



Citation: *Canada Employment Insurance Commission v MV*, 2023 SST 321

Social Security Tribunal of Canada Appeal Division

Decision

Appellant: Canada Employment Insurance Commission
Representative: Julie Villeneuve

Respondent: M. V.

Decision under appeal: General Division decision dated November 4, 2022
(GE-22-2407)

Tribunal member: Janet Lew

Type of hearing: Videoconference

Hearing date: March 1, 2023

Hearing participants: Appellant's representative
Respondent

Decision date: March 20, 2023

File number: AD-22-872

Decision

[1] The appeal is allowed. The Claimant's antedate request is denied.

Overview

[2] The Appellant, the Canada Employment Insurance Commission (Commission) is appealing the General Division decision. The General Division found that the Respondent, M. V. (Claimant), proved that he had good cause for the delay in claiming Employment Insurance benefits.

[3] The Claimant first applied for benefits in January 2018. But he did not file any biweekly reports. So, he did not get any benefits. He applied for benefits again in December 2021. Then in March 2022, he asked the Commission to antedate (backdate) his claim. He wanted the Commission to give him benefits for the times when he was separated from work, going all the way back to December 2017.

[4] Because the Claimant was late with his claim, he had to show that he had good cause for the delay. He had to show that he had good cause "throughout the period beginning on the earlier day and ending on the day when the claim was made."¹

[5] The Claimant explained why he was late. He had to look after his son who had serious medical issues. He was in and out of the hospital. The stress affected the Claimant's health too. The General Division accepted that these were exceptional circumstances. Because of that, it found that the Claimant had good cause for the delay in claiming Employment Insurance benefits.

[6] The Commission argues that the General Division made legal and factual errors. The Commission says that the General Division misinterpreted what "good cause" means. The Commission says the General Division did not follow the law when it looked at what "good cause" means.

¹ See section 10(5) of the *Employment Insurance Act*.

[7] The Commission also says that the General Division made a mistake in the facts. The General Division found that the Claimant's delay (in asking for his claim to be backdated) ended on December 30, 2021. But the Commission says the delay ended much later, in March 2022. The Commission says that is when the Claimant asked for his claim to be backdated. So, the Commission says the General Division used the wrong date.

[8] The Commission asks the Appeal Division to set aside the General Division decision and find that the Claimant did not have good cause for the entire period of the delay. The Claimant acknowledges that he was late with his claim. But he says that there were family problems and that he was looking after his son.

Preliminary matters

[9] The Claimant produced nine Records of Employment. Service Canada date stamped these Records as having been received on March 8, 2022. It is unclear how and when the Claimant knew that he had to file these Records, or to even ask that his claim be backdated.

[10] I queried whether the Claimant might have written on his second application form that he wanted benefits going back to December 2017. I also queried whether the Claimant spoke with Service Canada before March 8, 2022, such that it prompted him to file the Records and to ask for his claim to be backdated. The Claimant could not remember.

[11] To make sure the hearing file was complete, I asked the Commission to produce copies of the following:

- a) the Claimant's complete application form that he filed on December 30, 2021 and
- b) documents of any discussions between the Claimant and Service Canada between December 30, 2021 and March 8, 2022.

[12] Generally, the Appeal Division does not accept new evidence. However, if any documents were missing and if they showed that the Claimant had made his request before March 8, 2022, he might have been deprived of a chance to argue his case more effectively.

[13] The Commission responded. The Commission writes, “The Claimant’s application of 2021 is in the Reconsideration file, at pages GD3-13 to GD3-21.”² The Commission provided further clarification that there were indeed missing pages in the application form.³ The Commission provided copies of these pages.

[14] The Commission advised that it had sent two emails to the Claimant on January 4 and 5, 2022. The Commission does not have a copy of the original emails. But it provided templates of the emails that were sent. These emails asked the Claimant for the records of employment for the previous 52 weeks.

[15] These documents do not suggest that the Claimant discussed or asked for his claim to be backdated. It remains unclear what prompted the Claimant and when he might have first raised the issue of getting his claim backdated. The first documented evidence that shows when the Claimant asked for an antedate is in March 2022.

Issues

[16] The issues in this appeal are:

- a) Did the General Division misinterpret what “good cause” means?
- b) Did the General Division make a mistake when it defined the period of delay?
- c) If so, how should the error be fixed?

² See Commission’s correspondence of March 3, 2023, at AD 4-1

³ See Commission’s correspondence of March 20, 2023, at AD 7-1 to AD 7-7.

