Citation: *XX v Canada Employment Insurance Commission*, 2024 SST 101

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	X. X.
Respondent:	Canada Employment Insurance Commission
Representative:	Melanie Allen

Decision under appeal:	General Division decision dated June 29, 2023 (GE-22-3897)

Tribunal member:	Elizabeth Usprich
Type of hearing:	Videoconference
Hearing date:	December 19, 2023
Hearing participants:	Appellant Respondent's representative
Decision date:	January 31, 2024
File number:	AD-23-726

Decision

[1] The appeal is dismissed.

[2] There is an error of law. The General Division's decision says the length of the delay wasn't a consideration when deciding whether there was good cause to antedate (backdate) the claim.

[3] I have fixed the error by giving the decision the General Division should have given. But the outcome is the same. The Claimant can't get Employment Insurance (EI) benefits at the earlier date.

Overview

[4] X. X. is the Claimant. He stopped working on August 4, 2022. He applied for EI benefits on September 14, 2022.

[5] The Claimant asked the Canada Employment Insurance Commission (Commission) to antedate his application to July 31, 2022.[1] The Commission refused.

[6] The Claimant appealed to the Social Security Tribunal (Tribunal), but the General Division dismissed the appeal. The Claimant then appealed to the Appeal Division.

[7] The Claimant argues he only had a short delay. The Commission's administrative policy says it considers an application for benefits to be timely if someone applies within four weeks. It isn't disputed the Claimant waited longer than this to apply.

[8] The General Division made an error of law. The General Division's decision says that the length of the delay isn't a consideration. This is incorrect. It is a factor to be considered.

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[1] See GD3-15. A benefit period begins on the later of the Sunday of the week in which the interruption of earnings occurred and the Sunday of the week in which the initial claim (application) for benefits is made. See section 10 of the *Employment Insurance Act* (EI Act). Here, the Claimant is asking for the claim to be antedated to the Sunday of the week in which his interruption of earnings occurred.

[9] The parties agree all information was presented to the General Division. I am giving the decision the General Division should have given.

[10] I am dismissing the appeal. The Claimant didn't act as a reasonable and prudent person would have acted in similar circumstances. That means his claim can't be antedated.

Preliminary matters

[11] The Claimant has asked to have the decision completely anonymized. He says even using his initials is an issue. He is concerned solely about the publication of the decision.

[12] The Claimant says this goes beyond preference. It is a matter of his personal privacy. He worries a potential future employer would be able to link the case to him and that it would restrict his employment possibilities.

[13] I have considered the Claimant's arguments. I am balancing the Tribunal's commitment to open justice and the Claimant's request for privacy.[2] I find that anonymizing the decision by using "XX" instead of the Claimant's initials is adequate in the published version of the decision.

Issues

[14] The issues in this appeal are as follows:

a) Did the General Division fail to provide the Claimant with a fair process?

b) Did the General Division make an error of law when it said the length of the delay wasn't a consideration when deciding whether there was good cause to antedate the Claimant's claim for EI benefits?

c) If the General Division made an error, how should the error be fixed?

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[2] See the "Open justice and privacy" page of the Social Security Tribunal (Tribunal) website at https://sst-tss.gc.ca/en/decisions-laws-rules-and-policies/open-justice-and-privacy.

d) Can the Claimant's application for benefits be antedated?

Analysis

[15] I can only intervene (step in) if the General Division made an error. There are only certain errors I can consider. Briefly, I can intervene if the General Division made at least one of the following errors:[3]

- It acted unfairly in some way.
- It decided an issue it should not have, or didn't decide an issue it should have.
- It didn't follow the law or misinterpreted the law.
- It based its decision on an important error about the facts of the case.

The General Division provided the Claimant with a fair process

– The Claimant says his hearing took too long to be scheduled

[16] The Claimant argues it took the General Division an unreasonably long time to schedule and hear his case. He says the Tribunal's service standard wasn't followed.[4] The service standard was 45 days for his case, but it took substantially longer. Because of this, he says it was harder for him to collect all the details about his case, and it was less efficient.

[17] I don't find this amounts to an unfair process. There was no evidence the Claimant said he no longer had access to. He was the one who filed the appeal, so there was no surprise in terms of not knowing there was an appeal.

[3] See section 58(1) of the *Department of Employment and Social Development Act* (DESD Act).
[4] See AD1-4.

