



Citation: *SE v Canada Employment Insurance Commission*, 2022 SST 1015

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

# **Decision**

**Appellant:** S. E.

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

---

**Decision under appeal:** General Division decision dated May 24, 2022  
(GE-22-1078)

---

**Tribunal member:** Charlotte McQuade

**Type of hearing:** Teleconference

**Hearing date:** September 26, 2022

**Hearing participants:** Appellant  
Respondent's representative

**Decision date:** October 12, 2022

**File number:** AD-22-367

## Decision

[1] The appeal is allowed. The General Division made an error of law.

[2] I have substituted my decision for the General Division. The Claimant's claim reports can be antedated (backdated) to September 19, 2021.

## Overview

[3] S. E. is the Claimant. He filed his biweekly claims for Employment Insurance (EI) regular benefits late, on January 6, 2022. The Claimant asked the Canada Employment Insurance Commission (Commission) to treat them as though they were made earlier, starting from September 19, 2021.

[4] The Canada Employment Insurance Commission (Commission) decided the Claimant hadn't shown good cause for the delay and refused his request.<sup>1</sup>

[5] The Claimant appealed the Commission's decision to the Tribunal's General Division. The General Division decided the Claimant couldn't have his claims treated as though they were made from September 19, 2021, because he hadn't shown good cause for the delay.

[6] The Claimant is now appealing the General Division's decision. The parties agree that the General Division erred in law by failing to apply relevant case law. The Commission requested that the appeal be allowed and the matter be returned to the General Division for reconsideration. The Claimant would like me to allow the appeal and make the decision that the General Division should have made.

[7] I am allowing the appeal. I have decided to give the decision the General Division should have given. The Claimant had good cause for the delay. As a result, the Commission should backdate his claim reports to September 19, 2021.

---

<sup>1</sup> See section 10(5) of the *Employment Insurance Act* (EI Act) which sets out this test.

## **I did not consider the Claimant's new evidence**

[8] I did not consider the new evidence the Claimant filed with the Appeal Division, after the General Division decision was made, concerning his communication with the CRA.<sup>2</sup>

[9] New evidence is evidence that the General Division did not have before it when it made its decision.

[10] The Appeal Division generally does not accept new evidence about the issues that the General Division decided. This is because the Appeal Division isn't rehearing the case. Instead, the Appeal Division decides whether the General Division made certain errors, and decides how to fix those errors. In doing so, the Appeal Division looks at the evidence that the General Division had when it made its decision.

[11] I have reviewed the record before the General Division. This information was not provided to the General Division when it made its decision, so it is new evidence. None of the exceptions that allow me to consider this new evidence applies.<sup>3</sup> So, I can't consider the new evidence the Claimant now wants to provide.

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

[12] Before the hearing, the Commission agreed that the General Division made an error of law by relying on case law related to a different issue than the issue under appeal and by not considering case law relevant to the issue under appeal.<sup>4</sup>

[13] Both parties agree that I should allow the appeal.

---

<sup>2</sup> See AD9-1 to AD9-8.

<sup>3</sup> See *Shamra v Canada (AG)*, 2018 FCA 48, which explains that on a judicial review, the Federal Court will only accept new evidence where it provides general background information only, or highlights findings that the Tribunal made without supporting evidence, or reveals ways in which the Tribunal acted unfairly. Given that the Appeal Division's role is to review errors the General Division may have made, I think the same reasoning applies to new evidence at the Appeal Division.

<sup>4</sup> See AD2.

## **I accept the proposed outcome**

[14] I accept that the General Division made an error of law by relying on case law relating to a different issue than the one under appeal and by not considering case law relevant to the issue under appeal.

[15] To receive EI regular benefits, you have to make an initial claim for benefits as well as ongoing claims for each week you are claiming benefits.<sup>5</sup> There are deadlines for filing claims.<sup>6</sup>

[16] If you make your biweekly claims late, they can be treated as though they were made earlier. However, for this to happen, you need to show good cause for the delay during the entire period of the delay beginning on the earlier day and ending on the day when the claim is made.<sup>7</sup>

[17] The Claimant's biweekly claims were late. He asked the Commission to treat them as though they were made earlier but the Commission refused. The Claimant appealed that decision to the General Division. The General Division had to decide whether the Claimant had shown good cause for the entire period of the delay from September 19, 2021, to January 6, 2022.

[18] To show good cause, the Claimant had to show that he acted as a reasonable and prudent person would have acted in similar circumstances.<sup>8</sup> He also had to show that he took reasonably prompt steps to understand his entitlement to benefits and obligations under the law.<sup>9</sup> If he did not do so, he had to show that there were exceptional circumstances.<sup>10</sup>

---

<sup>5</sup> See section 49 of the EI Act.

<sup>6</sup> See section 26 of the *Employment Insurance Regulations* which explains the deadlines.

<sup>7</sup> See section 10(5) of the EI Act.

