Citation: *FD v Canada Employment Insurance Commission*, 2023 SST 411

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

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

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (491665) dated July 29, 2022 (issued by Service Canada)

Tribunal member:	Jillian Evans
Type of hearing:	Teleconference
Hearing date:	January 26, 2023
Hearing participant:	Appellant
Decision date:	April 19, 2023
File number:	GE-22-2638

Decision

[1] The appeal is dismissed.

[2] The Tribunal disagrees with the Appellant that his application for benefits should be antedated (or "backdated"). F. D. has not shown that he had good cause for the entire period of his delay in claiming Employment Insurance (EI) benefits. In other words, the Appellant has not given an explanation that the law accepts for the entire length of his delay. This means that F. D.'s claim cannot be treated as though it was made earlier.

[3] The Tribunal disagrees with the Appellant on the question of whether he had accumulated enough insurable hours of work during his qualifying period. He has not established that he qualifies for benefits.

Overview

[4] The appellant F. D. was dismissed from his full-time job on February 9, 2021. Under the negotiated terms of his severance, he received pay in lieu of notice for about 6 weeks, after which time he continued to receive 37 weeks of ongoing bi-weekly payments from his employer.

[5] All payments from his former employer ended on December 19, 2021. He applied for EI benefits on March 20, 2022 and was denied for having failed to accumulate any insurable hours of employment during the qualifying period that preceded his application.

[6] The Appellant disagrees with the Commission and says that because he was receiving ongoing severance payments from his former employer for the better part of a year, this should be attributed to him as insurable "work" for the purposes of qualifying for benefits.

[7] In the alternative, he says that his application should be 'backdated' (or antedated) to March 23, 2021 because he did not know that he could apply for EI benefits while he was still receiving an "income" from his former employer. He says that

he did not think it was proper to burden the system while he was still financially secure, and that he was told by a Service Canada agent that he should only apply once payments from his former employer had stopped.

[8] The Commission disagrees. It says that the Appellant cannot translate severance payments into insurable hours for the purposes of qualifying for EI. It also says that F. D. does not have a good explanation for why he waited as long as he did to apply for benefits: even after the payments from his former employer stopped, he waited another three months to apply while he applied for jobs, collected self-employment income and pursued job leads. The Commission says that this does not meet the test for showing good cause for delaying in his application.

Matters that I need to address first

The subject of this appeal

[9] The July 29, 2022 reconsideration decision that F. D. appealed to the Social Security Tribunal addressed two separate issues:

a) the Appellant's request to antedate his claim for benefits, and

b) whether the Appellant had accumulated sufficient insurable employment hours between March 21, 2021 and March 19, 2022 to qualify for benefits.

[11] In the Notice of Appeal that F. D. filed with the Tribunal on August 8, 2022 he only said that he was appealing the Commission's decision not to antedate his application for benefits. He did not say that he was appealing the Commission's decision about whether or not he had accumulated enough hours of insurable employment to qualify.

[12] Similarly, the written submissions the Appellant included with his Notice of Appeal also only addressed why he disagreed with the Commission's finding about his antedate request. He made no submissions about the question of the insurable hours he accumulated during his qualifying period.

[13] However, F. D. did include letters with his Notice of Appeal that he had received from the Canada Revenue Agency that talked about the issue of insurable hours.

[14] So, the Tribunal Member originally assigned to this appeal invited the Commission and the Appellant to a Pre-Hearing Conference (PHC) to clarify whether F. D. intended to also appeal the question of whether he had enough qualifying hours to establish a benefit period.

[15] The Appellant confirmed at the PHC that he was also appealing this issue to the Tribunal even though he had not mentioned it in his Notice of Appeal.

[16] Both F. D. and the Commission then went on to send the Tribunal a number of representations, documents and written submissions on both the antedate issue and benefit qualification issue in the months between the PHC and the hearing.

[17] Although F. D.'s Notice of Appeal does not indicate that he is appealing the Commission's ruling of *Benefit Period not Established*, he has confirmed that he is also appealing that finding. The Commission was given ample notice of F. D.'s intention to appeal this issue. Both parties have had more than enough opportunity to make submissions on both issues and they did.

[18] There is no prejudice to either party. I find that in the circumstances I have the jurisdiction to rule on this question.

Adjournments

[19] The PHC occurred on October 7, 2022.

[20] At that PHC, the Appellant advised the presiding Tribunal Member that he would be appealing the Canada Revenue Agency's decision that he had not accumulated any insurable hours while receiving severance payments from his former employer (the "CRA appeal").

