Citation: *Canada Employment Insurance Commission v DM*, 2024 SST 326

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	Canada Employment Insurance Commission
Representative:	Daniel McRoberts
Respondent:	D. M.

Decision under appeal:	General Division decision dated December 11, 2023 (GE-23-2865)

Tribunal member:	Elizabeth Usprich
Type of hearing:	Teleconference
Hearing date:	March 7, 2024
Hearing participants:	Appellant's representative Respondent
Decision date:	April 2, 2024
File number:	AD-23-1125

Decision

[1] The appeal is allowed.

[2] The General Division made an error of law. I have given the decision that the General Division should have given. I can't antedate the Claimant's application for EI benefits.

Overview

[3] D. M. is the Claimant. He is a longtime fisherman. He has made many claims for Employment Insurance (EI) benefits over the years when he isn't able to work in the off-season.

[4] The Claimant says the fishing season was poor and he forgot to apply in May 2023 for EI benefits. He waited until July 5, 2023 to apply. So, he had to ask to have his claim antedated (backdated).

[5] The Canada Employment Insurance Commission (Commission) denied the Claimant's request to have his claim antedated.

[6] The Claimant appealed to the Social Security Tribunal General Division. The General Division decided that exceptional circumstances existed and allowed the claim for antedating. The Commission appealed.

[7] The Commission argues the General Division made an error of law because it didn't apply settled case law when it made its decision.

[8] I am allowing the appeal. The Claimant's knowledge of the EI process doesn't give him an exceptional circumstance under the law. Unfortunately, the Claimant forgot to apply when he could, but this doesn't mean the claim for benefits can be antedated.

Issues

[9] The issues in this appeal are:

a) Did the General Division make an error of law by failing to apply binding case law that defines what an exceptional circumstance is?

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

Analysis

[10] I can intervene (step in) only if the General Division made a relevant error. There are only certain errors I can consider.[1] Briefly, I can intervene if the General Division made at least one of the following errors:

- 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 established case law.
- It based its decision on an important error about the facts of the case.

[11] In this case, the Commission argues the General Division didn't follow established case law and therefore made an error of law.

The General Division made an error of law when it failed to apply binding case law that defines what an exceptional circumstance is

[12] If a claimant doesn't take reasonably prompt steps to understand their entitlement to EI benefits, then the claimant must show there were exceptional circumstances that explain why they didn't apply.

[1] Section 58(1) of the *Department of Employment and Social Development Act* (DESD Act) sets out the grounds of appeal.

[13] In this case, it isn't in dispute by either party that the Claimant was very well aware of the EI claim process. He told the General Division that he has been fishing on his own for 37 years and making EI claims for most of that time.[2] This means there really isn't a question here about whether the Claimant was aware of his rights and responsibilities. He was.

[14] But even if the Claimant was aware of his rights and obligations, he filed his EI claim late. So, he still had to show that he had good cause and acted like a reasonable and prudent person in the same circumstances. The General Division found the Claimant acted as a reasonable and prudent person would have in similar circumstances.[3]

[15] The General Division also found the Claimant didn't take prompt steps to learn about his rights and obligations.[4] But, it found the Claimant had exceptional circumstances solely based on his 40-year experience with the EI system because he applied on time in the past without knowing about the four-week window.[5] The General Division's finding that the Claimant showed he had exceptional circumstances did not consider binding Federal Court of Appeal case law that describe what exceptional circumstances are.[6] This means there is an error of law.

[16] If a claimant is aware of their rights and responsibilities under the EI Act, then to show good cause that claimant will have to show there were exceptional circumstances that prevented them from applying. In this case, the Claimant repeatedly said during his hearing that he didn't know what happened. He just forgot to apply.[7]

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[2] Listen to the General Division hearing recording at 00:18:11.
[3] See the General Division decision at paragraph 21.
[4] See the General Division decision at paragraph 23.
[5] See the General Division decision at paragraph 23.
[6] See *Canada (Attorney General) v Roy*, A-216-93 (Federal Court of Appeal) and see *Canada (Attorney General)* v Smith, A-549-92 (Federal Court of Appeal).
[7] Listen to the General Division hearing recording at 00:09:35; 00:10:57; 00:22:28; 00:26:05; 00:27:24 and in the second hearing recording at 00:07:12.

