



[TRANSLATION]

Citation: *RT v Canada Employment Insurance Commission*, 2022 SST 1679

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

Decision

Appellant: R. T.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission
reconsideration decision (476500) dated May 20, 2022
(issued by Service Canada)

Tribunal member: Charline Bourque

Type of hearing: Teleconference

Hearing date: September 20, 2022

Hearing participant: Appellant

Decision date: October 20, 2022

File number: GE-22-2106

Decision

[1] The appeal is allowed.

[2] The Claimant has shown that he had good cause for the delay in applying for benefits.¹ In other words, the Claimant has given an explanation that the law accepts. This means that his application should be treated as though it was made earlier.

[3] The Claimant has shown that he was available for work. This means that he is entitled to receive Employment Insurance (EI) benefits.

Overview

– Antedate

[4] The Claimant applied for EI benefits on January 10, 2022. He is now asking that the application be treated as though it was made earlier, on October 31, 2021. The Canada Employment Insurance Commission (Commission) has already refused this request.

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

[6] The Commission says that the Claimant didn't have good cause because not having his Record of Employment (ROE) or waiting for it isn't good cause for delaying his application. The Claimant made no effort to learn about his rights and obligations. This means he doesn't have good cause because he can't be considered to have acted as a reasonable person would have.

[7] The Claimant disagrees and says that he was trying to get his ROE from his employer so that he could apply for EI.

¹ Section 10(4) of the *Employment Insurance Act* (Act) uses the term "initial claim" to refer to a claimant's first application for benefits, which is used to determine whether the claimant qualifies to establish a benefit period.

– **Availability**

[8] Then, the Commission decided that the Claimant was disentitled from receiving EI regular benefits from January 9, 2022, because he wasn't available for work.

[9] A claimant has to be available for work to get EI regular benefits. Availability is an ongoing requirement. This means that a claimant has to be searching for a job.

[10] I have to decide whether the Claimant has proven that he was available for work. 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 was available for work.

[11] The Commission says that the Claimant wasn't available because he voluntarily put himself in an unemployment situation by leaving his full-time job with the Government of Canada to retire. The Commission found that the Claimant was limiting his availability because he was working part-time and on call for the same employer, and that he didn't look for other work.

[12] The Claimant disagrees and says that he retired in March 2021. The employer offered him a 90-day employment contract from July 26, 2021, to December 31, 2021. He says that he didn't know he would have this contract when he retired, but agreed to return to work.

Issues

[13] Can the Claimant's application for benefits be treated as though it was made on October 31, 2021? This is called antedating (or, backdating) the application.

[14] Was the Claimant available for work from January 10, 2022?

Analysis

Issue 1: Can the Claimant's application for benefits be treated as though it was made on October 31, 2021?

[15] 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).

[16] The main arguments in this case are about whether the Claimant had good cause. So, I will start with that.

[17] To show good cause, the Claimant has to prove that he acted as a reasonable and prudent person would have acted in similar circumstances.³ 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.

[18] The Claimant has to show that he acted this way for the entire period of the delay.⁴ 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 October 31, 2021, to January 9, 2022.

[19] The Claimant also has to show that he took reasonably prompt steps to understand his entitlement to benefits and obligations under the law.⁵ This means that the Claimant has to show that he tried to learn about his rights and responsibilities as

² See section 10(4) of Act.

³ See *Canada (Attorney General) v Burke*, 2012 FCA 139.

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

⁵ See *Canada (Attorney General) v Somwaru*, 2010 FCA 336; and *Canada (Attorney General) v Kaler*, 2011 FCA 266.

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.⁶

[20] 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.

[21] The Claimant says that he had good cause for the delay because he was trying to get a ROE from his employer.

[22] The Claimant exchanged several emails with his employer starting November 12, 2021, asking it to issue a ROE because of a work stoppage of at least seven consecutive days and a reduction in his hours.⁷ It wasn't until January 2022 that he was told that the employer would not issue a ROE.

[23] The Claimant says that he hasn't applied for EI for more than 40 years. He thought that he needed the ROE to apply and was taking the necessary steps to get it.

[24] The Commission says that the Claimant had the option of asking the Commission for information either by phone or in person by going directly to a Service Canada office, but he didn't do so. A reasonable and prudent person with little experience with the EI program would be quick to ask Service Canada representatives about their eligibility and how to apply for benefits on time. The Claimant didn't do that.

[25] Also, the Commission notes that the Claimant confirmed that he didn't decide to file his EI claim until January 2022. These facts show that the Claimant did not act as a reasonable person in his situation would have acted. They also confirm that he didn't intend to file an EI claim until January 9, 2022.

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

⁷ See emails (GD3-37 to GD3-46).

