



Citation: *DF v Canada Employment Insurance Commission*, 2022 SST 484

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

Decision

Appellant: D. F.
Representative: J. F.
Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission
reconsideration decision (453091) dated February 1, 2022
(issued by Service Canada)

Tribunal member: Candace R. Salmon
Type of hearing: Videoconference
Hearing date: March 30, 2022
Hearing participants: Appellant
Appellant's representative
Decision date: May 30, 2022
File number: GE-22-376

Decision

[1] The appeal is allowed.

[2] The Claimant has shown that he had good cause for the entire period of the delay in applying for benefits. This means that his application can be backdated.¹

Overview

[3] The Claimant applied for Employment Insurance (EI) benefits on December 1, 2021. He is now asking that the application be treated as though it was made earlier, on November 1, 2020. The Canada Employment Insurance Commission (Commission) has refused this request.

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

[5] The Commission says that the Claimant didn't have good cause because he did not act like a reasonable person in his situation would have done to understand his rights and obligations under the law. The Commission submits that the Claimant delayed 58 weeks in applying for EI benefits, because he was not familiar with the EI program.

[6] The Claimant submitted that his mother told him he couldn't receive EI benefits because he was fired from a job. He said he didn't know a lot about EI, but he trusted and relied on his mother's information. He states that where he lives there isn't much information about the EI program, and submits there are exceptional cultural circumstances that explain why he failed to apply on time.

Issue

[7] Can the Claimant's application for benefits be treated as though it was made on November 1, 2020? This is called antedating (or, backdating) the application.

¹ Section 10(4) of the *Employment Insurance Act* uses the term "initial claim" when talking about an application. I use application because it is clearer.

Analysis

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

- 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).

[9] The Commission admits that the Claimant qualified for benefits on the earlier date.³ Therefore, the issue is whether he had good cause for the entire period of the delay in applying for benefits.

[10] To show good cause, the Claimant has to prove that he acted as a reasonable and prudent person would have acted in similar circumstances.⁴ In other words, he has to show that he acted reasonably and carefully just as anyone else would have if they were in his situation.

[11] The Claimant has to show that he acted this way for the entire period of the delay.⁵ That period is from the day he wants his claim to start, until the day he actually applied. So, for the Claimant, the period of the delay is from November 1, 2020, until December 1, 2021.

[12] The Claimant also has to show that he took reasonably prompt steps to understand his entitlement to benefits and obligations under the law.⁶ This means that he 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.⁷

² See section 10(4) of the *Employment Insurance Act*.

³ See GD4-2.

⁴ See *Canada (Attorney General) v Burke*, 2012 FCA 139 at para 5.

⁵ See *Canada (Attorney General) v Burke*, 2012 FCA 139 at para 5.

⁶ See *Canada (Attorney General) v Somwaru*, 2010 FCA 336 at para. 11; and *Canada (Attorney General) v Kaler*, 2011 FCA 266 at para 4.

⁷ See *Canada (Attorney General) v Somwaru*, 2010 FCA 336 at para 11.

[13] 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.

[14] The Claimant first spoke to a Commission agent on December 14, 2021. He asked to antedate his claim to November 1, 2020. He said he applied late because he wasn't familiar with "how EI works." He stated he hadn't used the program before and was told he wouldn't qualify because his job loss "wasn't COVID related."

[15] The Claimant's next call with the Commission was on January 10, 2022. He stated that he lives on a reservation, and was told by his friends that he wouldn't qualify for EI if his reason for losing his job wasn't COVID-19 related. He said this is why he didn't apply on an earlier date. He said that he didn't contact Service Canada, and never inquired about how EI works.

[16] The Commission refused to antedate the claim. The Claimant asked for reconsideration. He stated that on the reserve,⁸ information about EI is non-existent. He said that when he was informed by a friend about the program, he made a claim.

