



Citation: *EM v Canada Employment Insurance Commission*, 2024 SST 1312

**Social Security Tribunal of Canada
General Division – Employment Insurance Section**

Decision

Appellant: E. M.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (665421) dated May 22, 2024 (issued by Service Canada)

Tribunal member: Teresa M. Day

Type of hearing: Videoconference

Hearing date: September 4, 2024

Hearing participant: Appellant

Decision date: September 13, 2024

File number: GE-24-2283

Decision

[1] The appeal is dismissed.

[2] The Appellant's antedate request is denied because she hasn't shown good cause for her delay in applying for employment insurance (EI) benefits. She hasn't given an explanation the law accepts, so her application cannot be treated as though it was made on the earlier date she asked for¹.

Overview

[3] The Appellant was suspended from her job on October 15, 2021 because she failed to comply with her employer's mandatory Covid-19 vaccination policy. She applied for EI benefits 13 months later – on November 22, 2022.

[4] The Respondent (Commission) decided the Appellant does **not** qualify for EI benefits on this application².

[5] The Appellant then asked to have her claim backdated so her benefits could start as of October 17, 2021 to coincide with her last day of work³.

[6] This is called antedating a claim. The law says you must show good cause for your delay in applying for benefits if you wish to have your claim antedated to start on an earlier date⁴. There is a specific legal test to prove good cause.

¹ Section 10(4) of the *Employment Insurance Act* (EI Act) uses the term "initial claim" when talking about an application.

² At the hearing, the Appellant testified that she hadn't worked since October 15, 2021. This means she has zero hours of insurable employment in her qualifying period (the 52-week period immediately preceding her application on November 22, 2022) and, therefore, doesn't have sufficient hours to establish a claim starting November 2022.

³ This way, the Appellant could qualify for benefits on her application because additional hours from her Record of Employment (ROE) could be considered. If her claim were antedated to October 17, 2021, her qualifying period would be the 52-week period prior to that date and this qualifying period would capture all of the 1,995 hours reported on her ROE at GD3-18.

⁴ See section 10(4) of the EI Act.

[7] The Appellant said she had good cause for her delay because she was deterred from applying for EI benefits sooner because of information she saw on the EI website⁵. She was also told she wouldn't qualify for EI by people she knew who'd applied and been denied because they weren't vaccinated, so there was no good reason to apply when she lost her job⁶. Her lawyer subsequently told her she still should have applied for EI benefits, so she did.

[8] The Commission denied her antedate request. It said she didn't prove she had good cause for her delay in applying late⁷.

[9] The Appellant appealed that decision to the General Division of the Social Security Tribunal (Tribunal).

Issue

[10] Can the Appellant's application for EI benefits be antedated and treated as though it was made on October 17, 2021?

Analysis

[11] To decide this issue, I must determine if the Appellant has satisfied the legal test for her claim to be antedated to October 17, 2021.

[12] To do this, she must prove 2 things⁸:

- a) that she had **good cause** for her delay in applying for EI benefits throughout the whole period of the delay; and
- b) that she qualified for benefits on the earlier day.

⁵ The Appellant described it as something along the lines of 'if you were suspended due to not getting vaccinated, you may not get EI benefits' (see GD3-21).

⁶ See GD3-22.

⁷ See the decision letter at GD3-23 and the reconsideration decision letter at GD3-30.

⁸ The legal test is set out in Subsection 10(4) of the *Employment Insurance Act* (EI Act). See also *Canada (Attorney General) v. Kaler*, 2011 FCA 266.

[13] To prove **good cause**, the Appellant must show she acted as a reasonable and prudent person would have acted in similar circumstances⁹. In other words, she must demonstrate that she acted reasonably and carefully just as anyone else would have if they were in a similar situation. And she has to show this for the entire period of the delay¹⁰.

[14] The period of the Appellant's delay is the 13 months between October 17, 2021 (the day she wants her claim for EI benefits to start) and November 22, 2022 (the day she applied for EI benefits).

[15] The Appellant must also show she took reasonably prompt steps to understand her entitlement to EI benefits and obligations under the law¹¹. This means she must demonstrate that she tried to learn about her rights and responsibilities as soon as possible and as best she could. And if she didn't take these steps, she must show there were exceptional circumstances which explain why she didn't do so¹².

[16] So to succeed on her appeal, the Appellant must prove it is more likely than not that she had **good cause** throughout her 13-month delay in applying for EI benefits¹³.

Issue 1: Has the Appellant shown good cause for her delay?

