[TRANSLATION]

Citation: *KE v Canada Employment Insurance Commission*, 2023 SST 2033

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	K. E.
Representative:	J. N.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (599445) dated July 25, 2023 (issued by Service Canada)

Tribunal member:	Charline Bourque
Type of hearing:	In writing
Decision date:	November 23, 2023
File number:	GE-23-2357

Decision

[1] The appeal is dismissed.

[2] The Appellant hasn't shown that she had good cause for the delay in claiming Employment Insurance (EI) benefits during the entire period of the delay. This means that her claim can't be treated as though it was made earlier.

[3] The Appellant hasn't shown that she was available for work within the meaning of the law. So, I find that she can't receive EI benefits.

Overview

Antedate reports

[4] In general, to receive EI benefits, you have to make a claim for each week that you didn't work and want to receive benefits.[1] You make claims by submitting reports to the Canada Employment Insurance Commission (Commission) every two weeks. Usually, you make your claims online. There are deadlines for making claims.[2]

[5] The Appellant made her reports after the January 29, 2023, deadline. But she wants them to be treated as though they were made earlier, on December 4, 2022.

[6] For this to happen, the Appellant has to prove that she had good cause for the delay.

[7] The Commission decided that the Appellant didn't have good cause and refused the request. The Commission says that the Appellant doesn't have good cause because it is up to her to submit her reports by the deadline set out in the *Employment Insurance Act* (Act). In addition, the Appellant was careless in waiting until February 7, 2023, to submit her claimant reports, even though she had applied for benefits on December 8, 2022. The Appellant didn't act as a prudent person, concerned about her right to

[1] See section 49 of the *Employment Insurance Act* (Act).
[2] See section 26 of the *Employment Insurance Regulations* (Regulations).

benefits, would have acted, so she doesn't have good cause for the delay in submitting her reports.

[8] The Appellant disagrees and says that communicating with the Commission is difficult and that she should not be penalized for that reason. She also says that the situation is confusing and that the Act is complicated. She says that she contacted the Commission on February 8, 2023, and didn't get a message from the Commission saying it had called her back on February 10 and 13.

Availability

[9] In addition, the Commission decided that the Appellant was disentitled from receiving EI regular benefits from December 5, 2022, because she wasn't available for work, since her work permit limited her to working only for the employer X.

[10] 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.

[11] I have to decide whether the Appellant has proven that she was available for work. The Appellant has to prove this on a balance of probabilities. This means that she has to show that it is more likely than not that she was available for work.

[12] The Commission says that the Appellant wasn't available because there is no document on file that shows that she made reasonable, customary, and sustained efforts to find a job. In addition, she has major restrictions related to her work permit that limit her to only one employer.

[13] The Appellant disagrees and says she doesn't understand because she has two co-workers who have a restricted work permit for the same employer and one of them receives EI benefits while the other doesn't have enough insurable hours.[3]

[3] See the Appellant's arguments (GD2-14).

Matter I have to consider first

Hearing in writing

[14] The Appellant indicated that she wanted a hearing in writing when she filed her appeal with the Tribunal.[4]

[15] So, the Tribunal proceeded in writing to comply with the Appellant's request.

Issues

[16] Did the Appellant have good cause for the delay in claiming EI benefits?

[17] Was the Appellant available for work?

Analysis

Issue 1: Did the Appellant have good cause for the delay in claiming EI benefits?

[18] The Appellant wants her claims for EI benefits (claimant reports) to be treated as though they were made earlier, on December 4, 2022. This is called antedating (or, backdating) the claims.

[19] To get a claim antedated, the Appellant has to show good cause for the delay during the entire period of the delay.[5] The Appellant has to prove this on a balance of probabilities. This means that she has to show that it is more likely than not that she had good cause for the delay.

[20] And, to show good cause, the Appellant has to prove that she acted as a reasonable and prudent person would have acted in similar circumstances.[6] In other words, she has to show that she acted reasonably and carefully just as anyone else would have if they were in a similar situation.

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[4] See application for appeal to the Tribunal (GD2-3).
[5] See *Paquette v Canada (Attorney General)*, 2006 FCA 309; and section 10(5) of the Act.
[6] See *Canada (Attorney General) v Burke*, 2012 FCA 139.

[21] The Appellant also has to show that she took reasonably prompt steps to understand her entitlement to benefits and obligations under the law.[7] This means that the Appellant has to show that she tried to learn about her rights and responsibilities 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 to show that she acted this way for the entire period of the delay.[9] This period is from the day she wants her claim antedated to until the day she actually made the claim. So, for the Appellant, the period of the delay is from December 4, 2022, to February 8, 2023.

[23] The Appellant says that she had good cause for the delay because she should not be penalized for not being able to reach the Commission. She also says that she contacted the Commission on February 8 and that, even though the Commission says that it tried to reach her on February 10 and 13, she didn't get a message from it.

[24] The Commission says that the Appellant hasn't shown that she had good cause for the delay because it is up to the Appellant to submit her reports by the deadline set out in the Act. In addition, the Commission considers that the Appellant was careless in waiting until February 7, 2023, to submit her claimant reports, even though she had applied for benefits on December 8, 2022. The Appellant didn't act as a prudent person, concerned about her right to benefits, would have acted, so she doesn't have good cause for the delay in submitting her reports.

