Citation: *KS v Canada Employment Insurance Commission*, 2023 SST 1419

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	K. S.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (579183) dated April 12, 2023 (issued by Service Canada)

Tribunal member:	Elyse Rosen
Type of hearing:	Videoconference
Hearing date:	July 20, 2023
Hearing participant:	Appellant
Decision date:	July 25, 2023
File number:	GE-23-1373

Decision

[1] The appeal is dismissed.

[2] The Appellant hasn't proven that she meets the conditions to have her application for benefits antedated (in other words, backdated).[1]

Overview

[3] The Appellant worked in healthcare, in an administrative support role. She was placed on an unpaid leave of absence as of December 8, 2021, because she didn't follow her employer's vaccination policy.

[4] When the policy changed and employees were allowed to work even if they were unvaccinated, she asked to come back to work. She was told her contract had ended on January 10, 2022, and hadn't been renewed. But, she was told she could be placed in a pool of temporary workers and could bid on available shifts.

[5] She spent the next several months following up with her employer, unsuccessfully, to try to get shifts.

[6] After many months without work, and having spent a good chunk of her savings, she decided to look into whether she could get Employment Insurance (EI) benefits. On December 1, 2022, she applied for benefits.

[7] The Canada Employment Insurance Commission (Commission) reviewed the Appellant's application and decided that she hadn't worked enough hours in her qualifying period to qualify for benefits.[2] When she applied for benefits, she had been off

[1] Section 10(4) of the *Employment Insurance Act* (Act) uses the term "initial claim" when talking about an application for benefits.
[2] Section 7 of the Act says that the hours worked have to be "hours of insurable employment." In this decision, when I use "hours," I am referring to "hours of insurable employment."

work for almost a year. So, she asked that her application be antedated to an earlier date.[3]

[8] The Commission refused to antedate her claim. It says she doesn't have good cause for not applying for benefits sooner.

[9] The Appellant believes she meets the conditions to have her application antedated. She says she acted as a reasonable person would have in her circumstances. She claims she was misinformed by her employer about her entitlement to benefits and was misled into thinking she was still employed. She also expected that she would be called back to work when her employer's vaccination policy changed, but they didn't give her any shifts.

[10] She says the Records of Employment (ROEs) her employer submitted are inaccurate regarding the reason for the separation from employment (in other words, why she's no longer working). In her view, she should have received an ROE on January 10, 2022, saying her contract expired and there was a shortage of work. She claims that, if she had received such an ROE, she would have realized she should file an application for EI benefits.

[11] She argues that her employer discriminated against her because it didn't give her work when the vaccination policy changed. She had been a devoted employee, who put her own health and wellbeing at risk by doing her job. She feels she was mistreated and taken advantage of.

[12] She says that the pandemic was unprecedented. It was an extremely stressful time, and she wasn't thinking straight. This explains why it took her as long as it did to file her claim for EI benefits.

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[3] The Commission says the Appellant asked to have her application antedated to December 12, 2021. The Appellant says she asked to have her application antedated to January 10, 2022. I'm going to use the date the Appellant gave me. She is the one asking for her claim to be antedated, so she can decide what date she wants her claim antedated to.

[13] I have to decide whether the Appellant's application can be antedated to January 10, 2022, in these circumstances.

Issue

[14] Can the Appellant's application be antedated to January 10, 2022?

Analysis

[15] The law allows a claimant to request that their application for benefits be treated as though it was made on an earlier date.[4] This is called antedating the application.

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

1) You qualified for benefits on the earlier date (that is, the day you want your application antedated to).

2) 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 for applying for benefits later than you should have.

[17] I will begin by looking at whether the Appellant had good cause for the delay. If she didn't, the application can't be antedated, and it won't be necessary to determine whether she qualifies for benefits on the earlier date.

Has the Appellant shown good cause for the delay?

[18] I find that the Appellant hasn't shown good cause for the delay in making her application.

[19] To show good cause, the Appellant has to prove that she acted as a reasonable and prudent person would have acted in similar circumstances.[5] In other words, she has to show that she applied the same level of care, attention, and common sense as anyone else in a similar situation to hers would have.

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[4] See section 10(4) of the Act.
[5] See *Canada (Attorney General) v Burke*, 2012 FCA 139.

[20] The Appellant has to show that she acted this way for the entire period of the delay.[6] That period is from the day she wants her application antedated to until the day she applied for benefits. So, for the Appellant, the period of the delay is from January 10, 2022, to December 1, 2022.

