



Citation: *FM v Canada Employment Insurance Commission*, 2024 SST 1723

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant: F. M.
Representative: H. M.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission
reconsideration decision (657258) dated April 17, 2024
(issued by Service Canada)

Tribunal member: Edward Houlihan

Type of hearing: Videoconference

Hearing date: September 10, 2024

Hearing participants: Appellant
Appellant's representative

Decision date: September 23, 2024.

File number: GE-24-1849

Decision

[1] The appeal is dismissed. The Tribunal disagrees with the Appellant.

[2] The Appellant hasn't shown that she had good cause for the delay in applying for benefits. In other words, the Appellant hasn't given an explanation that the law accepts. This means that the Appellant's application can't be treated as though it was made earlier.¹

Overview

[3] The Appellant applied for Employment Insurance (EI) benefits on September 23, 2023. She is now asking that the application be treated as though it was made earlier, on May 22, 2022. The Canada Employment Insurance Commission (Commission) has already refused this request.

[4] I have to decide whether the Appellant has proven that she had good cause for not applying for benefits earlier.

[5] The Commission says that the Appellant didn't have good cause because She didn't act like a reasonable person in her situation. She made no efforts to verify her rights and obligations under the Act.

[6] They say that she shouldn't have assumed that her employer, would deal with her EI benefits while she was on maternity and parental leave.

[7] The Appellant disagrees.

[8] She says that her employer was the Government of Canada, and she was working and living outside of Canada.

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

[9] . She says she didn't know that she had to apply for EI benefits when she went on maternity and parental leave. She says that she was receiving benefits from her employer in addition to EI benefits (top-up)

[10] She said that because she was outside of Canada, she relied on information from her employer. She also says it was more difficult having a child in a foreign country. She didn't have contact with family and peers, so she was missing critical information.

Matters I have to consider first

The Commission made mistakes

[11] The first mistake occurred after the Appellant applied for benefits. The Commission sent a notice to the Appellant on January 4, 2024, denying her claim for benefits. They said that she didn't have any hours of insurable employment between September 25, 2022, and September 23, 2023.

[12] The notice should have said that the Appellant hadn't shown good cause to back date her claim for benefits to May 22, 2022.

[13] The second occurred when the Commission denied the Appellant's request for reconsideration to back date her claim for benefits. This notice says that the initial decision to deny her claim was made on November 20, 2023. In fact, the initial decision was made on January 4, 2024.

[14] The cases say that an error that doesn't cause prejudice to the Appellant isn't fatal to the decision that is being appealed.²

[15] For the first mistake, the Commission misunderstood what the Appellant was asking for. Later, they did address the right issue for the Appellant which was backdating her claim for benefits.

² See *Desrosiers v. Canada (Attorney General)*, A-128-89

[16] The Appellant was advised of the decision and was able to request reconsideration of the decision in a timely fashion.

[17] For the second mistake, the Commission made a clerical error. They gave the wrong date for when the initial decision was made. However, the Appellant was able to understand the results of her reconsideration request and was able to appeal that decision within the time limits.

[18] Counsel for the Appellant says that the *Desrosiers* case isn't applicable here. He says it can be distinguished as there was no prejudice to the Appellant in *Desrosiers* and there is significant prejudice to the Appellant here.

[19] He says that the prejudice to the Appellant here is that because she was denied EI benefits, her employer is recovering the top-up payments that she was paid while on maternity and parental leave.

[20] I disagree. The issue of prejudice is with regards to the Appellant's claim for benefits. Clerical errors aren't fatal to the decision under appeal. It doesn't look at the impact on the Appellant of the decision to deny benefits.

[21] I find that the mistakes made by the Commission did not hinder or prevent the Appellant from pursuing her claim for benefits. She was able to understand the decisions and pursue her claim in a timely manner.

Issue

[22] Can the Appellant's application for benefits be treated as though it was made on May 22, 2022.? This is called antedating (or, backdating) the application.

Analysis

[23] To get your application for benefits antedated, you have to prove these two things:³

³ See section 10(4) of the EI Act.

- a) You had good cause for the delay during the entire period of the delay. In other words, you have an explanation that the law accepts.
- b) You qualified for benefits on the earlier day (that is, the day you want your application antedated to).

[24] The main arguments in this case are about whether the Appellant had good cause. So, I will start with that.