[26] I am of the view that I cannot accept the Commission's last argument. It is difficult to argue that the Claimant didn't intend to file an EI claim before January 2022 when he was trying to get his ROE from his employer as early as November 2021.⁸

[27] I am also taking into account the fact that the Claimant didn't ask the Commission about his rights and obligations. But, while this is an important factor to consider, it is not the only one I have to consider. In the Claimant's case, I am of the view that the efforts he was making to try to get his ROE from his employer, the Government of Canada, must also be considered. He was looking for information from an organization that he felt was competent in EI matters. Also, it appears from email exchanges that his own department isn't familiar with EI rules, since it had no intention of issuing a ROE despite a seven-day work stoppage.

[28] I also note that the Claimant took the necessary steps as soon as he finally got a clear response from his employer. He then went to a Service Canada Centre to explain his situation and ask for an antedate.⁹

[29] I find that the Claimant has proven that he had good cause for the delay in applying for benefits. The Claimant took measures every week to eventually apply for EI. Although he could have asked the Commission for information more quickly, he was asking people who had or should have had genuine expertise in EI matters. As soon as he received a final response from his employer, he took the necessary steps to try to resolve his situation with the Commission.

[30] I am of the view that the Claimant has proven that he acted as a reasonable and prudent person would have acted in the circumstances. This means that he has good cause for the delay in applying for benefits.

⁸ See email dated November 12, 2021 (GD3-42).

⁹ See the Commission's supplementary information (GD3-25).

– **Conditions needed to antedate to October 31, 2021**

[31] Since the Claimant has proven that he had good cause for the delay in applying for benefits, I must consider whether the Claimant qualified for benefits on the earlier day.

[32] Because of the antedate, the claim will be established on October 31, 2021.

[33] The Commission confirms that, by establishing the claim on that date, the Claimant had the required number of insurable hours to establish a claim for benefits. The Claimant had 1796 insurable hours of employment.

[34] Still, I would like to notify the Claimant that the number of weeks of benefits he is entitled to will be changed from 24 to 35 weeks.¹⁰

[35] Also, his weekly benefit rate will be changed from \$638 to \$595.¹¹

[36] This means that the claim can be established on October 31, 2021, since the Claimant qualified as of that date. The Claimant is entitled to 35 weeks of EI benefits at a weekly benefit rate of \$595.

Issue 2: Was the Claimant available for work from January 10, 2022?

[37] Two different sections of the law require claimants to show that they are available for work. The Commission decided that the Claimant was disentitled under both of these sections. So, he has to meet the criteria of both sections to get benefits.

[38] First, the *Employment Insurance Act* (Act) says that a claimant has to prove that they are making “reasonable and customary efforts” to find a suitable job.¹² The *Employment Insurance Regulations* give criteria that help explain what “reasonable and customary efforts” means.¹³

¹⁰ See the Commission’s supplementary information to the Tribunal (GD-6).

¹¹ See the Commission’s supplementary information to the Tribunal (GD-6).

¹² See section 50(8) of the Act.

¹³ See section 9.001 of the *Employment Insurance Regulations*.

[39] Second, the Act says that a claimant has to prove that they are “capable of and available for work” but aren’t able to find a suitable job.¹⁴ Case law gives three things a claimant has to prove to show that they are “available” in this sense.¹⁵

[40] The Commission decided that the Claimant was disentitled from receiving benefits because he wasn’t available for work based on these two sections of the law.

[41] I will now consider these two sections to determine whether the Claimant was available for work.

Capable of and available for work

[42] I have to consider whether the Claimant was capable of and available for work but unable to find a suitable job. Case law sets out three factors for me to consider when deciding this. The Claimant has to prove the following three things:¹⁶

- a) He wanted to go back to work as soon as a suitable job was available.
- b) He made efforts to find a suitable job.
- c) He didn’t set personal conditions that might have unduly (in other words, overly) limited his chances of going back to work.

[43] When I consider each of these factors, I have to look at the Claimant’s attitude and conduct.¹⁷

– Wanting to go back to work

[44] The Claimant has shown that he wanted to go back to work as soon as a suitable job was available.

¹⁴ See section 18(1)(a) of the Act.

¹⁵ See *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96.

¹⁶ These three factors appear in *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96. This decision paraphrases those three factors for plain language.

¹⁷ Two decisions from case law set out this requirement. Those decisions are *Canada (Attorney General) v Whiffen*, A-1472-92; and *Carpentier v Canada (Attorney General)*, A-474-97.

[45] The Commission is of the opinion that it is a matter of the Claimant's credibility. According to his February 10, 2022, statements, he says that his employer, the Government of Canada, told him that it would give him a contract of two days per week. He worked part-time for it from July 2021 to November 2021. Since November 2021, he has been on call for the same employer, working about two days per week. These facts clearly show that the Claimant has a part-time job he is satisfied with.