[17] The General Division decided the Claimant knew the EI process so it made sense he wouldn't contact Service Canada for information.[8] The Claimant repeatedly mentions to the General Division that he knew what the process was.[9]

[18] The General Division then says,

> But that is okay because there are exceptional circumstances to explain his delay. He applied for EI fishing benefits on time for more than 40 years even though he didn't know about the four-week window. Given this decades-long experience, it would have been extraordinary for him to think he needed more information.[10]

[19] The General Division seems to be stating that the Claimant's experience gives him an exceptional circumstance. Respectfully, this is an error of law.

[20] The Federal Court of Appeal (FCA) hasn't given a specific definition about what exceptional circumstances are. This makes sense because the law should be applied to every individual case. But, the FCA has provided guidance. For example, the FCA has found that a person's illness could create an exceptional circumstance.[11] The FCA also said when speaking of a claimant's failure to apply for benefits:

> There appears to have been no circumstance which prevented him from doing so or which rendered exceptionally difficult the making of a claim at the outset rather than later on.[12]

[21] The FCA later said that "barring exceptional circumstances", a claimant is expected to take steps to find out what their obligations are under the EI Act.[13]

[22] So, since the Claimant was clear about what the process was, he has to show there was an exceptional circumstance that prevented him from applying. The General Division found the Claimant showed he had an exceptional circumstance solely based

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[8] See the General Division decision at paragraph 23.
[9] Listen to the General Division hearing recording at 00:06:09; 00:07:49; 00:18:54 and in the second hearing recording at 00:07:12.
[10] See the General Division decision at paragraph 23.
[11] See *Canada (Attorney General) v Roy*, A-216-93 (Federal Court of Appeal).
[12] See *Canada (Attorney General)* v Smith, A-549-92 (Federal Court of Appeal).
[13] See *Canada (Attorney General) v Somwaru*, 2010 FCA 336 at paragraph 11.

on his past experience with the EI system. The General Division decided these circumstances explained why the Claimant didn't request more information about his EI entitlement.[14] The General Division said that with his "decades-long experience, it would have been extraordinary for him to think he needed more information."[15]

[23] The General Division erred in law when it decided that because the Claimant had experience with the EI system, it gave him an exceptional circumstance that excused his applying late.

[24] The law has been clear that there must be something that prevents a claimant from applying or made it exceptionally difficult to apply. There is an error of law here because settled law was not applied to the facts of the case.

Remedy

[25] I have found an error. So, 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.[16]

[26] The parties agreed that all evidence was before the General Division. 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.[17]

The Claimant didn't have good cause for the delay and he had no exceptional circumstances, so the claim can't be antedated

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

[27] The Claimant is asking to have his application for EI benefits antedated. To get an application antedated, you have to prove you had good cause for the delay.[18]

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[14] See the General Division decision at paragraph 23.
[15] See the General Division decision at paragraph 23.
[16] Section 59(1) of the DESD Act allows me to fix the General Division's errors in this way.
[17] Section 59(1) of the DESD Act allows me to fix the General Division's errors in this way.
[18] See section 10(4) of the EI Act. See also *Canada (Attorney General) v Kaler*, 2011 FCA 266 at paragraph 4.

[28] To show good cause, the Claimant has to show he acted as a reasonable and prudent person would have acted in similar circumstances for the whole delay.[19] Usually, this means a claimant has to show he took reasonably prompt steps to understand his entitlement to benefits and obligations under the law.[20]

[29] In this case, the Claimant had been applying for benefits for approximately 37 years. Because of this, he didn't look into what specific timelines were. He told the General Division that he knew that there were dates that he had to apply by for his winter fishing claim.[21] So, a reasonable and prudent person in similar circumstances would have taken steps to learn what the deadline for applying was and would have applied by that date.

[30] The Claimant knew that there were rules about when he had to apply for EI.[22] The Claimant said he understood what his rights and obligations were.[23] If he was unsure what the deadline was, he needed to seek information about that date. If the Claimant knew what the deadline for applying was then he should have still taken steps to make sure he applied by the deadline.