[17] The Claimant spoke to a different Commission agent on February 1, 2022. He said that he applied late for benefits because he was dismissed from his employment and did not think he would qualify. He added that he had access to the internet and a personal computer, but did not visit the Commission's website to research the program and did not contact Service Canada. He said the closest Service Canada location is an approximately 20 minute drive from his home.

[18] The Commission's notes say that the Claimant lives on a reserve, and that he said "reserve people" don't know much about the EI program. At the hearing, he disputed this statement. He said that he, "did not say that, but I guess that's what" the agent heard. He said that while the agent was "probably listening" to him, it "felt like they weren't listening." The Claimant also described microaggressions he experienced when trying to access services, like being spoken over, or feeling like he wasn't accepted. He also cited the

⁸ A reserve is land set aside by the Crown for the use and occupancy of a First Nation group. See the *Indian Act* (R.S.C., 1985, c. I-5).

issue of taxis requiring people on the reserve to pay in advance, which they don't do anywhere else in town.

[19] The Claimant also said that his girlfriend convinced him to apply for EI benefits. He told the Commission that it took approximately six months for her to convince him to apply.

[20] The Commission maintained its decision. It refused to backdate the Claimant's claim for EI benefits. He appealed to the Tribunal. In the notice of appeal, he said that he hadn't received any of his Records of Employment (ROE), so he didn't know that he could have applied for EI. He reiterated again that his mother told him that he wouldn't qualify for EI because he was fired from his job. He said this was the, "main reason [he] didn't apply on time." He said, "with living on the reserve, my mother has always been my main source of information."

[21] The Commission says that the Claimant hasn't shown good cause for the delay because he failed to act as a reasonable person in his circumstances would have done. It states that the Claimant waited 58 weeks to file a claim for EI benefits, because he wasn't familiar with the EI program. It adds that the Claimant's statements weren't consistent with the record, because he said he wasn't familiar with the EI program, but said his girlfriend had experience with the program. It also notes that the Claimant stated that it took six months for his girlfriend to convince him to apply for EI benefits, so he did not apply at the first opportunity when he became aware that he may qualify.

[22] The Commission says that no exceptional circumstances exist in this case. It considered that the Claimant had access to a telephone and the internet, and the closest Service Canada location was only 20 minutes away.

[23] The Claimant says that he has shown good cause for the entire period of the delay because he acted as a reasonable person in his circumstances would have done, meaning the circumstances of being an indigenous person with little experience dealing with government bodies, and significant nervousness.

[24] His representative submitted that the Claimant did not feel that information about EI was accessible to him. Typically, what is discussed where he lives is a welfare

program, not EI. She submitted that while the Claimant had access to the internet and a phone, in his experience those government programs weren't accessible to him. She didn't mean that he couldn't physically access a website, but he didn't feel that the program itself was accessible to someone like him.

[25] I agree with the Commission that the Claimant had access to a telephone and the internet, which are resources he could have used to learn about his eligibility for benefits. He was also told by his girlfriend that he could apply and may qualify, but he waited six months to act on that information. The vital evidence that sets this case apart was delivered at the hearing.

[26] The Claimant was represented by a legal clinic, and his girlfriend attended as a witness. His girlfriend testified that she was in the room and listening on a speaker phone for every conversation the Claimant had with the Commission.

[27] The Claimant appeared nervous at the hearing, and did not often engage in fulsome responses to questions. He stated at one point that he was, "pretty nervous" and didn't have experience dealing with government agencies. He said he gets "nervous around government." He did not offer information easily. His girlfriend often added to his statements, and he agreed that her information was correct, but he did not elaborate. Multiple times, his representative stated, "you told me "x" before this hearing" and asked him to address points he hadn't made at the hearing. It was clear to me that the Claimant was not comfortable in the process.

[28] When the Claimant stated that his mother told him he couldn't get EI because he was fired from his job, his representative pushed him to address this more fully. The evidence and submissions from the Claimant and representative were that the Claimant grew up on a reserve and is an indigenous person. He is young, and relies heavily on his mother's statements because it is part of his culture to believe and respect the opinions and statements made by elders. This is why he did not question his mother's statement that he couldn't qualify for EI benefits. When his girlfriend said that he may qualify and should apply and try, he felt uncomfortable because he respects his mother and felt it would be a waste of everyone's time to try to obtain EI benefits.