[18] The service standard of 45 days is just that—a standard or a goal. The standard says 80% of the time, a final decision will be issued in 45 days.[5] This case fell in the other 20%. I don't find this means the Claimant was denied procedural fairness in any way. It is simply unfortunate.

– **The member wasn't biased**

[19] The Claimant says he didn't raise bias during the hearing because the thought of bias didn't occur to him until afterwards. He thought the member had pre-decided the case. In his mind, when she told him that the law was strict, it meant she wasn't really listening to him.

[20] The Claimant argues the member should have been more proactive. During the hearing, he asked her whether there were other arguments he should put forward. She responded that she wasn't his advocate and it was up to him to argue his case.[6]

[21] Allegations of bias are very serious. Members are presumed to be impartial. The test for bias is whether a reasonably well-informed person would think, in the circumstances, that the member would not decide the case fairly.[7] It isn't enough to show suspicion of bias. There needs to be actual evidence of bias. This means the legal test for showing a decision-maker is biased is high.[8]

[22] The Claimant argues that paragraph 16 of the General Division decision shows the member was biased because it starts with "I agree with the Commission." Respectfully, I disagree with the Claimant. Part of the member's role is to explain what each side's position is. The member did this. She then went on to explain why she agreed with the Commission. The fact that she disagreed with the Claimant doesn't mean she was biased.

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[5] See the "Service standards" page of the Tribunal's website at https://sst-tss.gc.ca/en/your-appeal/service-standards.
[6] See the General Division hearing recording at 0:37:54.
[7] See *Committee for Justice and Liberty et al v National Energy Board et al*, 1976 CanLII 2 (SCC), [1978] 1 SCR 369 at page 394.
[8] See *SM v Minister of Employment and Social Development*, 2015 SSTAD 1050 at paragraph 17.

[23] I disagree with the Claimant that the member wasn't listening. When the member said the law for antedating was demanding and strict, she was explaining a legal test.[9] This doesn't show she had made up her mind about the Claimant's facts or case. This doesn't mean she was biased.

– **The Claimant received a fair hearing**

[24] The Claimant argues the member prevented him from presenting his case. He argues that she blocked or stopped conversation.

[25] There is no sign on the hearing recording that the member did this.

[26] The Claimant also argues the member didn't ask him enough questions. She should have informed him what arguments he should have made.

[27] I disagree. The member properly explained the legal test for antedating at the beginning of the hearing. She explained good cause and asked the Claimant to tell her why he thought he had good cause for the delay.[10]

[28] The member told the Claimant it wasn't her role to make arguments for him. It was the Claimant's appeal. This means the Claimant had the responsibility to advance all his arguments.

[29] I listened to the recording of the General Division hearing, but the Claimant hasn't established that the member was biased.

[30] The General Division provided the Claimant with a fair process.

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[9] See *Canada (Attorney General) v Brace*, 2008 FCA 118 at paragraph 7; and *Quadir v Canada (Attorney General)*, 2018 FCA 21 at paragraph 5.
[10] See the General Division hearing recording from 0:12:20 to 0:14:55.

The General Division made an error of law by stating the length of the delay wasn't part of the legal test for antedating the claim

[31] The Claimant argues he only had a short delay in applying for EI benefits. The Commission gives a four-week grace period, and he applied not long after.[11] This is clear from the hearing recording and the General Division decision.[12]

[32] The General Division decision says, "I shouldn't look at the length of the delay, but instead the reasons for the delay."[13] To support its conclusion, the General Division relied on a case called *McBride*.[14] But in a case called *Burke*, the Federal Court of Appeal recognized the length of the delay as a relevant factor, even if the reason for the delay is the most important factor.[15]

[33] This means the reason for the delay is the most important consideration. But the length of the delay is still something that needs to be considered. It appears the General Division only focused on the reason for the delay. It was aware of *Burke* but overlooked one of its key principles: the length of the delay is a relevant factor that needs to be considered.[16] That means there is an error of law.

– It isn't necessary to consider other errors

[34] I have found there is an error of law in the General Division decision. That means it isn't necessary for me to consider other potential errors.

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[11] See the Commission's administrative policy of the Digest of Benefit Entitlement Principles (Digest) Chapter 3 section 1 at 3.1.1 https://www.canada.ca/en/employment-social-development/programs/ei/ei-list/reports/digest/chapter-3/antedate.html#a3_1_1.
[12] See the General Division decision at paragraphs 14 and 18 and the General Division hearing recording at 0:16:50.
[13] See the General Division decision at paragraph 19.
[14] See *Canada (Attorney General) v McBride*, 2009 FCA 1 at paragraph 6.
[15] See *Canada (Attorney General) v Burke*, 2012 FCA 139 at paragraph 11.
[16] See the General Division decision at paragraphs 10 and 11.

