Citation: *AB v Canada Employment Insurance Commission*, 2024 SST 361

# Social Security Tribunal of Canada
## Appeal Division

# Decision

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| **Appellant:** | A. B. |
| **Representative:** | Tom Thiru |
| **Respondent:** | Canada Employment Insurance Commission |
| **Representative:** | Jessica Earles |

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| **Decision under appeal:** | General Division decision dated December 18, 2023 (GE-23-2917) |

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| **Tribunal member:** | Solange Losier |
| **Type of hearing:** | Videoconference |
| **Hearing date:** | April 9, 2024 |
| **Hearing participants:** | Appellant<br>Appellant's representative<br>Respondent's representative |
| **Decision date:** | April 12, 2024 |
| **File number:** | AD-24-94 |

## Decision

[1] The appeal is dismissed. The General Division made an important error of fact.

[2] I have substituted my decision for the General Division and reached the same result. The antedate is denied.

## Overview

[3] A. B. is the Claimant in this case. She was working for a company for many years until her employment ended. She collected severance from her former employer and when that ended, she applied for Employment Insurance (EI) benefits. She asked the Commission to backdate her EI claim to an earlier date (this is also called an antedate request).

[4] The Canada Employment Insurance Commission (Commission) decided that the Claimant didn't have good cause for the delay in applying for EI benefits, so they refused to antedate her EI claim.[1] The Claimant appealed that decision to the General Division.

[5] The General Division concluded the same and dismissed her appeal.[2] The Claimant appealed that decision to the Appeal Division.[3]

[6] I have decided that the General Division made an important error of fact. I am giving the decision the General Division should have given. The Claimant does not have good cause.

## New evidence

[7] New evidence is evidence that the General Division did not have before it when it made its decision.

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[1] See reconsideration decision at page GD3-40.
[2] See General Division decision at pages AD1A-1 to AD1A-6.
[3] See Application for the Appeal Division at pages AD1-1 to AD1-9.

[8] The Appeal Division generally does not accept new evidence.[4] This is because the Appeal Division isn't the fact finder or rehearing the case. It is a review of the General Division's decision based on the same evidence.[5]

[9] There are some exceptions where new evidence is allowed.[6] For example, I can accept new evidence if it provides one of the following:

- general background information only
- if it highlights findings made without supporting evidence
- shows that the Tribunal acted unfairly

[10] In the Claimant's application to the Appeal Division, she submitted a medical note from her doctor, dated February 14, 2024.[7] She wrote there were three other factors affecting her delay specifically, erroneous information that the Commission gave her, anticipation of other employment and a death in her family.[8]

[11] I asked the parties whether the above evidence was new evidence and if so, whether it should be accepted.

[12] The Claimant's representative said that it was not new evidence because the Claimant has had medical issues for many years, even before the General Division hearing took place. He noted that the General Division likely had a copy of the medical note or should have had it. He explained that if the Claimant didn't raise her medical issues at the General Division hearing, then it was because she considers her health information private.

[13] In the alternative, the Claimant's representative submitted that if the above evidence was not before the General Division, then the new evidence should fall into

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[4] See *Tracey v Canada (Attorney General),* 2015 FC 1300 at paragraphs 29 and 34; *Parchment v Canada (Attorney General),* 2017 FC 354, at paragraph 23.
[5] See *Gittens v Canada (Attorney General),* 2019 FCA 256, at paragraph 13.
[6] See *Sharma* v *Canada (Attorney General),* 2018 FCA 48 and *Sibbald v Canada (Attorney General),* 2022 FCA 157.
[7] See page AD5-2.
[8] See pages AD1B-3; AD1-8 and AD1B-7.

one of the exceptions. Specifically, he said that it should be accepted as general background information.

[14] The Commission's representative said that the medical note and three additional factors raised by the Claimant is new evidence that was not before the General Division. She argues that the new evidence does not fall into any of the exceptions and so it should not be accepted by the Tribunal.

[15] I find that the medical note and three additional factors raised by the Claimant is in fact new evidence. I reviewed the General Division file and none of this evidence is in the record or the audio recording from the General Division hearing. This evidence was not before the General Division when it made its decision.

[16] I acknowledge that the Claimant wants to submit this new evidence because it provides an additional explanation on why she delayed making her application for EI benefits. However, appeals to the Appeal Division are not redos based on updated evidence of the hearings before the General Division.[9] Instead, they are reviews of the General Division based on the same evidence.