The short answer:

[17] No. The Appellant hasn't shown good cause throughout the entire 13 months she delayed applying for EI benefits.

⁹ *Canada (Attorney General) v Burke*, 2012 FCA 139 and see section 10(4) of the EI Act.

¹⁰ *Canada (Attorney General) v Burke*, 2012 FCA 139.

¹¹ *Canada (Attorney General) v Somwaru*, 2010 FCA 336; *Canada (Attorney General) v Kaler*, 2011 FCA 266.

¹² *Canada (Attorney General) v Somwaru*, 2010 FCA 336; *Canada (Attorney General) v Kaler*, 2011 FCA 266.

¹³ The Appellant has to prove good cause on a balance of probabilities. This means she must prove it is more likely than not.

The evidence:

[18] The Appellant was asked about the reasons for her delay when she made her antedate request. She told the Commission that¹⁴:

- She didn't think she was eligible for EI benefits because she was suspended from her employment for failing to get a Covid-19 vaccination.
- She went to the Government of Canada website, and it said that if you were suspended for not getting vaccinated, you may not get EI benefits.
- And she spoke with acquaintances who were also unvaccinated, and they didn't get EI benefits, so she had no good reason to apply.
- These things deterred her from applying when she stopped working.
- But in November 2022, she was speaking with her lawyer about not getting EI benefits, and her lawyer told her she still should have applied. So that's what she did.

[19] During the reconsideration process, she said that¹⁵:

- She was under stress and in shock when she lost her job for failing to get vaccinated. She retained a lawyer to fight this issue with her employer.
- She didn't contact Service Canada about her right to EI benefits.
- She checked the Service Canada website, and the information she found led her to believe she couldn't get EI benefits if she was suspended from her employment for failing to get vaccinated. So she didn't bother to apply.
- But in November 2022, her lawyer urged her to apply for EI – so she did.

¹⁴ See GD3-21, GD3-22,

¹⁵ See GD3-24 to GD3-25, GD3-28 and

[20] At the hearing, the Appellant testified that:

- When the pandemic started, she worked instead of going on “CERB”¹⁶.
- Then the employer changed its policy and made Covid vaccination mandatory. When she didn’t get vaccinated, she was sent home with no vacation pay, pay in lieu of notice or severance after 33 years of working for the employer.
- Shortly after her suspension, she retained a lawyer to fight for “fair severance” for her after 33 years of service. Her lawyer is still fighting the employer for this.
- She also looked at the EI website, and it said, ‘if you lost your job because you didn’t get vaccinated, you may not qualify for EI benefits’.
- She assumed there as no point in applying for EI benefits.
- She felt bullied and traumatized by her employer, and by the government and society in general – just because she wasn’t vaccinated. She felt she was under attack.
- After she was suspended, she was lived off her RRSP and other savings. She also turned 60 and took her CPP “early”.
- Then she had to move to accommodations that were less costly in order to reduce her living expenses. In December 2021, some family members came to live with her and paid “board”. This has helped her stay in her home.
- But none of this came close to replacing her income from employment.
- By November 2022, she’d pretty much depleted her RRSP and other savings.
- She told her lawyer about her difficult financial circumstances and her lawyer said she should have applied for EI benefits anyway. So that’s what she did.

¹⁶ A form of temporary emergency response benefits during the Covid-19 pandemic.

[21] I accept the Appellant's testimony as credible. It was given in a manner that was forthright and direct. It was also consistent with the statements she made to the Commission in support of her antedate request and during the reconsideration process.

My findings:

[22] The Appellant has **not** satisfied the legal test to prove she had good cause for her delay in applying for EI benefits.

The Appellant didn't behave as a reasonable person would have in similar circumstances.

[23] During the period of the Appellant's 13-month delay from October 17, 2021 to November 22, 2022, her circumstances were:

- She was suspended from her employment without pay.
- She'd received no separation moneys (such as vacation pay, pay in lieu of notice or severance pay) from the employer, despite 33 years of employment.
- She retained a lawyer and was fighting the employer for a fair severance package.
- She was living off her RRSP and savings to survive.
- She was forced to move to less costly accommodations.
- She was unable to meet her expenses without the help of family members, who moved in with her and paid board.

[24] When the Appellant was suspended from her employment on October 15, 2021, it may have been reasonable for her to wait 2 - 4 weeks before applying for EI benefits. But after that, the Appellant should have realized she needed to investigate and pursue EI benefits.