Remedy

[35] Since I have found an error, there are two main ways I can remedy (fix) it. I can make the decision the General Division should have made. I can also send the case back to the General Division if I don't feel the hearing was fair or there isn't enough information to make a decision.[17]

[36] The parties agreed that, if I found an error, I should give the decision the General Division should have given. There is no suggestion by either party that they didn't present all of their evidence to the General Division.

[37] I find this means I can give the decision that the General Division should have given. That includes deciding whether the claim for EI benefits should be antedated.[18]

The Claimant doesn't have good cause, so the claim can't be antedated

– The Claimant has to show he had good cause for the entire length of the delay

[38] This case is about whether the Claimant's application for EI benefits can be antedated. To get an application antedated, you have to prove you had good cause for the delay.[19]

[39] To show good cause, the Claimant has to show he acted as a reasonable and prudent person would have acted in similar circumstances.[20] This means he has to show he acted reasonably and carefully just as anyone else would have if they were in a similar situation. He has to show he acted this way for the entire length of the delay.[21]

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[17] Section 59(1) of the DESD Act allows me to fix the General Division's errors in this way.
[18] Section 59(1) of the DESD Act allows me to fix the General Division's errors in this way.
[19] See section 10(4) of the EI Act. See also *Canada (Attorney General) v Kaler*, 2011 FCA 266 at paragraph 4.
[20] See *Canada (Attorney General) v Burke*, 2012 FCA 139.
[21] See section 10(4) of the EI Act.

[40] The Claimant also has to show he took reasonably prompt steps to understand his entitlement to benefits and obligations under the law.[22] This means the Claimant has to show he tried to learn about his rights and responsibilities as soon as possible and as best he could. If the Claimant didn't take these steps, then he must show there were exceptional circumstances that explain why he didn't do so.[23]

[41] The Claimant is the one that must show he had good cause for the entire length of the delay. I find the Claimant hasn't done so, for the reasons that follow.

– **The Claimant's last day of work was August 4, 2022**

[42] The Claimant's last day of work was August 4, 2022.[24] But, he feels his job didn't "wrap up" until he returned items to his employer on August 12, 2022. He argues this means his delay was even less.

[43] The fact is that the last day the Claimant worked was August 4, 2022. This is when his interruption of earnings occurred.

[44] This means the period of the delay is from August 4, 2022, to September 14, 2022, when the Claimant applied for EI benefits.

– **A short delay, by itself, doesn't give you good cause**

[45] The Claimant argued he only had a short delay in applying for benefits. A short delay, by itself, doesn't give a person good cause.

[46] The Claimant relies on a Social Security Tribunal (Tribunal) decision that I will refer to as *SV*.[25] The Claimant feels his situation is the same as *SV*, so I should follow what was done in that case. He feels his delay of one to two weeks past the "grace"

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[22] See *Canada (Attorney General) v Somwaru*, 2010 FCA 336; and *Canada (Attorney General) v Kaler*, 2011 FCA 266.
[23] See *Canada (Attorney General) v Somwaru*, 2010 FCA 336; and *Canada (Attorney General) v Kaler*, 2011 FCA 266.
[24] See GD3-16 and GD2-5.
[25] See *SV v Canada Employment Insurance Commission*, 2020 SST 287.

period is within the permissible timeframe to apply. The Tribunal tries to be consistent in its decisions. But I can depart from another Tribunal decision if I explain why.[26]

[47] In *SV,* the claimant's job ended and he was paid severance and vacation pay. But, in that case, SV's employer told him he would not be able to get EI benefits until the severance and vacation pay had run out, so he had to wait to apply. The Tribunal found it was reasonable for him to have followed the advice he had received.

[48] The Tribunal then found the Commission's four-week administrative policy to be helpful.[27] The policy allows automatic antedating for applicants who apply within four weeks of an interruption of earnings. The Tribunal found it was reasonable to use that policy as a guideline from the date the claimant (SV) thought he could apply.

[49] In the present case, the Claimant says he didn't get any advice from his employer.[28] This means his case can be distinguished from *SV*. The facts are different. Because of that, I am not going to use the reasoning in *SV*. The Claimant here was never given any advice that he relied on.

