



Citation: *SR v Canada Employment Insurance Commission*, 2024 SST 806

## Social Security Tribunal of Canada Appeal Division

# Decision

**Appellant:** S. R.  
**Representative:** Matthew Moyal

**Respondent:** Canada Employment Insurance Commission  
**Representative:** Adam Forsyth

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**Decision under appeal:** General Division decision dated January 2, 2024  
(GE-23-2712)

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**Tribunal member:** Solange Losier

**Type of hearing:** In Writing  
**Decision date:** July 12, 2024  
**File number:** AD-24-46

## Decision

[1] The Claimant's appeal is dismissed. The General Division made an error of law.

[2] I'm substituting it with my own decision. The outcome remains the same. The Claimant doesn't have good cause for the entire period of delay, so her EI application can't be treated as though it was made on July 1, 2022.

## Overview

[3] S. R. is the Claimant and is employed as a teacher.

[4] The Canada Employment Insurance Commission (Commission) received an application for Employment Insurance (EI) regular benefits from the Claimant on December 29, 2022.<sup>1</sup>

[5] A few months later, on May 4, 2023, the Claimant asked the Commission to backdate (antedate) her EI application as though she had applied on July 1, 2022.<sup>2</sup>

[6] The Commission refused to antedate her EI claim because it said she didn't have good cause for the delay.<sup>3</sup> The Claimant appealed the Commission's decision to the General Division.

[7] The General Division concluded the same and dismissed her appeal.<sup>4</sup>

[8] The Claimant argues that the General Division made an error of law and errors of fact.<sup>5</sup> Because of this, she says that her appeal should be allowed and EI claim antedated to July 1, 2022.

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<sup>1</sup> See application for EI benefits at pages GD3-3 to GD3-13.

<sup>2</sup> See antedate request at page GD3-17.

<sup>3</sup> See reconsideration decision at pages GD3-25 to GD3-26.

<sup>4</sup> See General Division decision at pages AD1A-1 to AD1A-7.

<sup>5</sup> See application to the Appeal Division at pages AD1-1 to AD1-11 and Claimant's arguments at pages AD3-1 to AD3-3 and AD12-1 to AD12-4.

[9] I have found that the General Division made an error of law. To fix the error, I'm substituting with my own decision. The Claimant doesn't have good cause to antedate her EI application to July 1, 2022.

## **Preliminary matters**

### **– The initial hearing was rescheduled and the Claimant switched from a videoconference hearing to an in-writing hearing instead**

[10] The Claimant initially asked for a videoconference hearing and it was scheduled to be heard on May 14, 2024.<sup>6</sup>

[11] The Claimant's counsel wrote to the Tribunal and asked to reschedule the hearing date to July 2024 due to "extenuating circumstances."<sup>7</sup>

[12] I wrote back to obtain more information about the rescheduling request, namely what were the extenuating circumstances and why it needed to wait until July 2024.<sup>8</sup> The Claimant's counsel replied, explaining that they were out of the country.<sup>9</sup> They noted that the Claimant was a full-time teacher and has no further days off until the end of the school year.

[13] I granted the request in part.<sup>10</sup> I rescheduled the May 14, 2024, hearing date because they were out of the country. However, I denied the request to postpone it to July 2024 explaining that the appeal was filed in January 2024 and the Tribunal has to hear cases in a timely manner.<sup>11</sup>

[14] The new rescheduled date was set for June 3, 2024 (late afternoon) so that the Claimant had enough time to arrange her work schedule.<sup>12</sup> In my letter, I explained that

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<sup>6</sup> See page AD1-4.

<sup>7</sup> See page AD5-1.

<sup>8</sup> See pages AD6-1 to AD6-3.

<sup>9</sup> See page AD7-1.

<sup>10</sup> See pages AD8-1 to AD8-3.

<sup>11</sup> See section 8(1) of the *Social Security Tribunal Rules of Procedure*.

<sup>12</sup> See notice of hearing for June 3, 2024, at pages AD0A-1 to AD0A-3.

the hearing would be held by videoconference unless they told me they wanted a different type of hearing format.<sup>13</sup>

[15] The Claimant's counsel replied, saying that they would like to proceed with an in-writing hearing due to scheduling conflicts.<sup>14</sup> As a result, I converted the hearing to an in-writing hearing and gave them a bit more time to submit their written arguments.<sup>15</sup>

[16] Finally, I sent the parties a letter outlining the details and deadlines for the In-writing hearing.<sup>16</sup> Both parties sent their written arguments by the deadline set out (which was, June 10, 2024).<sup>17</sup>

## Issue

[17] Did the General Division make an error of law or error of fact when it decided that the Claimant didn't have good cause to antedate her EI claim?