[25] A reasonable person in the Appellant's circumstances would have taken steps to contact Service Canada for information about receiving EI benefits while suspended from employment **and/or** applied for EI benefits within 4 weeks of their suspension from employment on October 15, 2024. Especially if they were imminently facing the prospect of depleting their retirement savings, moving to save money, and relying on family members for help with expenses. A reasonable person would have recognized the need to ask Service Canada about the timeframe for applying for EI benefits or simply gone online and applied by that point.

[26] Yet the Appellant waited 13 months without taking any steps to apply for EI benefits or contact the Commission to enquire about the application process or the deadlines for applying.

[27] A reasonable and prudent person wouldn't have waited 13 months to verify their assumption that they wouldn't qualify for EI benefits¹⁷. Especially if they'd already had a year with no income coming in and been forced to alter their living arrangements because of it.

[28] Had the Appellant looked more carefully on Service Canada's website within 4 weeks of her last day of work on October 15, 2024, she would have seen the information about how it's possible to apply for EI benefits even if you aren't sure you're eligible for benefits.

[29] And if she'd contacted Service Canada by phone or in person and made enquiries within 4 weeks of her last day of work, she could have applied for EI benefits starting from her last paid day and the Commission could have begun its investigation into her separation from employment to determine if she was entitled to receive EI benefits while suspended¹⁸.

¹⁷ The Appellant testified she assumed there was no point in applying for EI benefits because she had been suspended from her employment for failing to get vaccinated.

¹⁸ The application for EI benefits contains questions about why you are no longer working. If you stop working because you are suspended from your employment, the Commission will investigate to determine whether you are disqualified from EI benefits because you were suspended due to your own misconduct.

[30] The Appellant's failure to do these things means she didn't act as a reasonable person in her situation would have throughout the period of her delay.

The Appellant didn't take reasonably prompt steps to understand her entitlement to EI benefits and her obligations under the law.

[31] The courts have said this is a requirement for an antedate¹⁹.

[32] The Appellant is essentially arguing that:

- a) She had a lot of stressful things going on in her life and shouldn't be penalized for failing to apply for EI benefits sooner; and
- b) She didn't know if she was eligible for EI benefits given the circumstances of her suspension – **or** that there was a timeframe to apply benefits. If she'd known these things, she'd have applied sooner.

[33] Neither of these arguments excuse the Appellant from her personal responsibility to find out about how **and when** to apply for EI benefits.

[34] It was incumbent on her to verify her rights with Service Canada as soon as possible and as best she could. Yet she waited 13 months after being suspended without pay to apply for EI benefits, without once contacting Service Canada about applying for benefits while suspended **and when** to do so. This was not trying to learn about her rights as best she could.

[35] The Appellant says she was deterred from applying because of a warning she saw on Service Canada's website and because of what she was told by acquaintances who also lost their employment for failing to get vaccinated.

¹⁹ See *Canada (Attorney General) v Somwaru*, 2010 FCA 336; and *Canada (Attorney General) v Kaler*, 2011 FCA 266. The courts have also repeatedly held that ignorance of the law is not good cause for a delay, nor is reliance on unverified information or assumptions: see *Canada (Attorney General) v Kaler*, 2011 FCA 266, *Canada (Attorney General) v Trinh*, 2010 FCA 335, and *Canada (Attorney General) v. Rouleau*, A-4-95.

[36] But the courts have said that good faith and ignorance of the law do not in themselves constitute a valid reason to justify the delay in applying for EI benefits²⁰.

[37] The courts have also said that a delay in applying for benefits based on an incorrect and **unverified assumption that a claimant would not be eligible** does **not** constitute good cause for delay for purposes of the EI Act²¹. This means the Appellant had an obligation to verify her assumptions about the EI program, her eligibility, and the deadlines for applying in a timely manner.

[38] The Appellant testified that she went to Service Canada's website and saw a warning to applicants who'd been suspended or terminated for failing to get vaccinated that they may not get EI benefits. She said that based on what she was hearing from other unvaccinated people about their experiences with EI, she **interpreted** this warning as meaning she need not bother applying.

[39] I see no probative evidence that Service Canada's website expressly advised claimants not to bother applying if they'd lost their job for failing to comply with their employer's vaccination policy. At most, there was a suggestion that each case would be determined on its merits and that employees who were suspended or let go for not following their employer's vaccination policies **might not** get EI benefits.

[40] A reasonable person would have contacted Service Canada within 2-4 weeks of their suspension to verify if they could apply for benefits in the circumstances of their suspension **and** confirm the deadlines for doing so.