[50] The Claimant also relies on another case that I will refer to as *MC*.[29] Again, I have to look at the Tribunal decision the Claimant is referring to and see whether it is the same as his case.[30]

[51] In *MC*, the industry the claimant worked in was significantly impacted by COVID-19. There was some confusion about how the Canada Emergency Response Benefit (CERB) worked as well. The Tribunal found that, because it was a confusing time, the claimant had acted as a reasonable and prudent person would have in the same situation. It also found there were exceptional circumstances in his case. These factors distinguish *MC* from the case before me.

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[26] See *Canada (Attorney General) v Bri-Chem Supply Ltd*, 2016 FCA 257.
[27] See section 3.1.1 of the Digest of Benefit Entitlement Principles.
[28] See the General Division hearing recording at 0:27:45.
[29] See *MC v Canada (Attorney General)*, 2021 SST 312.
[30] See *Canada (Attorney General) v Bri-Chem Supply Ltd*, 2016 FCA 257.

[52] Again, I don't find *MC* to be persuasive in the current case. There are no exceptional circumstances here. There was no confusing time. The Claimant says he wasn't aware of the temporary measures and didn't think he could get benefits sooner. This was an assumption.

[53] Further, this case isn't about eligibility. That isn't in dispute. This case is about applying for benefits. Even if the Claimant had a waiting period while a payment ran out, it is still expected that people apply for benefits to find out their eligibility. It is important, as part of the EI scheme, that claimants apply for benefits in a timely way.[31]

[54] I don't agree that the only period of delay to be looked at is the time frame past the Commission's four-week administrative policy. The policy is to allow those applying within the four-week period an automatic antedate. Those people have still delayed. But the policy automatically allows their claims to be antedated.

[55] Because those claims are late, or delayed, it is still a time frame that should be taken into account. The entire period should be considered as part of the delay.

[56] Even if this is incorrect, and only the time frame past the four-week administrative automatic antedate period should be considered, I don't find it changes the analysis in this case.

[57] The Federal Court of Appeal has been clear. It says, "The obligation and duty to promptly file a claim is seen as very demanding and strict. This is why the 'good cause for delay' exception is cautiously applied."[32] This means that antedating a claim isn't automatic beyond the four-week administrative policy. There has to be a good explanation for the delay.

[58] I don't find the Claimant only slightly delayed. If that had been the case, he would have fallen within the four-week administrative policy time frame.

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[31] See *Canada (Attorney General) v Beaudin*, 2005 FCA 123 at paragraph 6.
[32] See *Canada (Attorney General) v Brace*, 2008 FCA 118 at paragraph 7.

[59] I have considered the length of the delay as a factor. I will now focus on the Claimant's reasons for the delay, which is the more important consideration.[33]

– The reasons for the delay don't give the Claimant good cause

[60] The Claimant says there were a number of reasons why he didn't apply for EI benefits right away. I will consider each of his arguments below. But regardless of whether I look at them separately or together, he hasn't shown that he had good cause for his entire delay.

[61] First, the Claimant argues the Commission's website accepts as a reason for delay that someone hasn't received their Record of Employment (ROE).[34] Yet, that isn't what the website says. It says this is often a reason put forward by claimants. Nowhere does it say this is an acceptable reason for the delay. The next paragraph on that page also makes it clear that the reason for the delay by itself doesn't prove good cause for the delay.

[62] In this case, I don't find waiting for a ROE gives the Claimant good cause for his delay. He says he was waiting to receive his ROE before he applied for EI benefits. Yet, he told the Commission he knew he could have applied for EI without his ROE.[35] Additionally, on August 30, 2022, his employer told him the ROE had been issued electronically on August 19, 2022.[36] Had the Claimant applied on August 30, 2022, he would not have been late.

[63] Second, the Claimant has admitted that his main focus was finding a job instead of looking into EI benefits.[37] But he says that, because he received a severance payment, he figured he wasn't eligible to receive benefits until the severance had run out.[38]

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[33] See *Canada (Attorney General) v Burke*, 2012 FCA 139 at paragraph 11.
[34] See section 3.3.0 of the Digest of Benefit Entitlement Principles at https://www.canada.ca/en/employment-social-development/programs/ei/ei-list/reports/digest/chapter-3/reasons-delay.html#a3_3_0.
[35] See GD3-21.
[36] See GD2-5.
[37] See GD3-15, GD3-19, GD3-21, and GD2-5.
[38] See the General Division hearing recording at 0:24:40 and also GD2-5.

