



Citation: *Canada Employment Insurance Commission v SD*, 2024 SST 591

Social Security Tribunal of Canada Appeal Division

Decision

Appellant: Canada Employment Insurance Commission
Representative: Kevin Goodwin

Respondent: S. D.

Decision under appeal: General Division decision dated February 27, 2024
(GE-24-264)

Tribunal member: Elizabeth Usprich

Type of hearing: Videoconference

Hearing date: May 15, 2024

Hearing participants: Appellant's representative
Respondent

Decision date: May 24, 2024

File number: AD-24-192

Decision

[1] The appeal is allowed.

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

Overview

[3] S. D. is the Claimant. He applied for EI benefits on October 11, 2023 and asked to have his claim antedated (backdated) to May 21, 2023.

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

[5] The Claimant appealed to the Social Security Tribunal (Tribunal). The General Division decided that exceptional circumstances existed and allowed the claim for antedating. The Commission appealed to the Tribunal's Appeal Division.

[6] The Commission argues the General Division made an error of law.

[7] I am allowing the appeal. The General Division made an error of law because it didn't apply settled case law when it made its decision. I have given the decision the General Division should have given. The claim can't be antedated.

Issue

[8] 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? (delete if won't be deciding this)

Analysis

[9] 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.

[10] 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 by failing to apply binding case law that defines what an exceptional circumstance is

[11] If a person wants to get EI benefits, they have to take reasonably prompt steps to understand their entitlement to benefits. If they don't, then they must show that there were exceptional circumstances that explain why they didn't apply earlier.

[12] The facts in this case aren't disputed. The Claimant told the General Division that he is the oldest son in a strict Indian family which has a cultural impact on him losing his job. He said he was paralyzed with anxiety and was focussed on getting new employment as soon as possible.²

[13] The Commission has maintained that the Claimant didn't show good cause for delay. It says the factors relied on by the Claimant didn't interfere with his ability to

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

² See the General Division decision at paragraph 13. See also the Commission's Submissions at AD2-1, which don't dispute the facts.

search for a job and attend interviews. So, it would have been reasonable for the Claimant to contact the Commission.³

[14] The General Division identified the legal test properly.⁴ The General Division found the circumstances that existed in the Claimant's life to be exceptional, but it didn't apply binding, Federal Court of Appeal (FCA), case law. It isn't enough to say a situation is exceptional. The General Division must explain and give adequate reasons, including applying binding case law to the facts of the case.

[15] The FCA hasn't specifically defined what "exceptional circumstances" are. In its decision of *Caron*, the court says, "but I feel that the circumstances would have to be very exceptional, and anyhow, I do not think that such inaction could remain understandable when it lasted for over fourteen months, as here".⁵ This case also says, "ignorance of the law is not as such a sufficient excuse for a claim to be made retroactive".⁶

[16] In the later case of *Smith*, the FCA says, "in the present case, Mr. Smith made no attempt throughout the six-month period to submit a claim, and 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. True, the respondent consciously opted to seek new employment, rather than throw himself on the unemployment insurance system which he may have had a perfect right to do".⁷ It later says, "such motives, pure as they were, do not on the present state of the law allow him to antedate his claim on the ground that he had 'good cause' for the delay in making it" (emphasis added).⁸

[17] In *Somwaru*, the FCA says, "the law is therefore clear that, barring exceptional circumstances, a prospective claimant in the respondent's position is expected to 'take

³ See GD3-22 and GD4-2.

⁴ See the General Division decision at paragraphs 9 to 12.

⁵ See *Canada (Attorney General) v Caron*, A-395-85 (Federal Court of Appeal) (*Caron*).

⁶ See *Canada (Attorney General) v Caron*, A-395-85 (Federal Court of Appeal). This is also reaffirmed in *Canada (Attorney General) v Kaler*, 2011 FCA 266 at paragraph 4.

⁷ See *Canada (Attorney General) v Smith*, A-549-92 (Federal Court of Appeal) (*Smith*).

⁸ See *Canada (Attorney General) v Smith*, A-549-92 (Federal Court of Appeal).

reasonably prompt steps' to understand his obligations under the Act".⁹ So, this means, it is settled law that a claimant has to take "reasonably prompt steps" to understand if they are entitled to benefits and ignorance of the law isn't an excuse.

[18] The FCA has held, "this obligation imports a duty of care that is both demanding and strict".¹⁰ The FCA has also said, "this is why the 'good cause for delay' exception is cautiously applied."¹¹

[19] Finally, the FCA has stressed the importance of good cause throughout the whole period of delay. In *Howard*, the Court found the applicant didn't show good cause for the entire period of the delay. For part of the time, the applicant had shown he was caring for his injured wife and child and was involved in litigation over his mother's estate.¹² The applicant, when his severance ran out, didn't want to go to the "government with his hand out".¹³

[20] The General Division didn't consider this settled, and binding, law and apply it to the facts of the case. The General Division stated its findings, decided the Claimant was credible, honest and straightforward in his testimony and made a conclusion without giving an analysis of the law.¹⁴

[21] This means the General Division erred in law. It didn't explain how the Claimant's situation, and failure to apply for EI, was exceptional according to binding case law.

Remedy

[22] 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.¹⁵

⁹ See *Canada (Attorney General) v Somwaru*, 2010 FCA 336 at paragraph 11.

¹⁰ See *Canada (Attorney General) v Kaler*, 2011 FCA 266 at paragraph 4.