Analysis

[17] The Appeal Division may intervene in General Division decisions if there are jurisdictional, procedural, legal, or certain types of factual errors.⁴

[18] For factual errors, the General Division had to have based its decision on an erroneous finding of the fact that it made in a perverse or capricious manner or without regard for the material before it.

Did the General Division misinterpret what “good cause” means?

[19] The Commission argues that the General Division misinterpreted “good cause” under section 10(5) of the *Employment Insurance Act*.

[20] If a claimant wants to have their claim backdated, they have to show that there “was good cause for the delay throughout the period beginning on the earlier day and ending on the day when the claim was made.”⁵

[21] The Commission accepts that the Claimant’s circumstances were unfortunate. His son experienced serious medical issues that took him in and out of the hospital. This also affected the Claimant’s own health. But the Commission says that this is not enough to show that the Claimant’s circumstances were exceptional and that this showed “good cause.”

[22] The Commission notes that the Claimant was able to work between December 24, 2017, and March 11, 2022. The Commission argues that if the Claimant was able to return to work, he could have called the Commission to ask about his benefits. The Commission argues that this is what a reasonable person would have done.

[23] The Commission argues that a claimant has to take “reasonably prompt steps” to determine their rights and obligations under the *Employment Insurance Act*.⁶

⁴ See section 58(1) of the *Department of Employment and Social Development Act*.

⁵ See section 10(5) of the *Employment Insurance Act*.

⁶ See *Canada (Attorney General) v Albrecht*, 1985 CanLII 5582 (FCA), [1985] 1 FC 710, at page 718.

[24] The General Division identified what the Claimant had to do to show good cause. The General Division said that the Claimant had to prove that he acted as a reasonable and prudent person would have acted in similar circumstances. It said that, in other words, the Claimant had to show that he acted reasonably and carefully just as anyone else would have if they were in a similar situation.

[25] The General Division also wrote:

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

[26] The *Kaler* case was about a claimant who got laid off from work in November 2008. She could not read or write. She did not apply for benefits earlier. She believed her employer would call her back when there was more work. She left Canada in January 2009 and did not return until July 2009. When she got back, family and friends told her to apply for Employment Insurance benefits. She asked her employer for a record of employment. She got the record of employment on August 6, 2009. She applied for benefits on August 19, 2009.

[27] Both the Board of Referees and the Umpire (they were like the General Division and the Appeal Division) found that Ms. Kaler's illiteracy "provide[d] cause for taking an excessive amount of time to apply for benefits."

[28] The Court of Appeal said that the facts have to be "viewed expressly through the lens of the proper definition."⁸ The Court found that the Board failed to apply the law to the facts and that the Umpire failed to intervene.

⁷ Citing *Canada (Attorney General) v Somwaru*, 2010 FCA 336; and *Canada (Attorney General) v Kaler*, 2011 FCA 266.

⁸ See *Kaler*, at para 7.

[29] In the Claimant's case, the General Division properly set out what the test was to see if there was "good cause." But, according to the *Kaler* case, the General Division also has to apply the law to the facts. It has to look at the facts "through the lens of the proper definition."

[30] In the cases *Canada (Attorney General) v Albrecht*⁹ and *Canada (Attorney General) v Brace*,¹⁰ the Federal Court of Appeal said this meant that an applicant has to "be able to show that he did what a reasonable person in his situation would have done to satisfy himself as to his rights and obligations under the [*Employment Insurance Act*]." ¹¹

[31] The Court of Appeal also said that an applicant has to show what a reasonable person would have done—unless there are exceptional circumstances.¹² The Court of Appeal did not list what exceptional circumstances could be.

[32] So, the General Division looked to see whether there were any exceptional circumstances in the Claimant's case. The General Division accepted that the Claimant was preoccupied with his son's health and that that the Claimant also developed his own health issues. He became depressed and lost considerable weight. It found that these were exceptional circumstances, even if the Claimant had worked during part of the delay. The General Division found that the work was only intermittent.

[33] The General Division acknowledged that the Claimant's delay was lengthy. It ran for four years from late 2017/early 2018. But the General Division found that the Claimant was preoccupied with his son's health and his own throughout the delay.

[34] There is no question that the Claimant would have been preoccupied with his son's and his own health. But the delay was long. As well, the Claimant worked. Greater scrutiny of the evidence (or lack of evidence) was warranted.

⁹ See *Canada (Attorney General) v Albrecht*, 1985 CanLII 5582 (FCA), [1985] 1 FC 710, at page 718.

¹⁰ See *Canada (Attorney General) v Brace*, 2008 FCA 118, at para 8.