[64] The Claimant says he looked into EI benefits once he had his ROE.[39] That was when he learned there were temporary measures in place which meant he didn't have to wait until the severance payments had run out before receiving benefits.

[65] The Claimant argues he was sure he had to wait for the severance to run out. So, it isn't reasonable to expect that he research his entitlement to benefits. He would not have known there were temporary measures in place.

[66] I understand the Claimant's position. Yet, I find the timing of when he would receive benefits isn't what I need to look at. The issue is when he should have **applied** for benefits and whether he is asking to have his claim antedated.

[67] The fact is the Claimant needed to apply quickly for benefits. His eligibility for benefits and the timing of benefits aren't part of the legal test for antedating. The test is simply whether he had good cause for the delay. Regardless of the temporary measures, he should have applied for benefits quickly. So, I don't find this reason gives him good cause.

[68] Third, the Claimant argues his employer failed to give him any information about applying for EI. He relies on a Government of Canada web page that says:

> Service Canada works closely with employers to ensure that the Employment Insurance (EI) program is run fairly and efficiently. As an employer, you are responsible for:
>
> - advising employees to register for EI benefits as soon as possible after they stop working.[40]

[69] But this isn't law. There is no legal obligation for an employer to give an employee this type of information. Instead, it is up to each individual claimant to find out their rights and obligations under the law. So, I find the employer's not giving the

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[39] See the General Division hearing recording at 0:19:32.
[40] See the "EI - Employer responsibilities" at https://www.canada.ca/en/employment-social-development/programs/ei/ei-list/ei-employers/responsibilites.html.

Claimant information doesn't amount to giving him good cause, nor is it an exceptional circumstance.

[70] In this case, the Claimant didn't apply promptly. He says that was because he was busy looking for work and he didn't think he would get benefits right away. Unfortunately, he didn't take prompt steps to find out his rights and obligations under the law. He made assumptions that turned out to be incorrect.

[71] I find that the Claimant didn't seek the information that a reasonable person, in similar circumstances, would have.[41] Alternatively, he could have simply applied to find out whether he could get benefits.

– **There are no exceptional circumstances that apply in this case**

[72] The General Division found that the Claimant didn't have any exceptional circumstances. The Claimant agrees he told the General Division everything on this issue. He isn't arguing that exceptional circumstances apply in his case.

[73] I agree with the General Division and find this means there aren't any exceptional circumstances that apply in this case.

[74] I find that there were no exceptional circumstances that prevented the Claimant from applying for benefits. This means that the Claimant had to take reasonably prompt steps to understand his entitlement to benefits and obligations under the law.[42]

– **There aren't any other arguments that give the Claimant good cause for the delay**

[75] The Claimant says he has had a claim antedated before. He admits that was a different situation. But he thought delaying his application wasn't a big deal.

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[41] See *Attorney General (Canada) v Trinh*, 2010 FCA 335, where the Federal Court of Appeal makes it clear that a claimant's reliance on rumours, unverified information, or on unfounded and blind assumptions doesn't constitute good cause. This also means that ignorance of the law isn't good cause.
[42] See *Attorney General (Canada) v Trinh*, 2010 FCA 335 at paragraph 10.

[76] Each application is considered individually, so I can't comment on the previous application.

[77] The Claimant also argues that "pre-COVID-19" case law (before temporary measures were in place) should not be considered. But to his knowledge, there isn't any newer case law.

[78] The Federal Court of Appeal cases that have been referred to are still valid law. So, I reject the Claimant's argument.

[79] While the Claimant's delay wasn't extremely long, approximately six weeks, the delay is only one factor. I have considered this factor. The Federal Court of Appeal has said the more important consideration is the reason for the delay.[43] In this case, the Claimant hasn't shown he had good cause for the entire length of the delay.

Conclusion

[80] The appeal is dismissed.

[81] The General Division made an error of law. Its decision says the length of the delay isn't a consideration. This is incorrect. It is a factor to be considered.

[82] I have fixed the error by giving the decision the General Division should have given. But the outcome is the same. I can't antedate the Claimant's application for benefits.

Elizabeth Usprich
Member, Appeal Division

[43] See *Canada (Attorney General) v Burke*, 2012 FCA 139 at paragraph 11.