[17] I am not accepting the Claimant's new evidence because it isn't general background information and does not meet any of the other exceptions. This means I can't consider the Claimant's new evidence when making my decision.

## Issues

[18] The issues in this appeal are:

a) Did the General Division make an important error of fact by not considering the cumulative impact (or totality) of the Claimant's circumstances, including those it listed under "other matters"?

b) If so, how should the error be fixed?

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[9] See *Gittens v Canada (Attorney General),* 2019 FCA 256, at paragraph 13.

## Analysis

[19] On the Claimant's application to the Appeal Division, she checked off the boxes that say the General Division made an error of law, an important error of fact and didn't follow procedural fairness.[10]

[20] An error of law can happen when the General Division does not apply the correct law or uses the correct law but misunderstands what it means or how to apply it.[11]

[21] An error of fact happens when the General Division bases its decision on an "erroneous finding of fact made in a perverse or capricious manner or without regard for the material before it".[12]

[22] This involves considering some of the following questions:[13]

- Does the evidence squarely contradict one of the General Division's key findings?
- Is there no evidence that could rationally support one of the General Division's key findings?
- Did the General Division overlook critical evidence that contradicts one of its key findings?

[23] The General Division has to follow a fair process. This is called procedural fairness. So, if the General Division didn't follow a fair process in some way, then I can intervene.[14]

[24] At the Appeal Division hearing, the Claimant's representative confirmed that he was arguing all three grounds of appeal.

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[10] See pages AD1-3 and section 58(1) of the DESD Act. These are also known as the "grounds of appeal".
[11] See section 58(1)(b) of the DESD Act.
[12] See section 58(1)(c) of the DESD Act.
[13] This is a summary of the Federal Court of Appeal's decision in *Walls v Canada (Attorney General)*, 2022 FCA 47, at paragraph 41.
[14] See section 58(1)(a) of the DESD Act.

### – The General Division decided that the Claimant did not have good cause to antedate her EI claim

[25] The General Division had to decide whether the Claimant could antedate her application for EI benefits from April 3, 2022 to March 6, 2023.[15]

[26] To do so, the Claimant had to show that she had "good cause" for filing her application for EI benefits late for the entire period of delay.[16]

[27] To establish good cause, the Claimant has to show that she did what a reasonable person in her situation would have done in similar circumstances to satisfy herself of her rights and responsibilities under the *Employment Insurance Act* (EI Act), unless there are exceptional circumstances.[17]

[28] This includes an obligation for the Claimant to take reasonably prompt steps to determine her entitlement to EI benefits.[18]

[29] In this case, the General Division decided that the Claimant hadn't shown that she had good cause for the delay in applying for EI benefits for the entire period of delay.[19]

[30] The General Division found that the Claimant hadn't acted as a reasonably prudent person in the same situation would have done. It said she didn't make reasonably prompt inquiries to learn about her rights and obligations under the EI Act because it took her almost a year before she reached out to Service Canada.[20]

[31] At the General Division hearing, the Member asked the Claimant if there were any exceptional circumstances that might excuse her from taking reasonably prompt steps. The Claimant testified there were no exceptional circumstances that prevented or

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[15] See reconsideration decision at page GD3-40.
[16] See section 10(4) of the *Employment Insurance Act* (EI Act).
[17] See *Canada (Attorney General) v Kaler,* 2011 FCA 266 at paragraph 4 and *Canada (Attorney General) v Mendoza*, 2021 FCA 36 at paragraphs 13 and 14.
[18] See *Canada (Attorney General) v Carry*, 2005 FCA 367, at paragraph 5.
[19] See paragraphs 2, 11 and 17 of the General Division decision.
[20] See paragraph 17 of the General Division decision.

delayed her from applying for EI benefits or contacting Service Canada.[21] Because of that, it accepted that her circumstances were not exceptional.[22]

– **The parties agree that the General Division made an important error of fact**

[32] The Claimant and Commission agree that the General Division made an important error of fact.[23]

[33] They agree that the General Division erred because it did not consider the totality of the Claimant's circumstances before deciding that she did not have good cause, specifically some of the circumstances it listed under "other matters".