[21] The Appellant also has to show that she took reasonably prompt steps to understand her entitlement to EI benefits.[7] This means that the Appellant has to show that she tried to learn about her rights and responsibilities under the law as soon as possible and as best she could. If the Appellant didn't take these steps, then she must show that there were exceptional circumstances that explain why she didn't do so.[8]

[22] The Appellant has the burden of proof. This means she has to show that it's more likely than not that she had good cause for the delay in making her application for benefits.

[23] Good cause for the delay is interpreted very strictly.[9] This is because it's difficult for the Commission to administer claims and properly review a claimant's entitlement to benefits when the application for benefits isn't filed on time.[10] So, it's only in exceptional circumstances that an application can be antedated.

[24] The Appellant says she didn't apply for benefits sooner because she'd been misinformed and misled by her employer.

[25] When her employer put her on leave, she was told that she wasn't entitled to benefits because she hadn't followed her employer's vaccination policy.

[26] When her contract expired, her employer didn't send her anything in writing telling her that she was no longer employed.

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[6] See *Canada (Attorney General) v Burke*, 2012 FCA 139.
[7] See *Canada (Attorney General) v Somwaru*, 2010 FCA 336; and *Canada (Attorney General) v Kaler*, 2011 FCA 266.
[8] See *Canada (Attorney General) v Somwaru*, 2010 FCA 336; and *Canada (Attorney General) v Kaler*, 2011 FCA 266.
[9] See *Canada (Attorney General) v Brace*, 2008 FCA 118.
[10] See *Canada (Attorney General) v Beaudin*, 2005 FCA 123.

[27] When the policy changed, she contacted her employer to arrange a return to work. This is the first time she learned that her contract had ended and hadn't been renewed.

[28] Because she was told she would be put in a pool and could bid on shifts, she didn't consider herself to be unemployed.

[29] Throughout this time, she says she wasn't thinking straight because of the stress of the pandemic. She says the circumstances were exceptional. And her only focus was trying to go back to work.

[30] The Commission says the Appellant didn't act the way a reasonable person would have acted in the circumstances. This is because she never contacted the Commission or looked at the Service Canada website to determine her rights and responsibilities concerning an application for EI benefits during the period of the delay.

[31] The Appellant objects to being labelled as unreasonable. I can certainly understand her objection. It was clear to me from her testimony at the hearing that she is an intelligent and responsible person. She was extremely well-prepared and had obviously researched the issues in this case. I didn't find her to be unreasonable, in the everyday sense of that term.

[32] But acting as a "reasonable person" in the context of an antedate request has consistently been held by the courts to mean one thing. It means taking steps, as soon as you have stopped working, to learn about your rights and responsibilities under EI law.[11] The Appellant didn't do that.

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[11] See *Mauchel v Canada (Attorney General),* 2012 FCA 202; *Bradford v Canada Employment Insurance Commission*, 2012 FCA 120; *Canada (Attorney General) v Kaler*, 2011 FCA 266; *Canada (Attorney General) v Innes*, 2010 FCA 341; *Canada (Attorney General) v Scott*, 2008 FCA 145; *Canada (Attorney General) v Brace*, 2008 FCA 118; *Canada (Attorney General) v Beaudin*, 2005 FCA 123; *Shebib v Canada (Attorney General)*, 2003 FCA 88; *Canada (Attorney General) v Ehman*, A-360-95; *Canada (Attorney General) v Rouleau*, A-4-95; *Canada (Attorney General) v Larouche*, A-644-93; *Canada (Attorney General) v Smith*, A-549-92; *Canada (Attorney General) v Caron*, A-395-85; and *Canada (Attorney General) v Albrecht*, A-172-85.

[33] More specifically, during the period of the delay the Appellant never contacted the Commission or consulted the Service Canada website to verify whether:

- what her employer had told her about her entitlement to benefits at the time she was placed on leave was correct
- the fact that her full-time contract hadn't been renewed impacted her entitlement to benefits
- the fact that she was in a pool of temporary workers and not getting any shifts entitled her to benefits
- not having accurate ROEs impacted her ability to file an application
- the alleged discrimination by her employer impacted her entitlement to benefits

[34] Given how the case law interprets the concept of "reasonable person" in the context of an antedate request, I agree with the Commission that the Appellant didn't act as a reasonable person would have in the circumstances. She didn't act quickly after being placed on a leave, or after learning that her full-time contract would not be renewed. She didn't take steps to learn about her rights and responsibilities concerning EI benefits as soon as she could, and as best she could, even though she had been out of work since December 2021.