[25] I agree with the Commission. Even though the Appellant tried to reach the Commission on February 8, 2023, and February 28, 2023, she had made her claim more than nine weeks before. I understand that the Appellant is of the view that the

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[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 Burke*, 2012 FCA 139.

Commission didn't leave a message for her to call back, contrary to what the Commission says, but the Appellant didn't follow up either. Then, the Appellant says that she went to a Service Canada office on June 2, 2023.

[26] The Appellant says that she was doing everything possible to reach the Commission despite her work schedule, but I can only note that she wasn't working during the period when she wanted unemployment and had the responsibility of finding out the status of her claim for benefits.

[27] I also understand that the Act can be complex, but it is a claimant's responsibility to find out the status of their claim.[10] Also, case law recognizes that ignorance of the Act doesn't justify a delay in submitting reports.[11]

[28] So, I find that the Appellant hasn't proven that she had good cause for the delay in making her claim because she was late in contacting the Commission and can't justify the delay by ignorance of the Act. I am of the view that the Appellant didn't act as a reasonable and prudent person would have acted in her circumstances.

[29] The appeal is dismissed on the antedate issue.

Issue 2: Was the Appellant available for work?

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

[31] First, the 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*

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[10] See *Canada (Attorney General) v Somwaru*, 2010 FCA 336; and *Canada (Attorney General) v Kaler*, 2011 FCA 266.
[11] See *Canada (Attorney General) v Albrecht*, 1985 FCA 170; *Canada (Attorney General) v. Persiiantsev*, 2010 FCA 101.
[12] See section 50(8) of the Act.

(Regulations) give criteria that help explain what “reasonable and customary efforts” mean.[13] I will look at those criteria below.

[32] 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] I will look at those factors below.

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

Capable of and available for work

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

a) She wants to go back to work as soon as a suitable job is available.

b) She has made efforts to find a suitable job.

c) She hasn’t set personal conditions that might unduly (in other words, overly) limit her chances of going back to work.

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

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[13] See section 9.001 of the Regulations.
[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.

– **Wanting to go back to work**

[36] The Appellant has shown that she wanted to go back to work as soon as a suitable job was available.

[37] She says that she went back to work on January 9, 2023.

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

[38] The Appellant hasn't made enough effort to find a suitable job.

[39] The Appellant says that she didn't make efforts to find a job. She says that she was laid off on December 22, 2022, and went back to work on January 9, 2023. She adds that this period coincided with the holiday break when most businesses were closed.[18]

[40] I find that the Appellant was laid off on December 2, 2022, and not on December 22, 2022.[19]

[41] So, I find that the Appellant made no effort to find a job.

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

[42] The Appellant did set personal conditions that might have unduly limited her chances of going back to work.

[43] The Appellant says that she doesn't understand why she can't receive EI benefits because her permit limits her to working for her employer when two co-workers receive benefits.

[44] The Commission says that the Appellant's work permit is valid until July 1, 2024, allowing her to work exclusively for her employer as a sewing machine operator. The work permit sets conditions, such as prohibiting her from working for an employer, in a profession, and at a location other than what is indicated. The Commission considers

[18] See Appellant's letter (GD6-3).
[19] See Record of Employment (GD3-17).

that claimants with a closed work permit can rebut this presumption of non-availability by showing that they are making serious job search efforts and that they want to ask Immigration, Refugees and Citizenship Canada (IRCC) to remove the restrictions on the work permit. This isn't the Appellant's case, since she hasn't shown that she made efforts to do this.

[45] I agree with the Commission. The Appellant can only work for her current employer based on the restrictions indicated on her work permit.[20] To obtain a restricted work permit, the employer committed to having the Appellant work during the period of her work permit. But, if the employer no longer has work to offer an employee, the employee must make efforts to ask for a change to their work permit. The employee could apply for an "open" work permit to allow them to look for work for any employer.

[46] In this case, the Appellant didn't take any steps to change her work permit. The Appellant asked to validate a permanent job offer, but this still applies to her current employer.[21]

[47] I find that this means the Appellant has set personal conditions that limit her chances of finding a job. The Appellant can't work for an employer other than her current one.

– **So, is the Appellant capable of and available for work?**

[48] Based on my findings on the three factors, I find that the Appellant hasn't shown that she was capable of and available for work but unable to find a suitable job.

[49] The appeal is dismissed on the issue of availability.

[20] See work permit (GD2-17).
[21] See the letter of request to validate a permanent job offer, dated October 13, 2023 (GD6-2).

Conclusion

[50] The Appellant hasn't proven that she had good cause for the delay in making her claim for benefits throughout the entire period of the delay. This means that her claim can't be treated as though it was made earlier.

[51] The Appellant hasn't shown that she was available for work within the meaning of the law. Because of this, I find that she can't receive EI benefits.

[52] The appeal is dismissed.

Charline Bourque

Member, General Division – Employment Insurance Section