[21] The Minister of National Revenue's decision on this issue would be relevant evidence in F. D.'s hearing. So the SST hearing was scheduled for December 14, 2022

in hopes that the Appellant would know the outcome of the CRA appeal before he had to come to the Tribunal.

[22] On December 1, 2022, however, the Appellant contacted the Tribunal to update them on the CRA appeal. He had been told by the CRA that his CRA appeal would not be decided until January 15, 2023.

[23] The Appellant's hearing before the Tribunal was adjourned to January 26, 2023 to ensure that the CRA appeal decision would be available for his hearing.

[24] The Appellant received the CRA's appeal decision on January 18, 2023 and sent it to the Tribunal the same day. It was provided to the Commission on January 19, 2023 and since both parties had a chance to review it before the scheduled date, the hearing proceeded on January 26, 2023 as scheduled.

Post-Hearing Documents

[25] F. D.'s appeal hearing was on January 26, 2023. During his submissions that day, he referenced handwritten notes that he had made during a telephone discussion he had with a Service Canada agent within days of being terminated by his employer.

[26] These notes had not been filed as part of his appeal submissions, despite being relevant to the matters at issue on his appeal. The handwritten notes had been made on the back side of document GD7-3. The Appellant indicated that the notes corroborated his sworn testimony at the hearing and he indicated that he would send them to me after the hearing. He did.

[27] I chose to accept this document after the hearing as it is directly related to the issues on appeal. The document was sent to the Commission and they were given a chance to respond. No response was received by the Commission by the deadline of February 15, 2023.

Issues

[28] Did the Claimant have good cause for the delay in claiming EI benefits such that his application should be antedated to March 23, 2021?

[29] Did the appellant have sufficient insurable hours to qualify for benefits under s. 7 of the Act as of March 22, 2022?

Analysis

[30] The following key dates are not in dispute.

[31] I summarize them here as they are helpful in clarifying the timeline of events that are relevant in this appeal.

- February 9, 2021 – F. D. is dismissed from his job.
- February 10, 2021 to March 22, 2021 (the “Notice Period”) – F. D. receives pay in lieu of notice from his employer, and remains on their benefit plan.
- March 23, 2021 – F. D.’s Notice Period ends. He starts receiving 37 weeks of ongoing severance payments from his former employer (the “Severance Period” begins”)
- June 29, 2021 – F. D. begins self-employment.
- December 19, 2021 - F. D.’s Severance Period ends, and he receives the last installment of his severance payments.
- Feb 10, 2022 – F. D.’s self-employment concludes.
- March 20, 2022 – F. D. submits his application for EI benefits
- April 12 2022 – His application is denied.
- April 29, 2022 – F. D. requests a reconsideration.

- July 29, 2022 – The Commission maintains its initial decision.

[32] I will now decide the two issues.

The Appellant's claim for benefits should not be antedated to March 23, 2021

[43] When a claimant delays in filing an application for benefits, the antedate provisions may allow the late application to be recognized as having been made earlier than it actually was. The purpose of this "backdating" is to allow a claimant to be put in the position he or she would have been in had the delay in filing their claim for benefits not occurred.

[44] Here, F. D. wants his claim for EI benefits to be treated as though it was made earlier. He is asking that his application be treated as though it had been filed the week after he his Notice Period ended. This would change his qualifying period to the 52 weeks prior to March 21, 2021. During that period he accrued thousands of insurable hours of employment.

[45] To get a claim antedated, the Appellant has to prove that he had good cause for the delay. He has to prove that he had good cause during the **entire period** of the delay.[1]

[46] The Appellant has to prove this on a balance of probabilities. This means that F. D. has to show that it is more likely than not that he had good cause for the entire 13.5 month period of delay between February 10, 2021 and March 22, 2022.

[47] And, to show good cause, F. D. has to prove that he acted as a reasonable and prudent person would have acted in similar circumstances.[2] 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 and that he continued to act reasonably during the entire period of delay.[3]

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[1] See *Paquette v Canada (Attorney General)*, 2006 FCA 309; and section 10(4) of the EI Act.
[2] See *Canada (Attorney General) v Burke*, 2012 FCA 139.
[3] See *Canada (Attorney General) v Burke*, 2012 FCA 139.

[48] The Appellant has to show that he took reasonably prompt steps to understand his entitlement to benefits and obligations under the law.[4] This means that F. D. has to show that he tried to learn about his rights and responsibilities as soon as possible and as best he could.