[34] They submit that the General Division should have considered the totality of the Claimant's circumstances, including those circumstances it listed under other matters and whether they amounted to good cause.

[35] I agree with the parties for the following reasons.

[36] After concluding that the Claimant did not have good cause or exceptional circumstances, the General Division identified "other matters" in its decision.

[37] The General Division noted that it had made its finding reluctantly. In paragraphs 19 to 24 of the General Division decision, it highlighted the following circumstances:

- The Claimant had lived experience working and contributing to society.
- She arrived in Canada 40 years ago and had worked continuously until her employment was terminated in April 2022.
- She didn't want to be a burden on government social assistance programs and thought applying for EI benefits would affect her entitlement to her severance package.

[21] See audio recording at 25:11 to 25:22 and paragraph 18 of the General Division decision.
[22] See paragraph 18 of the General Division decision.
[23] See section 58(1)(c) of the DESD Act.

- Her employer is a large and sophisticated company with a human resources department. She was told to keep the terms of her severance package confidential and had to sign an indemnity in favour of the employer.

- Her employer did not tell her to reach out to Service Canada to inquire about her eligibility for EI benefits.

- Her employer did not comply with its legal obligation to issue the Record of Employment (ROE) to the Claimant on time. It waited more than one year after her job ended before issuing the ROE.

- The ROE contains important information about applying for EI benefits, but the Claimant didn't get it. As well, the ROE does not tell potential claimants that they should immediately make inquiries to Service Canada about their entitlement to EI benefits even when they are getting severance payments.

- Finally, timely delivery of the ROE and use of plain language on the form would have helped the Claimant receive the EI benefits she was otherwise entitled to receive.

[38] The General Division listed the above circumstances as other matters after making its findings on good cause. However, some of the circumstances it listed as other matters were relevant to its determination on good cause (i.e., her arrival to Canada and 40-year work history; the size and sophistication of the employer; and the employer's failure to issue the ROE promptly, etc.).

[39] In doing so, it failed to consider the totality of the Claimant's circumstances (including those it listed in other matters) and whether they cumulatively amounted to good cause.

[40] For the reasons above, I find that the General Division made an important error of fact.[24] Since I have found one error, I do not need to consider any other alleged errors.

## Fixing the error

[41] There are two options for fixing an error by the General Division.[25] The first option is to send the file back to the General Division for reconsideration. The second option is to give the decision that the General Division should have given.

[42] I asked the parties what I should do to fix the error.

[43] The Claimant says that I should make the decision the General Division should have made. Specifically, she wants me to render the decision in her favour finding that she had good cause to antedate her EI application and qualifies to get EI benefits. However, if the matter was sent back to the General Division for reconsideration, the Claimant says she would not be opposed.

[44] The Commission agrees that I should make the decision the General Division should have made. It says that I should consider the cumulative impact or totality of the Claimant's circumstances and decide that she did not have good cause or exceptional circumstances.

### – I will fix the error by making the decision

[45] I agree with the parties. They were given a full opportunity to present their cases, and the file is complete. So, I will fix the error by giving the decision the General Division should have given. In making this decision, I can make necessary findings of fact.[26]

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[24] See section 58(1)(c) of the DESD Act.
[25] See section 59(1) of the DESD Act.
[26] See section 64 of the DESD Act.

## Antedate

### – The period of delay

[46] The Claimant applied for EI benefits on March 6, 2023.[27]

[47] On May 1, 2023, the Claimant asked the Commission to antedate her EI claim to an earlier date, April 3, 2022.[28]

[48] I find that the period of delay runs from April 3, 2022 to March 6, 2023. This is the period that the Claimant has to show that she took reasonably prompt steps to understand her entitlement to EI benefits and obligations under the law.

### – The Claimant's reasons for the delay in applying for EI benefits

[49] The Claimant provided several reasons for the delay in applying for EI benefits. I have summarized them as follows:

- She has a long history of employment since her arrival to Canada 40 years ago.
- She made an honest mistake by not applying for EI benefits earlier.
- She received a separation package from her employer which included severance payments from August 28, 2022 to March 12, 2023.[29]
- Part of the separation terms required her to immediately report any employment or self-employment to her former employer.
- She was worried that if she applied for EI benefits, any payments made would be considered compensation and could affect her severance payments which she relied on financially.
- Her former employer is a large and sophisticated company with a human resources department.

