedate.<sup>13</sup> So, I accept that the Claimant qualified for benefits on July 14, 2019.

[31] The Claimant's initial claim is to start on July 14, 2019.

## **Conclusion**

[32] The appeal is allowed. The General Division erred in law. I have substituted my decision for that of the General Division and find that the Claimant's initial claim is antedated to July 14, 2019.

Charlotte McQuade  
Member, Appeal Division

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<sup>13</sup> See page AD5-1.