[49] If the Appellant didn't take these steps, then he must show that there were exceptional circumstances that explain why he didn't do so.[5]

[50] F. D. says that he had good cause for the delay. He says:

a) Between February 10, 2021 (his first day of unemployment) and December 19, 2021 he was receiving income from his employer. He did not wish to burden the Employment Insurance system until he was no longer receiving payments from his former employer.

b) He also advised that he spoke with an agent at Service Canada on February 11, 2021 who told him that he would not be entitled to EI benefits until his bi-weekly severance payments were exhausted. This agent told him to apply after he received his last severance payment from his former employer.[6]

c) His former employer was deducting EI premiums from the bi-weekly severance payments that they sent him during the Severance Period, and so he believed that he could not apply for EI under those circumstances.

[51] After the payments from his former employer stopped on December 19, 2021, he waited another three months before applying for benefits. His reasons for delay changed after December 19, 2021.

[52] F. D. explained that during this period:

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[4] See *Canada (Attorney General) v Somwaru*, 2010 FCA 336; and *Canada (Attorney General) v Kaler*, 2011 FCA 266.
[5] See *Canada (Attorney General) v Somwaru*, 2010 FCA 336; and *Canada (Attorney General) v Kaler*, 2011 FCA 266.
[6] GD20

i) He continued to earn money from his self-employment.

ii) He was applying to and looking for jobs.

iii) He did not apply until three months after receiving the last payment from his former employer because he waited to see if any of his job seeking activities would result in employment.

[53] F. D. says that, together, these explanations show that he had good cause for delaying his application for benefits by 13.5 months. He asks that his application be antedated.

[54] The Commission says that F. D.'s explanations do not show good cause for his entire period of delay.

[55] The Commission appears to accept that F. D. had good cause for the delay in applying while he was still receiving severance payments from his employer between February 10, 2021 and December 19, 2021:

a) The Level 2 adjudicator at the Commission who was involved in F. D.'s Request for Reconsideration acknowledged that he had been receiving severance monies until December 19, 2021 and concluded only that F. D. "did not have good cause *for the period of delay between 20/12/2021 to 21/03/2022*."[7]

b) In their Representations, the Commission also focuses its submissions on the period of delay from December 20, 2021 to March 21, 2022, submitting that by December 20, 2021, "the claimant was aware of employment insurance and he was no longer receiving payments from his employment."

[56] In all the circumstances, I am of the opinion that F. D. did have good cause for his delay in applying for benefits up to December 19, 2021: he had been expressly told by Service Canada that "benefits would not pay out until severance finishes" and his

[7] GD3-48

former employer continued to deduct EI contributions from his ongoing severance payments.

[57] However, F. D. has to prove that he had good cause for the entire period of delay. I cannot grant an antedate based on good cause for only part of the period of delay.[8] An antedate request must be denied when the good cause part of the delay disappears over time.

[58] F. D. has not shown good cause for his delay in applying between December 20, 2021 and March 22, 2022. The law is clear that delaying an application because of possible job prospects does not amount to good cause, nor does waiting to exhaust self-employment income.[9]

[59] F. D. knew that he needed to apply for EI benefits as soon as his severance payments ended: in his notes from his February 11, 2021 telephone call with Service Canada, he notes: "Agent confirms that I can apply for application after last payment received. *Put a reminder in calendar for +/- December 2021 to submit UI application."

[60] The Appellant took no steps to exercise his rights and obligations between December 20, 2021 and March 22, 2022. He failed to do so because he was busy working and looking for work and did not want to apply for benefits until he had exhausted all of his other options. I find that his actions were commendable, but that they do not constitute good cause for the delay according to the jurisprudence of the Court.

[33] Having decided that it is not appropriate to antedate F. D.'s application, I now turn to the question of qualifying for benefits as of the date the application was made: March 22, 2022.

The Appellant did not accumulate sufficient insurable hours between March 21, 2021 and March 19, 2022 to establish a benefit period.

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[8] *Canada (Attorney General) v. Mehdinasab*, 2009 FCA 282 (CanLII
[9] *Howard v. Canada (A.G.)*, 2011 FCA 116; *Canada (A.G.) v. Ouimet*, 2010 FCA 83

[34] Subsection 7(2) of the Employment Insurance Act (Act) states that in order to qualify for employment insurance benefits, a worker making a claim must (a) have experienced an interruption of earnings from employment, and (b) must also have acquired, in his qualifying period, at least 420 hours of insurable employment.[10]

[35] When he initially applied for benefits on March 22, 2022, F. D. confirmed on his application that the last day that he had worked for an employer had been more than a year earlier, on February 9, 2021.