[31] The FCA also recognized the length of the delay as a relevant factor, even if the reason for the delay is the most important factor.[24]

[32] If a claimant doesn't take the steps they need to, then they must show there were exceptional circumstances that explain why.[25]

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[19] See *Canada (Attorney General) v Burke*, 2012 FCA 139 and see section 10(4) of the EI Act.
[20] See *Canada (Attorney General) v Somwaru*, 2010 FCA 336; and *Canada (Attorney General) v Kaler*, 2011 FCA 266.
[21] See the General Division decision at paragraph 17 and listen to the General Division hearing recording at 00:14:33.
[22] Listen to the General Division hearing recording at 00:18:11.
[23] Listen to the General Division hearing recording at 00:06:09 and 00:07:49 where the Claimant acknowledges this.
[24] See *Canada (Attorney General) v Burke*, 2012 FCA 139 at paragraph 11.
[25] See *Canada (Attorney General) v Somwaru*, 2010 FCA 336; and *Canada (Attorney General) v Kaler*, 2011 FCA 266.

[33] I find the Claimant knew what his rights and obligations under the EI Act were. He agreed that he knew. The Claimant repeatedly said that he forgot to apply.[26] So, I find the Claimant didn't act as a reasonable and prudent person would have in the same circumstances. Unfortunately, forgetting doesn't give a claimant good cause for their delay.

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

[34] The Claimant applied for benefits on July 5, 2023.[27] The Claimant asked to have the claim antedated to May 28, 2023.[28] This means the Claimant was approximately five and a half weeks late.

[35] The Claimant was not aware that the Commission has a four-week administrative policy for late applicants.[29] This was discussed at his hearing.[30] The policy allows automatic antedating for applicants who apply within four weeks of an interruption of earnings.

[36] This policy isn't law. Those that apply and who fall within the Commission's four-week administrative time frame have still delayed. But the policy automatically allows their claims to be antedated.

[37] As well, section 26 of the EI Regulations, says a claim for benefits must be made by a claimant three weeks after the week for which benefits are claimed.[31] In this case, the Claimant's lateness in making the claim is not disputed under the law or the non-binding policy. He agrees he filed late.

[38] Even if there is automatic antedating during the first four weeks, the claims are still late, or delayed. So, it is still a time frame that should be taken into account. This

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[26] Listen to the General Division hearing recording at 00:09:35; 00:10:57; 00:22:28; 00:26:05; 00:27:24 and in the second hearing recording at 00:07:12.
[27] See GD3-12.
[28] See GD3-17.
[29] 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.
[30] Listen to the General Division hearing recording at 00:14:49.
[31] See section 26 of the *Employment Insurance Act Regulations*.

means the entire period should be considered as part of the delay. So, in this case the Claimant was five and a half weeks late.

[39] 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] The EI regulations and the Commission's four-week administrative policy give leeway for those applying late. But, antedating a claim isn't automatic beyond the four weeks.

[40] There has to be a good explanation for the delay. If there was only a slight delay it would have fallen within the four-week administrative policy time frame. But it didn't. I have considered the length of the delay as a factor. I have also dealt with the Claimant's reason for the delay, which is the more important consideration.[33]

– **There were no exceptional circumstances**

[41] The Claimant was specifically asked by the General Division if there were other circumstances as to why he applied late. He said there weren't.[34]

[42] The Claimant mentioned that it had been a bad fishing season and that his boat had some repairs that were costly. I don't find that these are exceptional circumstances. There was nothing that prevented the Claimant from applying for EI benefits or made it exceptionally difficult to apply. He simply forgot.

[43] There are no exceptional circumstances. That means the Claimant hasn't shown he had good cause for the entire length of the delay.

[44] I empathize with the Claimant. I understand this was the first time that he forgot to apply. I realize costs are high and the EI benefits would be helpful. But I don't find there are exceptional circumstances that would allow me to grant EI benefits.

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[32] See *Canada (Attorney General) v Brace*, 2008 FCA 118 at paragraph 7.
[33] See *Canada (Attorney General) v Burke*, 2012 FCA 139 at paragraph 11.
[34] Listen to the General Division hearing recording at 00:27:06.

Conclusion

[45] The appeal is allowed.

[46] The General Division made an error of law by failing to apply settled law to the facts of the case.

[47] I have fixed the error by giving the decision the General Division should have given. I can’t antedate the Claimant’s application for benefits.

Elizabeth Usprich
Member, Appeal Division