## Analysis

[18] I can intervene if the General Division made a relevant error. There are only certain errors I can consider.<sup>18</sup> For example, if the General Division made an error of law or error of fact, then I can intervene.<sup>19</sup>

### – The Legal Test for Antedate

[19] The Claimant has to prove two things to get her application for EI benefits antedated.<sup>20</sup> First, she has to prove she had good cause for the delay during the entire

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<sup>13</sup> The Tribunal offers different types of hearings such as In-writing, in-person, teleconference and videoconference hearings.

<sup>14</sup> See page AD9-1.

<sup>15</sup> See pages AD10-1 to AD10-3. The subsequent hearing date set for June 3, 2024, by videoconference was cancelled.

<sup>16</sup> See In-writing hearing instructions and deadline at pages AD11-1 to AD11-3.

<sup>17</sup> See Claimant's arguments at pages AD1-1 to AD1-11; AD3-1 to AD3-3 and AD12-1 to AD12-4. The Commission's arguments are at pages AD4-1 to AD4-6 and AD13-1 to AD13-2.

<sup>18</sup> See section 58(1) of the *Department of Employment and Social Development Act* (DESD Act) sets out the grounds of appeal.

<sup>19</sup> See sections 58(1)(b) and 58(1)(c) of the DESD Act.

<sup>20</sup> See section 10(4) of the *Employment Insurance Act* (EI Act).

period of delay. Second, she has to prove that she qualified for EI benefits on the earlier date.

[20] The Court says that barring exceptional circumstances, claimants are expected to take reasonably prompt steps to understand their obligations under the *Employment Insurance Act* (EI Act).<sup>21</sup>

[21] To establish good cause, the Court also says that claimants must be able to show that they did what a reasonable person in their situation would have done to satisfy themselves of their rights and obligations under the EI Act.<sup>22</sup>

– **The General Division concluded that the Claimant didn't have good cause**

[22] The General Division considered the Claimant's argument that she had applied for EI benefits in the summer of 2022 after the school year ended and that the application was "lost" by the Commission.<sup>23</sup>

[23] However, the General Division determined that it was more likely the application wasn't complete and that the Claimant forgot about it.<sup>24</sup> It also noted that the Commission purges incomplete claims after 72 hours.

[24] The General Division also found that the Claimant had applied for EI benefits on December 29, 2022.<sup>25</sup> It said that on May 4, 2023, the Claimant asked the Commission to antedate her EI application to July 1, 2022.

[25] As a result, the General Division determined that the period of delay ran from July 1, 2022, to May 4, 2023.<sup>26</sup>

[26] The General Division considered the other reasons for the delay provided by the Claimant, but decided that she hadn't shown she had good cause for the delay in

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<sup>21</sup> See *Canada (Attorney General) v Somwaru*, 2010 FCA 336.

<sup>22</sup> See *Canada (Attorney General) v Kaler*, 2011 FCA 266, at paragraph 4.

<sup>23</sup> See paragraph 6 of the General Division decision.

<sup>24</sup> See paragraph 17 of the General Division decision.

<sup>25</sup> See paragraph 3 of the General Division decision.

<sup>26</sup> See paragraph 11 of the General Division decision.

applying for EI benefits for the entire period.<sup>27</sup> Because of that, her application for EI benefits couldn't be antedated to July 1, 2022.

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

[27] An error of law happens when the General Division doesn't follow the law correctly, or applies the law but misunderstands what it means or how to apply it.<sup>28</sup>

[28] In its decision, the General Division outlined the relevant section in law and applicable legal test.<sup>29</sup> It correctly stated that to show good cause, the Claimant has to prove that she acted as a reasonable person would have acted in similar circumstances.<sup>30</sup>

[29] The General Division also correctly stated that if the Claimant didn't take steps, then she must show that there were exceptional circumstances to explain why she didn't do so.<sup>31</sup>

[30] This legal principle comes from a case called *Somwaru*.<sup>32</sup> In that case, a person was forced to retire because of the factory he worked at shut down. He started collecting a pension and didn't think he could get EI benefits with a pension. A few months later he applied for EI benefits, after a friend told him otherwise.

[31] The Court in *Somwaru* stated the following in its decision:<sup>33</sup>

The law is therefore clear that, barring exceptional circumstances, a prospective claimant in the respondent's position is expected to "take reasonably prompt steps" to understand his obligations under the Act. Because the respondent took no such steps, it was unreasonable for the Umpire to conclude that his belief he could not apply for benefits while collecting a pension constituted good cause for his delayed application. It cannot be said that the circumstances in this case were "exceptional."