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[27] See application for EI benefits at pages GD3-3 to GD3-14.
[28] See antedate request at page GD3-18.
[29] See page GD2-13.

- She was told to keep the terms of her separation package confidential and signed an indemnity in favour of the employer.
- The employer did not tell her to reach out to Service Canada to inquire about EI benefits.
- She was focused on getting new employment and didn't want to be a burden on government social assistance programs.
- She also thought that she had to wait for her ROE. The employer did not issue it promptly.

– **The Claimant does not have good cause**

[50] I find that the Claimant has not proven she had good cause for the delay in applying for EI benefits.

[51] The Claimant did not act like a reasonable and prudent person in similar circumstances would have done to verify her rights and obligations under the EI Act.

[52] The Claimant assumed that she had to wait for her severance to end before applying for EI benefits, but she didn't take any steps to verify this information with Service Canada.

[53] The Claimant could have contacted Service Canada by telephone or visited a centre in-person to make inquiries. In doing so, she didn't have to disclose the terms of her separation package but could have simply made an inquiry about her eligibility for EI benefits while in receipt of severance payments.

[54] Similarly, in another case, a person received the equivalent of 11 months of severance from his employer.[30] He delayed applying for EI benefits for around 11 months after his employment ended and asked the Commission to antedate his EI

[30] See *Shebib v Canada (Attorney General),* 2003 FCA 88.

claim to an earlier date. The Court decided that a claimant's ignorance of the law did not amount to good cause.

[55] The Claimant submitted one page of her separation agreement with the employer.[31] In addition to the details about her severance, it includes a section called "mitigation". That section says that if she finds other employment or engages in self-employment during the period, she is receiving severance payments, she would have to notify human resources. It further states that if the compensation is equal to 75% of her base salary, then she will receive one-half of the remaining balance of the severance payments.

[56] The separation agreement does not say that she cannot apply for and receive EI benefits, it simply says that if she engages in employment or self-employment, then she may lose some of her severance.

[57] The employer issued the ROE on April 19, 2023, shortly after her severance payments ended.[32] Even so, the Claimant could have still made inquiries with Service Canada and/or applied for EI benefits while she was waiting for the ROE to be issued. In fact, once she realized that the employer had not issued the ROE promptly, this should have triggered her to contact Service Canada sooner than she did.

[58] To be clear, this is not a case where the employer gave the Claimant false information about EI benefits, they simply paid her severance over a continuous period and didn't give her any information about EI benefits.[33] Additionally, it is not the employer's responsibility to tell the Claimant about her rights and obligations under the EI Act.

[59] The Claimant says she didn't want to be a burden on government social assistance programs and was looking for other work. But, in another case, the Court

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[31] See page GD3-36.
[32] See page GD3-16.
[33] The facts of this case are distinguishable from *Canada (Attorney General) v Albrecht*, A-17285. In that case, the Claimant relied on advice from his employer and placement agency which caused the delay in applying for EI benefits and it was accepted as good cause.

found there was no good cause where someone received a severance package and didn't want to receive government "hand outs" and was trying to find a job.[34]

[60] The Claimant has a lengthy history of employment in Canada and knew about the availability of EI benefits. In my view, a reasonable person in the Claimant's circumstances would have taken steps earlier to speak with Service Canada about her particular situation.

– **There were no exceptional circumstances**

[61] I find that there were no exceptional circumstances in this case. The Claimant was asked at the General Division hearing if she had any exceptional circumstances, and she testified there were none.[35]

[62] None of the reasons provided by the Claimant are exceptional. At any point when she stopped working, she could have inquired and/or applied for EI benefits.

– **Summary**

[63] I find that the Claimant does not have good cause for the entire period of delay in applying for EI benefits. I have considered the Claimant's reasons and circumstances, individually and cumulatively, but they do not amount to good cause. While she had good faith and made an honest mistake, it does not amount to good cause. There were no exceptional circumstances. This means that I am denying her request to antedate her EI claim.

## Conclusion

[64] The appeal is dismissed. The General Division made an important of fact. I have substituted my decision for the General Division and the outcome remains the same. The Claimant does not have good cause, so her antedate is denied.

Solange Losier
Member, Appeal Division

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[34] See *Howard v Canada (Attorney General),* A-283-10.
[35] See audio recording from General Division hearing at 25:10 to 25:20.