[35] I find that there were three events that should have prompted her to look into her right to EI benefits:

- being placed on leave
- learning that her contract had ended and would not be renewed
- being several weeks without an assigned shift after being told she could join the pool of temporary workers

[36] Instead, she waited until her savings were depleted to look into her entitlement to EI benefits. I find that a reasonable person would not have waited, and certainly would

not have waited so long. When she finally made her application, she had been without work for nearly a year. I find that a reasonable person would have acted far sooner.

[37] I also find that there wasn't anything exceptional about the circumstances the Appellant was in.

[38] I agree with the Appellant that the pandemic was an unprecedented event. I have no doubt that it was a source of tremendous stress for her. I believe her when she says she wasn't thinking straight at the time.

[39] But, the record shows that she was able to be very proactive about following up with her employer to try to get shifts, to get them to accommodate her need for different PPE, and to get them to amend her ROEs (although she never did get one that said what she thought it should say). I find that, in the circumstances, she had the required focus to also learn about her rights and responsibilities concerning making an application for EI benefits.

[40] I understand that, once her employer's policy changed, the Appellant's focus was on returning to work and getting shifts. She clearly wanted to return to work. However, this doesn't change the fact that she should have looked into her right to EI benefits and learned how and when to make an application. Being focussed on returning to work isn't an exceptional circumstance.

[41] Neither is the fact that her employer didn't issue an ROE on January 10, 2022, stating that her contract had ended and there was a shortage of work, or that the ROEs it did issue are, in her view, inaccurate.

[42] The Appellant read me the terms of her employment contract during the hearing. They indicate that the contract ends on January 10, 2022. So, she should have been aware that her contract had ended. And, in any event, by March 2022, she was told her contract had ended, yet it didn't prompt her to act and to look into whether she could get EI benefits.

[43] As for the fact that she thought her ROEs were inaccurate, the Federal Court of Appeal has held that not having an ROE or waiting for an employer to correct an ROE aren't good cause for not filing an application for benefits on time.[12]

[44] The Appellant says she mistakenly thought that, because she was in a pool and could bid on shifts, she wasn't actually unemployed. So, she thought she wasn't entitled to EI. I believe that she mistakenly understood this. But, her mistake results from not knowing the law.

[45] The Federal Court of Appeal has repeatedly said that not knowing the law isn't good cause for not applying for benefits on time.[13] It has even said this in cases where, like the Appellant, the claimant didn't apply for benefits because they thought they were still employed.[14]

[46] I must follow the decisions of the Federal Court of Appeal. So, as much as I empathize with the Appellant, I can't find that she has good cause for not applying for benefits on time.

[47] The Appellant feels she was mistreated and discriminated against by her employer. That isn't something I have the jurisdiction (in other words, authority) to decide. I can only decide whether she meets the conditions to have her application antedated. It's for other forums (in other words, other courts or tribunals) to decide whether she has a claim against her employer in the circumstances.

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[12] See *Canada (Attorney General) v Ouimet*, 2010 FCA 83; *Canada (Attorney General) v Brace*, 2008 FCA 118; and *Canada (Attorney General) v Chan*, A-185-94.
[13] See *Canada (Attorney General) v Kaler*, 2011 FCA 266; *Canada (Attorney General) v Innes*, 2010 FCA 341; *Canada (Attorney General) v Somwaru*, 2010 FCA 336; *Canada (Attorney General) v Trinh*, 2010 FCA 335; *Canada (Attorney General) v Ouimet*, 2010 FCA 83; *Canada (Attorney General) v Mehdinasab*, 2009 FCA 282; *Canada (Attorney General) v Carry*, 2005 FCA 367; *Canada (Attorney General) v Labrecque*, A-690-94; *Canada (Attorney General) v Chan*, A-185-94; *Canada (Attorney General) v Larouche*, A-644-93; and *Canada (Attorney General) v Smith*, A-549-92.
[14] See *Canada (Attorney General) v Innes*, 2010 FCA 341; and *Canada (Attorney General) v Dunnington*, A-1865-83.

[48] I have decided that the Appellant doesn't have good cause for not applying for benefits on time. So, I don't have to consider whether she qualifies for benefits as of January 10, 2022.

Conclusion

[49] I find that the Appellant doesn't meet the conditions to have her application antedated. She hasn't proven that she had good cause for the delay in applying for benefits throughout the entire period of the delay.

[50] This means that the appeal is dismissed.

Elyse Rosen

Member, General Division – Employment Insurance Section