<sup>8</sup> See *Canada (Attorney General) v Burke*, 2012 FCA 139.

<sup>9</sup> See *Canada (Attorney General) v Somwaru*, 2010 FCA 336; and *Canada (Attorney General) v Kaler*, 2011 FCA 266.

<sup>10</sup> See *Canada (Attorney General) v Somwaru*, 2010 FCA 336; and *Canada (Attorney General) v Kaler*, 2011 FCA 266.

[19] The Claimant's explanation for the delay was that he tried to complete a claim for EI benefits over the phone but it was not accepted. So, he called the agency he thought was the Commission to find out what was wrong and was told he first had to file his income taxes. He asked the agent to send records he needed. Once he had received those and filed his taxes, the Claimant tried to make his biweekly reports on January 6, 2022. The Claimant later found out that he had been speaking to the CRA, and not the Commission.<sup>11</sup>

[20] The General Division concluded the Claimant had not shown good cause for the delay. The General Division decided that a reasonable and prudent person wouldn't have waited fifteen weeks before calling the Commission to file biweekly reports.<sup>12</sup>

[21] In reaching this decision, the General Division found it unlikely that either the Commission or CRA would have advised a claimant that they must file income taxes before making an EI claim.

[22] The General Division reasoned that the *Employment Insurance Act* (EI Act) sets out a strict test and the General Division had to apply the law, even if the government did make errors. The General Division cited a case from the Federal Court of Appeal in support of that reasoning.<sup>13</sup>

[23] However, the case the General Division relied on is not about whether a person can rely on misinformation from a government authority to show good cause for the delay in filing reports. Rather it is about a claimant who was overpaid as the result of an error by the Commission.

[24] The General Division did not consider more relevant case law. In a case called *Canada (Attorney General) v. Pirotte*, the Federal Court of Appeal made the following comment about delay caused by misinformation on behalf of the Commission:<sup>14</sup>

---

<sup>11</sup> See paragraphs 6 and 13 to 16 of the General Division decision.

<sup>12</sup> See paragraph 20 of the General Division decision.

<sup>13</sup> The General Division referred to *Robinson v Canada (Attorney General)*, 2013 FCA 255.

<sup>14</sup> See *Canada (Attorney General) v Pirotte*, A-108-76.

“In such a case we would be dealing not so much with ignorance of law as with mistake induced by representations on behalf of the Commission. Such a case might be regarded as good cause for delay because it would be a cause imputable to the Commission rather than to the claimant.”

[25] Since the Claimant’s explanation for the delay was that he had been misinformed by a government agency who he thought was the Commission, the *Pirotte* case was relevant case law.

[26] I accept that the General Division made an error of law by relying on unrelated case law about a mistake made by the Commission in overpaying a claimant and did not consider more relevant case law about whether a person can rely on misinformation from the Commission to show good cause.

[27] Since the General Division committed an error of law, I have the authority to intervene in this case.<sup>15</sup>

## **Remedy**

[28] The Claimant asks that I make the decision the General Division should have. He is concerned with further delay and understands his new evidence cannot be considered by me if I make the decision the General Division should have.

[29] The Commission requested in their submissions that the matter be returned to the General Division for reconsideration since the Claimant wanted to submit new evidence in support of his appeal. However, given the Claimant’s request that I substitute my decision for that of the General Division, the Commission’s representative said at the hearing that she was not opposed to this remedy.

[30] I have decided to substitute my decision for that of the General Division because the error is one of law. Although the Claimant now has new evidence he wants to

---

<sup>15</sup> See section 58(1) of the *Department of Economic and Social Development Act* (DESD Act) which lists an error of law as a type of error that allows the Appeal Division to intervene in a decision of the General Division.

provide, I am satisfied that the Claimant had a full and fair opportunity at the first hearing to submit any evidence he wanted to rely on at that time.

### **The Claimant's claim reports can be antedated to September 19, 2021**

[31] The Claimant has shown good cause for the delay from September 19, 2021, to January 6, 2022.

[32] The Commission argued before the General Division that the Claimant had not shown good cause for the delay.

[33] The Commission said the Claimant had an EI claim within the last month, and was advised in his application completed on October 16, 2021, that he could use the same Access Code that he previously used in his last claim. The Commission says the Claimant was also advised on the Confirmation page, "To prove your eligibility and receive any payment you may be entitled to, you are required to complete biweekly reports. Failure to do so may result in a loss of entitlement and payment."

[34] The Commission argued that a reasonable person, in the Claimant's situation, who had a history of claims and who was aware of his rights and obligations, would not delay 15 weeks to request and receive benefits they could have been entitled to receive.

[35] The Commission also argued that the Claimant's information that the Commission gave him misinformation is not credible as there is no conversation on the Claimant's file before January 6, 2022, where he enquires about benefits. The Commission says that the Claimant has not shown any exceptional circumstances to excuse him from understanding his rights and obligations.