[29] The witness stated that she kept bringing up the EI program because she felt the Claimant was stuck in a bad position and should be entitled to EI benefits because he worked and earned the insurable hours of employment to qualify. The representative submitted that the Claimant eventually applied for EI only because his girlfriend “wouldn’t stop asking.” The Claimant agreed with this statement.

[30] The Claimant testified that he always knew that the EI program existed, and thought that it was there to give you money if you weren’t working. He stated that he thought his situation was different because he was fired. He added that while the Commission is correct that the closest Service Canada location is a 20 minute drive from his home, it is not easy for him to access transportation. He said there are busses and taxis; but, if you call a taxi to drive you, they always make people on the reserve pay upfront instead of paying on arrival like everyone else.

[31] The representative submitted that the Claimant and his girlfriend have different views on how things work, because she is not indigenous. Her experience is that, “things will work out and will be fine” because that’s her experience as a white woman. The Claimant expected to be denied and that there wouldn’t be a positive resolution, because that’s his experience. He is used to being treated differently. He pursued this claim only because his girlfriend pushed him to do it, based on her experience. The Claimant agreed with his representative’s submissions.

[32] I don’t see any evidence that the Commission considered all of the Claimant’s circumstances when it determined that he didn’t act as a reasonable person. There are comments in the file stating he lives on a reserve, but there were no follow-up questions about how that related to his claim or the delay in filing for EI benefits. It is vital to recognize that the Claimant grew up and has lived his entire life on a reserve. This community has shaped his life experience, who he is, and what a reasonable person in his circumstance would be.

[33] I find the Claimant acted as a reasonable person in his circumstances. He relied on his mother’s statement that he would not be entitled to EI, not only because she had experience with the EI program and was his parent, but because it was culturally

respectful and appropriate to follow her advice. The Claimant's girlfriend later told him that he should apply anyway, because he might be entitled. He delayed further, because he believed his mother and felt it would be inappropriate, in addition to useless, to apply for EI benefits.

[34] The law says that unless there are exceptional circumstances, a Claimant is expected to take reasonably prompt steps to understand their rights and obligations under the law.⁹

[35] The population of indigenous people in Canada is just under five percent of the national population.¹⁰ The history of colonialism, displacement, and residential schools,¹¹ and their ongoing impact, is unique to this group of people in Canada. The fact that the Claimant is an indigenous person, born and raised on a reserve, who has rarely interacted with government agencies and is nervous to deal with the government creates a unique circumstance that I find exceptional.

[36] The antedate provisions in the *Employment Insurance Act* are not the product of "mere legislative whim,"¹² but contain a policy that is vital to its efficient administration. Antedating a claim for benefits may adversely affect the integrity of the system, because it gives a claimant a retroactive and unconditional award of benefits without any possibility of verifying the eligibility criteria during the period of retroactivity.¹³ Antedate is not a right of every claimant, but is an advantage for which he must qualify; and, as the courts have said, it is an advantage that should be applied exceptionally. The obligation to promptly apply for EI benefits is seen as very demanding and strict. This is why the "good cause for delay" exception is cautiously applied.

⁹ See *Canada v. Somwaru*, 2010 FCA 336 at para 11.

¹⁰ See Indigenous Services Canada's Annual Report to Parliament 2020 at page 9.

¹¹ I have opted not to add length and potential confusion to the readers of this decision by explaining official notice, and subsequently taking official notice of colonialism, displacement, and residential schools. However, I find these are facts that are clearly beyond reasonable dispute and would correctly be subject to official notice. See *R. v. Find*, 2001 SCC 32 at para. 48.

¹² See *Canada (Attorney General) v. Beaudin*, 2005 FCA 123 at para 5.