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<sup>27</sup> See paragraphs 17–19 of the General Division decision.

<sup>28</sup> See section 58(1)(b) of the DESD Act.

<sup>29</sup> See paragraphs 8, 10 and 12–13 of the General Division decision.

<sup>30</sup> See paragraph 10 of the General Division decision. Also, see *Canada (Attorney General) v Burke*, 2012 FCA 139.

<sup>31</sup> See paragraph 12 of the General Division decision.

<sup>32</sup> See *Somwaru*, at paragraph 3.

<sup>33</sup> See *Somwaru*, at paragraph 11.

[32] In this case, the Claimant and Commission agree that the General Division made an error of law by failing to consider whether her circumstances amounted to exceptional circumstances.<sup>34</sup>

[33] I agree with the parties on this issue. As noted above in *Somwaru*, barring exceptional circumstances, a claimant is expected to “take reasonably prompt steps” to understand their obligations under the EI Act.

[34] I find that the General Division erred in law because it didn’t make a finding about whether the Claimant had exceptional circumstances.<sup>35</sup> This was required.

[35] The Claimant has made arguments about other alleged errors. But it isn’t necessary for me to consider them because I have already found one.

[36] I will now consider how to fix the error.

### **Fixing the error**

[37] There are two options for fixing an error made by the General Division.<sup>36</sup> I can either send the file back to the General Division for reconsideration or give the decision that the General Division should have given.

[38] The Claimant says that the Appeal Division should overturn the General Division’s decision and give her EI benefits that she rightfully deserves.<sup>37</sup>

[39] The Commission says that the Appeal Division should fix the error by substituting it with its own decision.<sup>38</sup> It says that the Claimant didn’t have good cause throughout the entire period of delay and there were no exceptional circumstances for failing to act in a timely manner. As a result, it says that the outcome should remain the same.

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<sup>34</sup> Both parties agree that the General Division made an error of law. See Claimant’s arguments at page AD12-3 and Commission’s arguments at page AD4-4.

<sup>35</sup> See section 58(1)(b) of the DESD Act.

<sup>36</sup> See section 59(1) of the DESD Act.

<sup>37</sup> See pages AD12-1 to AD12-4.

<sup>38</sup> See page AD4-6.

– **I will give the decision the General Division should have given**

[40] I'm satisfied that the record is complete. The Claimant had a full and fair opportunity to present her case before the General Division.

[41] I will substitute my decision for the General Division's decision. This means that I can decide whether the Claimant can antedate her EI claim to the earlier date and make any necessary findings of fact.<sup>39</sup>

– **The Claimant doesn't have good cause to antedate her EI application**

[42] I find that the period of delay in this case runs from July 1, 2022, to May 4, 2023.

[43] This is the period of time that the Claimant has to prove that she had good cause for the entire period of delay.

[44] I find that the Claimant doesn't have good cause to antedate her EI claim to July 1, 2022, for the following reasons.

[45] I wasn't persuaded that the Claimant submitted a complete application for EI benefits in the summer of 2022. The Commission doesn't have any evidence of this application.<sup>40</sup> And the Claimant can't exactly remember when she made it.<sup>41</sup>

[46] In my view, if the Claimant thought that she had submitted an application for EI benefits in the summer of 2022, then a reasonable and prudent person in similar circumstances would have followed up with the Service Canada sooner than she did. She could have also checked her Service Canada portal to see the status of her EI claim.

[47] The Claimant also says that she was experiencing financial hardship and distress.<sup>42</sup> She had to borrow money from friends and family to make ends meet. She now has debts to repay.

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<sup>39</sup> See section 64(1) of the DESD Act.

<sup>40</sup> See pages GD3-23 to GD3-24.

<sup>41</sup> See page GD3-19.

<sup>42</sup> See pages GD5-2 GD9-5 and AD1-6.



[48] But I think someone who is experiencing financial hardship and distress wouldn't wait until December 2022 to inquire about the EI application she says was made in the summer of 2022. In other words, a reasonable person in similar circumstances wouldn't wait several months to find out the status of their EI application when they need the money so urgently.

[49] The Claimant spoke to her school board about her EI application and was told that processing times might cause delays and asked her to be patient.<sup>43</sup> However, the Claimant didn't seek to verify this information with Service Canada, even though she could have.