[41] A reasonable person would not have relied on information obtained from acquaintances to make their decision about whether to apply for EI benefits or not. With all of the information and misinformation being communicated to Canadians at the time, it was important for the Appellant to verify her eligibility directly with Service Canada. Yet the Appellant relied on her own assumptions and opinions and took no

²⁰ See footnote 19 above. See also *Albrecht*, A-172-85; *Larouche*, A-644-93; *Carry* 2005 FCA 367 and *Mauchel*, 2012 FCA 202.

²¹ See *Howard v. Canada (Attorney General)*, 2011 FCA 116, *Canada (Attorney General) v. Innes*, 2010 FCA 341, and *Shebib v. Canada (Attorney General)*, 2003 FCA 88.

such steps until over a year later, when her lawyer correctly pointed out she should have applied for EI benefits anyway.

[42] By failing to do this, the Appellant wasn't trying to learn about her rights as best she could.

[43] This means she hasn't proven she took reasonably prompt steps to understand her right to apply for EI benefits and the rules and deadlines for doing so, as is required for an antedate.

There was nothing preventing the Appellant from contacting Service Canada throughout the period of her delay.

[44] I see no evidence the Appellant was prevented from contacting Service Canada or applying for EI benefits online.

[45] The Appellant testified that she was traumatized and in shock by how she was treated by her employer after 33 years of service. She also that she was being personally attacked by her employer, government and society for her decision not to get vaccinated.

[46] But she was still able to retain a lawyer shortly after her suspension and work with that lawyer to fight the employer for a fair severance package. She was also able to speak with others who'd lost their jobs for failing to get vaccinated and ask about their experiences with EI benefits. And she testified she had access to internet and telephone service throughout the period of her delay.

[47] From this evidence I conclude the Appellant could have contacted Service Canada to enquire about receiving EI benefits following her suspension from employment and the deadlines to apply for benefits prior to November 22, 2022.

[48] She also could have simply gone online to Service Canada's website and submitted an application²², which is neither difficult nor time consuming (as she did immediately after her lawyer told her she still should have applied for benefits).

[49] Instead, the Appellant relied on her unverified assumptions (that she wasn't eligible for benefits because she was unvaccinated and that her application would be rejected for this reason) for over a year. And in doing so, she made a deliberate choice not to contact Service Canada or apply online.

[50] I therefore find the Appellant has not proven there were special circumstances that explain why she didn't take reasonably prompt steps to understand her rights and obligations under the EI Act.

Issue 2: What do my findings mean for the Appellant?

[51] The Appellant must prove she had good cause throughout the entire period of her delay in applying for EI benefits.

[52] This means she must show she acted as a reasonable person in her circumstances would have **and** that she took reasonably prompt steps to understand her rights and obligations during the period of the delay – or that there were exceptional circumstances which prevented her from doing so.

[53] This is the legal test for an antedate. And it doesn't depend on whether the Appellant worked hard and contributed to the EI program for many years or whether she feels she's been treated unfairly because of her decision not to get vaccinated.

[54] I have found the Appellant hasn't satisfied any part of the legal test for the entire period of her delay. This means her claim for EI benefits cannot be antedated²³.

²² And if she'd gone online even just to look at the application form itself, she would have seen that claimants are encouraged to apply as soon as they are separated from their employment and the Commission will then determine if they are eligible for EI benefits or not.

²³ I don't need to consider whether the Appellant qualified at the earlier date (October 17, 2021) because she hasn't satisfied the first part of the test for an antedate.

[55] It also means she's not entitled to receive EI benefits during the period of her delay, namely from October 17, 2021 to November 22, 2022.

[56] I acknowledge the Appellant's difficult financial circumstances. But the Supreme Court of Canada has said I must follow the law, even if the outcome seems unfair²⁴. This means I can't make an exception for the Appellant, no matter how compelling her circumstances may be. And I don't have jurisdiction to direct the Commission to pay her EI benefits she's not entitled to.

Conclusion

[57] The Appellant is not entitled to antedate her claim for EI benefits. This is because she hasn't proven she had good cause for her delay in applying for benefits throughout the entire period of the delay.

[58] This means her claim cannot be treated as though it was made on the earlier date she requested.

[59] The appeal is dismissed.

Teresa M. Day
Member, General Division – Employment Insurance Section

²⁴ See *Granger v. Canada* (CEIC), [1989] 1 SCR 141.