¹¹ See *Canada (Attorney General) v Brace*, 2008 FCA 118 at paragraph 7.

¹² *Howard v Canada (Attorney General)*, 2011 FCA 116 at paragraph 6 (*Howard*).

¹³ *Howard v Canada (Attorney General)*, 2011 FCA 116 at paragraph 4.

¹⁴ See the General Division decision at paragraphs 15 and 16.

¹⁵ Section 59(1) of the DESD Act allows me to fix the General Division's errors in this way.

[23] 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.¹⁶

The Claimant didn't have good cause for the entire length of his delay because his circumstances weren't exceptional, so the claim can't be antedated

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

[24] 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.¹⁷

[25] 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.¹⁸ Usually, this means a claimant has to show he took reasonably prompt steps to understand his entitlement to benefits and obligations under the law.¹⁹

[26] If a claimant doesn't take the steps they need to, then they must show there were exceptional circumstances that explain why.²⁰

[27] I am adopting the General Division's findings about the circumstances that existed for the Claimant.²¹ The Claimant hasn't argued that he looked into his rights and obligations promptly. These facts aren't in dispute. Here, the question is whether, under the law, the circumstances experienced by the Claimant are exceptional.

¹⁶ Section 59(1) of the DESD Act allows me to fix the General Division's errors in this way.

¹⁷ See section 10(4) of the EI Act. See also *Canada (Attorney General) v Kaler*, 2011 FCA 266 at paragraph 4.

¹⁸ See *Canada (Attorney General) v Burke*, 2012 FCA 139 and see section 10(4) of the EI Act.

¹⁹ See *Canada (Attorney General) v Somwaru*, 2010 FCA 336; and *Canada (Attorney General) v Kaler*, 2011 FCA 266.

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 paragraphs 14 and 15.

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

[28] The Claimant applied for benefits on October 11, 2023 and the claim was made effective for October 8, 2023.²²

[29] The Claimant told the General Division that the delay in applying was because of anxiety.²³ He said that he lost his job, without cause, and he had never received EI benefits.²⁴

[30] He said he was hiding and had shame about losing his job and that it was to do with his culture.²⁵ He said he feels his mental health was the issue and what he did, was what a reasonable person would do.²⁶ He said that one week isn't enough after you lose your job.

[31] But the Claimant didn't lose his job a week before he applied. The Claimant's last day of work was on February 13, 2023. The Claimant received severance from his employer, which is why he wasn't looking for the claim to start until May 21, 2023. He told the Commission that he didn't apply for EI right away because he was receiving benefits and was unsure what to do. He said he was also looking for work.²⁷

[32] After the Commission denied benefits, the Claimant requested reconsideration. He wrote that after he lost his job it had a profound emotional and psychological distress. He also said that in July 2023 he was caring for his grandmother who unfortunately then passed away.²⁸

[33] The Claimant also noted that he could provide documents showing his job search efforts, including correspondence with recruitment agencies and applications submitted.²⁹

²² See GD3-11 and GD3-18.

²³ Listen to the General Division hearing recording at 00:34:05.

²⁴ Listen to the General Division hearing recording at 00:48:01.

²⁵ Listen to the General Division hearing recording at 00:49:15.

²⁶ Listen to the General Division hearing recording at 00:50:04.

²⁷ See GD3-17.

²⁸ See GD3-21.

²⁹ See GD3-31.

[34] These are all certainly extenuating circumstances. But I don't find that they are exceptional circumstances.

[35] It is an exceptionally long time it took the Claimant to look into his rights and responsibilities. From the time he lost his job to the day he applied was 7 months and 27 days. I am aware that the Claimant isn't seeking benefits back to February 2023. But this was still time the Claimant could have used to make himself aware of his rights and responsibilities.

[36] From May 21, 2023 to October 11, 2023 was still 4 months and 20 days. The FCA says the reason for the delay is the most important factor, but the length of the delay can still be a relevant factor.³⁰ In this case, it is a significant delay.

[37] The Claimant argued he was paralyzed by anxiety. Yet, he also said that he was focussed on looking for, and applying for, jobs. I find this means that he wasn't completely paralyzed, and wasn't in a situation where something was preventing him from applying.

[38] I understand and accept that there is a cultural aspect, and shame, attached to what happened. I also understand, for a portion of the time, his grandmother's illness and passing was difficult.³¹ While I empathize, these are all unfortunate circumstances but they aren't exceptional and didn't prevent him seeking information about his rights and obligations.

[39] I find this case to be similar to *Howard*.³² As noted above, the applicant in that case was focussed on getting a new job, didn't want to get governmental assistance, and was caring for his injured wife and son while dealing with the litigation of his mother's estate. Just as in this case, there are many compelling factors of unfortunate things that were going on. But I find that, based on decided case law, that exceptional

³⁰ See *Canada (Attorney General) v Burke*, 2012 FCA 139 at paragraph 11.

³¹ Listen to the General Division hearing recording at 00:53:00.

³² It is also similar to *Smith* because the applicant in that case was also focussed on finding a job, instead of looking into EI benefits.

circumstances must truly be exceptional. For example, something that prevented an applicant from seeking out information like a hospitalization.

[40] That isn't present here. The Claimant was going through a lot. But he was still able to function and look, and apply for, multiple jobs. I find this means that the Claimant could have sought information about his rights and obligations under the EI Act.

[41] So, while I empathize with the Claimant, I don't find there are exceptional circumstances that would allow me to grant EI benefits.

Conclusion

[42] The appeal is allowed.

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

[44] 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