[50] The Claimant submitted another application for EI benefits in December 2022. But yet, she delayed asking for the antedate until May 2023. While the Claimant may not have been aware of the option to antedate, the Court has decided that ignorance of the law, even if coupled with good faith, isn't sufficient to establish good cause for delay.<sup>44</sup>

[51] A claimant is expected to "take reasonably prompt steps" to understand their rights and obligations under the EI Act, *barring exceptional circumstances*.

[52] I generally accept that the Covid-19 pandemic was exceptional in nature, but I don't think it prevented or delayed the Claimant in this case from taking reasonably prompt steps to inquire about her application for EI benefits earlier than she did.

[53] I find that none of the Claimant's circumstances were exceptional to justify her inaction for several months. At any point, she could have easily contacted Service Canada by telephone or in-person to inquire about her rights and obligations under the EI Act. She could also have verified her assumptions about the backlogs and delays with Service Canada directly, instead of her employer. Lastly, she could have checked her Service Canada account online to see the status of her EI claim.

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<sup>43</sup> See page GD3-19.

<sup>44</sup> See *Canada (Attorney General) v Carry*, 2005 FCA 367, at paragraph 5 and *Canada (Attorney General) v Kaler*, 2011 FCA 266, at paragraph 4.

[54] To summarize, the Claimant hasn't proven that she had good cause to antedate her EI claim for the entire period of delay. Her particular circumstances weren't exceptional. I don't need to consider whether she qualified on the earlier date because she doesn't have good cause.

– **The case law submitted by the Claimant wasn't relevant**

[55] In the Claimant's written arguments to the Appeal Division, she included a brief summary of three Federal Court of Appeal (FCA) decisions to support her position that Covid-19 related delays were accepted as valid reasons/good cause for late applications:<sup>45</sup>

- *Canada (Attorney General) v Tucker*, 2021 FCA 17
- *Smith v Canada (Attorney General)*, 2021 FCA 63
- *Jones v Canada (Attorney General)*, 2021 FCA 112

[56] However, the Commission wrote to the Tribunal to say that the cases were incorrectly identified by the Claimant and don't match the arguments offered.<sup>46</sup> It says that the above cases aren't applicable because they deal with *Income Tax Act*<sup>47</sup>, the *Patent Act*<sup>48</sup> and the *Canada Transportation Act*<sup>49</sup>.

[57] I looked for the above FCA decisions as cited by the Claimant, but I couldn't find them. This is what I found when I tried searching for them in other ways:

[58] For example, I searched under the following "2021 FCA 17" and it was a decision called "*Eyeball Networks Inc. v Canada*" that dealt with the *Income Tax Act*.

[59] I searched "2021 FCA 63" and it was a decision called "*Google Canada Corporation v Paid Search Engine Tools LLC*" dealing with the *Patent Act*.

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<sup>45</sup> See pages AD12-1 to AD12-4.

<sup>46</sup> See pages AD13-1 to AD13-2.

<sup>47</sup> See *Eyeball Networks Inc. v Canada*, 2021 FCA 17.

<sup>48</sup> See *Google Canada Corporation v Paid Search Engine Tools LLC*, 2021 FCA 63.

<sup>49</sup> See *Air Passenger Rights v Canada (Attorney General)*, 2021 FCA 112.

[60] And the same happened with the last decision. I searched under “2021 FCA 112” and that was a decision called “*Air Passenger Rights v Canada (Attorney General)*” dealing with the *Canada Transportation Act*.

[61] None of these decisions deal with the *Employment Insurance Act*. So, I don’t find them helpful in this case.

[62] For good measure, I also searched for the decisions by name only in case the Claimant made a mistake with the citations. And this is what I found:

- *Canada (Attorney General) v Tucker*, A-381-85 is a decision from the FCA. It was a decision from 1986 about misconduct and EI benefits.
- *Smith v Canada (Attorney General)*, A-875-96 is a decision from the FCA. It was a decision from 1997 about misconduct and EI benefits.
- *Canada (Attorney General) v Jones*, 2007 FCA 333 is a decision from the FCA. It was a decision from 2007 about misconduct and EI benefits.

[63] None of these decisions are about good cause and antedating an EI application. So, I don’t find them helpful in this case.

## **Conclusion**

[64] The Claimant’s appeal is dismissed. The General Division made an error of law by failing to consider whether the Claimant’s circumstances amounted to exceptional circumstances.

[65] I have substituted with my own decision and the result hasn’t changed. The Claimant doesn’t have good cause for the entire period of delay. This means that her EI claim cannot be antedated to July 1, 2022.

Solange Losier  
Member, Appeal Division