[36] The Claimant's position is that he has good cause for the delay because the delay resulted from mistaken advice he received from the CRA that he had to first file his taxes before he could claim EI. He thought at the time that he had been speaking to the Commission.

[37] The Claimant testified before the General Division that he had re-applied for EI benefits when his prior benefits ended in September 2019. He tried to apply electronically but the application would not go through. So, he called Service Canada to ask for help. The agent told him that he hadn't filed his taxes and that was why he couldn't go forward with his EI claim. He had to first file his taxes. The Claimant provided his email and asked for his tax information to be sent to him so he could file his taxes and then file for EI. Once the tax information was sent to him, he filed his taxes and then contacted Service Canada again in January 2022 to claim EI benefits.<sup>16</sup>

[38] The Claimant testified that he never received an access code in the mail, as he had on prior occasions when claiming EI. When it did not come in, he took it as good faith that he needed to do the taxes.<sup>17</sup> This is why he didn't do anything until he had filed his taxes. <sup>18</sup>The Claimant explained that, although at the time he thought he had been speaking to the Commission, it was possible he had been speaking to the CRA. He said the phone numbers were very similar.<sup>19</sup>

[39] The General Division member enquired with the Claimant why the initial application on file shows that it was confirmed as accepted on October 16, 2021.<sup>20</sup> The Claimant denied seeing this. He said he did not receive this confirmation or anything in the mail. The Claimant said when he tried to apply, he did so electronically over the phone. He said the system rejected him and told him he was not eligible to apply, which is why he called the Commission.<sup>21</sup>

[40] I find the Claimant has shown good cause for the delay.

---

<sup>16</sup> I heard this from the audio recording of the General Division hearing at approximately 0:12:45 to 0:14:36.

<sup>17</sup> I heard this from the audio recording of the General Division hearing at approximately 0:16:40 to 0:18:00 and also at approximately 0:23:07 to 0:25:35.

<sup>18</sup> I heard this from the audio recording of the General Division hearing at approximately 0:19:14.

<sup>19</sup> I heard this from the audio recording of the General Division hearing at approximately 0:15:51 to 0:17:01.

<sup>20</sup> See GD3-13.

<sup>21</sup> I heard this from the audio recording of the General Division hearing at approximately 0:19:45 to 0:25:35.



[41] Although the Claimant's October 16, 2021, application was confirmed as accepted, I accept the Claimant's testimony that he was not aware of this confirmation and understood his claim had not been accepted. I found the Claimant's testimony to be credible and it was provided under oath.

[42] I also accept the Claimant's testimony as to the reason for the delay. The Claimant has provided the same explanation consistently in all his communications with the Commission.<sup>22</sup> The Claimant has identified the source of the misinformation, being the CRA. Further, the Claimant's actions are consistent with his explanation. He filed the taxes and then contacted the Commission again to claim EI once he had filed his taxes.

[43] The Claimant took reasonably prompt steps to understand his entitlement to benefits and obligations under the law. He called immediately to the agency whom he believed was the Commission when he understood that his application for benefits was not accepted. He then followed the instructions he had been given to file his income tax and promptly attempted to file his claim reports once he had filed his income tax.

[44] I find the Claimant acted as a reasonable and prudent person would have done in his situation. A reasonable and prudent person in the Claimant's situation, thinking they were speaking to the Commission would have done as the Claimant did, and follow the advice they were given, particularly since no access code was received as had been received in prior EI claims. While the Claimant did mix up the phone number, the Claimant testified that the phone numbers were very close. I find that a reasonable and prudent person might also mix up two very similar government phone numbers.

[45] As above, in *Pirotte v. Unemployment Insurance Commission*, the Federal Court of Appeal held that good cause may exist where a mistake induced by the Commission's advice is the cause for the delay, and the delay is not attributable to a claimant.<sup>23</sup>

---

<sup>22</sup> See GD3-23 and GD3-24 and GD3-27.

<sup>23</sup> See *Canada (Attorney General) v Pirotte*, A-108-76.

[46] In the Claimant's situation, although it turned out that he had not spoken to the Commission but rather the CRA, he believed that he was speaking to the Commission. His delay in filing his claimant reports was a direct result of this conversation.

[47] This is not a case of ignorance of the law but rather a case where the delay was induced by advice he received from the CRA, whom the Claimant believed to be the Commission.

[48] I find it does not make a difference that the Claimant received this advice from the CRA, rather than the Commission. The important fact is that the Claimant believed this advice was from the Commission. I see no reason why the principle from the *Pirotte* case should not apply in this circumstance.

[49] The Claimant has shown good cause for the delay. So, his claim can be backdated to start from September 19, 2021.

## **Conclusion**

[50] The appeal is allowed. The General Division made an error of law.

[51] The Appeal Division substitutes its decision for the General Division to find that the Claimant's claimant reports can be backdated to start on September 19, 2021.

Charlotte McQuade  
Member, Appeal Division