[46] I agree with the Commission that the Claimant works part-time. I am of the view that a claimant who works part-time isn't systematically disqualified from receiving EI benefits, since the Act doesn't mention this.

[47] The Claimant worked between 7.5 and 43 hours per week. So, he is available for work every day of the week and willing to go back to work.

– **Making efforts to find a suitable job**

[48] The Claimant has made enough efforts to find a suitable job.

[49] The Commission is of the view that it is a matter of the Claimant's credibility. According to his February 10, 2022, statements, he said that he didn't look for other work and isn't looking for other work. Also, on May 20, 2022, the Claimant didn't know what to say about the job postings he had looked at and where he had seen them. Finally, he mentioned having applied to the Lévis school board and that there would have been part-time work for him. But, he turned it down, since the hours conflicted with those of the Agency. In addition, he added that there were several job opportunities at the Agency, but nothing serious, and that the jobs offered were always part-time or on-call. The Commission says that these facts clearly show that the Claimant didn't actively look for and isn't actively looking for work, because he is satisfied with the part-time job he has and is limiting himself to his employer, the Government of Canada.

[50] To be able to get EI benefits, a claimant is responsible for actively looking for a suitable job.¹⁸ Intending to work isn't enough. A claimant has to show that they are making efforts to do so.

[51] The Claimant confirms that he signed two contracts with his employer. The first contract covered the period from July 26, 2021, to December 31, 2021, while the second contract covered the period from January 9, 2022, to December 31, 2022, but ended on May 5, 2022.

[52] I find that the Claimant retired from his job. Then, his employer offered him a part-time contract. The Claimant was under contract with his employer until May 2022. So, he had a part-time job during that period.

[53] I am of the view that a claimant wanting a part-time job, when it is the same type of job they had before, does not automatically make them unavailable for work. The Act requires a claimant to work a minimum number of hours of employment to establish an EI claim. This means that the Claimant has enough hours of employment after he retired to qualify.

[54] Also, I am of the view that the concepts of full-time or part-time work aren't specified in relation to job searches. Still, a claimant must not limit their chances of finding a job by setting personal conditions. A claimant isn't disentitled just because they were looking for part-time work. But it may be an indication that they are limiting their job search.

[55] I find that the Claimant has shown that he made reasonable and customary efforts to find a suitable job, since he was under contract with his employer until May 2022.

¹⁸ See *Cornelissen-O'Neil*, #A-652-93; *De Lamirande*, 2004 FCA 311.

– **Unduly limiting chances of going back to work**

[56] The Claimant hasn't set personal conditions that might have unduly limited his chances of going back to work.

[57] The Commission says the Claimant argues that, after he retired on July 15, 2021, from the Government of Canada, his employer gave him a contract of two days per week. He worked for it on a part-time contract basis from July 2021 to November 2021. Since November 2021, he has been on call for the same employer and works about two days per week. These facts clearly show that retiring was the Claimant's personal choice and that he is limiting himself to one employer who can only give him part-time work.

[58] The Claimant says that he didn't know his employer would offer him a contract when he was retiring. He accepted the contract and a new one starting in July 2021 and again in January 2022.

[59] A claimant's availability cannot be subject to specific personal conditions or overly limiting restrictions that would limit their chances of finding a job.¹⁹

[60] I am of the view that the concepts of full-time or part-time work aren't specified in relation to job searches, as the Commission argues.

[61] I am also of the view that working part-time doesn't disentitle the Claimant on the basis that he isn't available every working day. The Claimant didn't indicate that he wasn't available on some of these working days. He works part-time and can work on different business days as required by the Act. He even worked more than 40 hours a week.

¹⁹ See *Canada (Attorney General) v Gagnon*, 2005 FCA 321.

[62] Finally, maintaining the Commission's interpretation would mean that all claimants who work part-time are automatically disentitled from benefits. The Act would have specifically said so if Parliament had wanted to make such a disqualification, which isn't the case. The Act doesn't say that a claimant is disqualified from benefits just because they work part-time.

[63] I find that the Claimant hasn't set personal restrictions that limit his chances of going back to work. In fact, the Claimant did go back to work.

– **So, was the Claimant capable of and available for work?**

[64] Based on my findings on the three factors, I find that the Claimant has shown that he was capable of and available for work but unable to find a suitable job.

Conclusion

[65] The Claimant has proven that he had good cause for the delay in applying for benefits throughout the entire period of the delay.

[66] The Claimant has shown that he was available for work within the meaning of the Act. Because of this, I find that the Claimant is entitled to EI benefits.

[67] The appeal is allowed.

Charline Bourque
Member, General Division – Employment Insurance Section