¹³ See *Canada (Attorney General) v. Beaudin*, 2005 FCA 123 at para 5.

[37] There is no question that the Claimant did not take prompt steps to learn about his rights and obligations under the law. However, the law also allows for exceptional circumstances. I find the Claimant has established that his experience as an indigenous person on a reserve is an exceptional circumstance that impacted his access to information about the EI program, because he relied on the advice of his mother instead of communicating with the Commission. He further delayed in applying when his girlfriend first encouraged him to apply, because he respected his mother's advice and opinion.

[38] Further, the Claimant exhibited nervousness at the hearing, and at one point stated he was nervous interacting with government. While the Tribunal is a separate entity from the Commission, I understand that in the Claimant's view the Tribunal is an agent of the government. It is reasonable to believe that his fear and nervousness would have extended to dealing with the Commission as well. I find this means he acted as a reasonable person in his circumstances because a reasonable person who has lived the Claimant's life, recognizing the history of colonialism, displacement, and residential schools, may reasonably feel they cannot access government programs because the government is not an ally or a body they can trust.

[39] The fact that the Claimant is an indigenous person living on a reserve with a particular set of experiences that impacted his application for EI existed throughout the entire period of the delay, meaning the exceptional circumstances existed throughout the entire period.

[40] This means I find that the Claimant meets the first part of the test for antedating a claim, because he had exceptional circumstances for failing to take reasonably prompt steps to understand his rights and obligations under the law.

[41] Further, the Commission submits that the Claimant would have qualified on the earlier date. As there is no evidence to the contrary, I accept this as fact. Therefore, the Claimant also meets the second legal requirement to grant antedate.

Other Issues

[42] One of the Claimant's arguments was that a person shouldn't carry the full responsibility for accessing government programs. He said that the government should be responsible for ensuring information about their programs is readily available no matter where a person lives in Canada. He submitted the federal government was negligent in its fiduciary responsibility to ensure that everyone living in Canada is provided with information about government programs, and said there is little to no information about the EI program on reserves.

[43] The Commission's website explains the process for applying to access EI benefits. It is readily available to anyone in Canada with access to the internet. However, I appreciate the Claimant's comment that being available online doesn't mean that an indigenous person will believe a government program is accessible to them.

[44] The Claimant felt that he experienced barriers when speaking with Commission agents. At the hearing, he was nervous and it was difficult to get information from him. His girlfriend and representative had to encourage him to speak to me, and even then it was short sentences. It is clear from the Commission's notes that its agents did not ask questions about how the Claimant's identification as an indigenous person may have affected the lateness of his claim. No one asked him if he had transportation to the local Service Canada office, only how far away it was. Transportation was assumed. The file says that his mother told him he wouldn't qualify for EI, and later says his grandmother told him he wouldn't qualify. It is reasonable for the Claimant to feel that he wasn't being listened to, which is the evidence he gave at the hearing

[45] The representative referred to the Employment Insurance Service Quality Review Report: Making Citizens Central.¹⁴ The report states that its review panel met with First Nations groups, who "highlighted the fact that existing EI service quality issues were particularly heightened in their communities." It references, "perceived discrimination and insensitivity," and recommends that any solutions recognize the, "particular effect that

¹⁴ Available on the Employment and Social Development Canada website.

service quality can have on certain groups, particularly Indigenous communities, which are impacted by a concentration of challenges.” The representative submitted that a significant barrier is that the legislation and policies are explicitly difficult to understand.

[46] I appreciate that the *Employment Insurance Act* and its regulations are not easily interpreted. One of the reasons the Tribunal focuses on writing in plain language is to ensure our decisions and website are easily understood by users. I have no authority to direct any agency or department to adopt similar advancements, but hope that plain language and clarity become the standard instead of the exception.

Conclusion

[47] I find the Claimant has proven that he had good cause for the entire period of the delay in applying for benefits.

[48] The appeal is allowed.

Candace R. Salmon
Member, General Division – Employment Insurance Section