[36] When it reviewed his application the Commission told F. D. that he didn't qualify for employment insurance benefits because he needed 420 hours of insurable employment during the 52 weeks preceding his application.

[37] He had instead accumulated 0 hours during this period.

[38] F. D. agrees that he did not perform any actual work for his former employer – or for any employer – between March 23, 2021 and March 22, 2022. He agrees that he did not perform a single hour of labour for any employer in the year before he applied for EI benefits.

[39] The only work that he performed throughout this qualifying period was self-employment. He earned income from a consulting project between June 29, 2021 and February 10, 2022. He was not an employee of any employer between March 21, 2021 and March 22, 2022.

[40] However, he says that because he continued to receive a bi-weekly "severance" income from his former employer between March 2021 and December 2021, these payments should be recognized for the purposes of qualifying for benefits.

[41] He says that he was paying EI premiums out of these severance payments and that because he was earning an "income" during this period, the Commission should

[10] At the time of the Appellant's initial claim (March 2022), s. 7(2) only required 420 hours of insurable employment.

attribute insurable employment hours to this period of even though he did not work during this period.

[42] Given the position taken by F. D., the Commission sought a ruling by the Canada Revenue Agency on whether or not the Appellant had acquired insurable hours between after February 10, 2021.

[43] The CRA rendered their ruling on July 14, 2022. They determined that:

a) F. D. continued to be an employee of his former employer from February 10, 2021 to March 23, 2021 (the Notice Period).

b) No insurable hours were earned during this period because "the remuneration is not attributable to specific work hours" but the notice payments were insurable earnings.

c) After March 23, 2021, F. D. was no longer an employee of his former employer.

[61] The CRA did not make any determination about whether F. D. earned any insurable hours after March 23, 2021 while receiving his severance payments. They did determine that those bi-weekly severance payments were not insurable earnings.

[62] The Appellant appealed the CRA's decision to the Minister of National Revenue. He also requested a determination from the Minister on whether or not he had earned any insurable hours or insurable earnings during the Severance Period.

[63] In his appeal decision of January 11, 2023, the Minister upheld the CRA's findings about the Notice Period: no insurable hours were earned during this period.

[64] The Minister also determined that during the Severance Period, between "March 24, 2021 to December 19, 2021, [F. D.] did not have any insurable earnings or insurable hours."

[65] At the hearing, I explained to the Appellant that the CRA has exclusive jurisdiction to make a determination about an EI claimant's insurable hours and

insurable earnings.[11] The Minister had determined that F. D. had not accrued any insurable hours during his qualifying period. I am not permitted to overrule the Minister on that issue.

[66] I explained to the Appellant that he had two options:

a) If he intended to appeal the Minister's decision to the Tax Court of Canada, I could hold his appeal to the Tribunal in abeyance until he had a decision from that proceeding. He could then introduce that decision as evidence in his appeal to the SST.

b) If he did not intend to appeal the Minister's decision to the Tax Court of Canada, I could proceed with his hearing and would be required to decide the question of the Appellant's qualification for benefits based on the record before me at the hearing.

[67] I confirmed with the Appellant that the choice was his and that I would be happy to grant an adjournment to give him time to pursue his appeal of the Minister's ruling to the Tax Court of Canada if he wished.

[68] After much consideration, F. D. ultimately confirmed that he

a) Would not be appealing the Minister's decision to the Tax Court of Canada and

b) Wished to proceed with his appeal to the Tribunal based on the evidentiary record before the Tribunal.

[69] The Minister of National Revenue has determined that F. D. had accrued zero insurable hours during the 52 week qualifying period that preceded his application for benefits. This is the only evidence before me on this question and by declining his right to appeal the CRA ruling, F. D. has accepted this finding for the purpose of this hearing.

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[11] *Canada (AG) v. Didiodato*, 2002 FCA 345; *Canada (AG) v. Romano*, 2008 FCA 117; see also section 90.1 of the EI Act

[70] F. D. does not have enough insurable hours to qualify for benefits.

Conclusion

[71] The Appellant hasn't proven that he had good cause for the delay in making his claim for benefits throughout the entire period of the delay.

[72] The Appellant did not accrue sufficient hours during his qualifying period to establish a benefit period.

[73] The appeal is dismissed.

Jillian Evans

Member, General Division – Employment Insurance Section