¹¹ See *Albrecht*, at page 718.

¹² See *Canada (Attorney General) v Somwaru*, 2010 FCA 336.

[35] For instance, the Claimant had his own health issues. This suggested that he could not “satisfy himself as to his rights and obligations under the *Employment Insurance Act*.” Yet, the Claimant did not produce any medical evidence that could have shown this.

[36] The General Division found the Claimant’s work was intermittent. It cited the example that his employer called him to work for just five days in early 2018 before laying him off again. Yet, there was evidence that the Claimant worked for much longer periods. The Records of Employment show the following:

- The Claimant worked from January 22, 2018, to July 13, 2018, before the employer shut down for five weeks¹³
- While not a long time, he worked from January 14, 2019, to March 29, 2019.¹⁴ He was laid off from work after that.
- The Claimant returned to work on April 15, 2019 and continued working until July 19, 2019.¹⁵ He was then laid off from work.
- The Claimant returned to work on August 6, 2019. He worked to January 1, 2020.¹⁶ His employer laid him off again because of a shortage of work.
- The Claimant did not work again until May 19, 2020, and then continued working for just under a year, to April 9, 2021, when he was again laid off. There was a shortage of work.¹⁷

[37] This evidence fell short. It did not show that there were exceptional circumstances. Instead, the Records of Employment raised questions. If the Claimant had been able to work for several weeks or months at a time, what prevented him from

¹³ See Record of Employment dated July 26, 2018, at GD 3-24.

¹⁴ See Record of Employment dated April 18, 2019, at GD 3-26.

¹⁵ See Record of Employment dated July 26, 2019, at GD 3-28.

¹⁶ See Record of Employment dated January 16, 2020, at GD 3-29.

¹⁷ See Record of Employment dated April 22, 2021, at GD 3-30.

“satisfy[ing] himself as to his rights and obligations”? In other words, was there anything that prevented him or made him unable to make enquiries? Was there any reason he could not call the Commission and find out what he had to do for his claim?

[38] Supporting medical evidence that showed that the Claimant could not “satisfy himself as to his rights and obligations under the *Employment Insurance Act*” might have helped the Claimant. But it would have had to cover the entire period of the delay. And, based on the evidence before the General Division, it cannot be said that there were exceptional circumstances.

[39] If the delay had been really short, instead of spanning several years, if the Claimant had not worked for several months at a time during the delay, and if the Claimant had supporting medical evidence for the entire period of the delay, that would have put a different lens on the nature of the circumstances.

[40] The General Division failed to look at the facts “through the lens of the proper definition” when it examined whether there were exceptional circumstances.

[41] Given my findings, I do not have to address the rest of the Commission’s arguments.

Fixing the error

[42] How can I fix the General Division’s error? I have two choices.¹⁸ I can substitute my own decision, or I can refer the matter to the General Division for reconsideration. If I substitute my own decision, this means I may make findings of fact.¹⁹

[43] I will give the decision that the General Division should have given. I have the necessary information to make a decision. The parties agree on the basic facts. Neither the Claimant nor the Commission has asked me to return this matter to the General

¹⁸ Section 59 of the *Department of Employment and Social Development Act*.

¹⁹ *Weatherley v Canada (Attorney General)*, 2021 FCA 58, at paras 49 and 53, and *Nelson v Canada (Attorney General)*, 2019 FCA 222, at para 17.

Division for a reconsideration. Both parties had the opportunity to present their case at the General Division. There is no allegation that they did not get a fair hearing there.

[44] The Commission has referred me to two cases, which I find helpful. In CUB 70202, Mr. Bombardier asked the Commission to antedate his claim from June 8, 2007, to January 7, 2007. He explained why he was late. His wife was in poor health. They moved so it would benefit her health and to be closer to family. He also had to fix and sell his old house and find a new home. His priority and preoccupation were around his wife's health.

[45] Justice Goulard found that "a claimant's health problems have generally not been considered to constitute good cause for a delay in applying for benefits when the claimant is not otherwise prevented from applying for benefits and has taken no steps to enquire in regard to what he needs to do to establish his claim."²⁰ He cited several cases that came to the same conclusion.

[46] Justice Goulard found nothing prevented Mr. Bombardier from applying for benefits or at least making enquiries. So, he had not established good cause for the six-month delay.

[47] Similarly, there was nothing that the prevented the Claimant from at least calling the Commission and asking what he needed to do, throughout the period of the delay.

Conclusion

[48] The appeal is allowed. The Claimant's antedate request is denied.

Janet Lew
Member, Appeal Division

²⁰ See CUB 70202.