[25] To show good cause, the Appellant has to prove that she acted as a reasonable and prudent person would have acted in similar circumstances.⁴ In other words, she has to show that she acted reasonably and carefully just as anyone else would have if they were in a similar situation.

[26] The Appellant has to show that she acted this way for the entire period of the delay.⁵ That period is from the day she wants her application antedated to until the day she actually applied. So, for the Appellant, the period of the delay is from May 22, 2022, to September 23, 2023.

[27] The Appellant also has to show that she took reasonably prompt steps to understand her entitlement to benefits and obligations under the law.⁶ This means that the Appellant has to show that she tried to learn about her rights and responsibilities as soon as possible and as best she could. If the Appellant didn't take these steps, then she must show that there were exceptional circumstances that explain why she didn't do so.⁷

[28] The Appellant has to prove this on a balance of probabilities. This means that she has to show that it is more likely than not that she had good cause for the delay.

⁴ See *Canada (Attorney General) v Burke*, 2012 FCA 139.

⁵ See *Canada (Attorney General) v Burke*, 2012 FCA 139.

⁶ See *Canada (Attorney General) v Somwaru*, 2010 FCA 336; and *Canada (Attorney General) v Kaler*, 2011 FCA 266.

⁷ See *Canada (Attorney General) v Somwaru*, 2010 FCA 336; and *Canada (Attorney General) v Kaler*, 2011 FCA 266.

[29] The Appellant says that she had good cause for the delay. She says that she had no understanding or experience with the EI.

[30] She says that she was receiving additional benefits for maternity and parental leave(top-up). She didn't know that she had to apply for EI benefits for her maternity and parental leave.

[31] No one told her she had to apply for benefits. She thought that her employer would do everything.

[32] She says that she only found out she had to apply for EI benefits when her employer asked for her EI statements after she had returned to work.

[33] The Appellant also says that she had special circumstances that provided good cause for the delay. She was working in a foreign country and had a difficult birth. She says that as mature first-time parents, she and her spouse were struggling with all the newborn issues in a foreign country.

[34] She says that she didn't have her family, friends or colleagues to help with information about EI benefits.

[35] The Commission says that the Appellant hasn't shown good cause for the delay. They say that she didn't act like a reasonable person in her situation. She made no effort to enquire about her rights and obligation under the Act.

[36] They say that she assumed that her EI benefit and her top-up benefits from her employer would be one process that her employer would take care of for her. She didn't take any steps to see that this was the case during the entire period of delay.

[37] They say that she relied on ill-founded assumptions and didn't take reasonably prompt steps to get information and find out what she had to do to apply for benefits.

[38] The Commission says that the Appellant should have been aware of the requirement to apply for EI benefits. They say it was part of her employer's emails to her

beginning in February 2022. The employer requested she provide proof of eligibility for benefits from Service Canada.

[39] The Commission also says that the employer contacted the Appellant on July 26, 2023, asking for her EI statements. Despite the request, the Appellant delayed another 2 months before applying for benefits.

[40] They say that the delay was the result of the Appellant's negligence and lack of concern. She does not have good cause for delay for the entire period.

[41] I find that the Appellant hasn't proven that she had good cause for the delay in applying for benefits.

[42] The Appellant gave birth while working outside of Canada. The child was born May X, 2022. The Appellant applied for EI benefits on September 23, 2023.

[43] The Appellant says that neither she nor her spouse had any experience with EI and the process to apply for benefits. The mistake made was not deliberate.

[44] Unfortunately, the cases say that ignorance of the law, even with good faith does not constitute good cause for delay.⁸

[45] The Appellant was paid additional money on top of EI benefits(top-up) by her employer. She thought that because her employer was the Government of Canada, it was all one process for her.⁹

[46] She says that she didn't know that she had to apply for benefits until July 2023 when her employer asked for her EI statements to reconcile with her top-up of additional payments from the employer.¹⁰

[47] She says that when she finally understood that she had to apply for benefits, she applied on September 23, 2023.

⁸ See *Canada (Attorney General) v. Kaler*, 2011 FCA 266

⁹ See GD3-29

¹⁰ See GD3-29

[48] She says that her department has since updated the instructions to employees on how to apply for maternity and parental leave including applying for benefits. She says that if she had the new instructions, she doesn't think she would be in this situation.

[49] I don't find that the Appellant acted as a reasonably prudent person in her circumstances.

[50] There is no evidence that the employer or anyone else misinformed the Appellant. In fact, the employer's email instructions to the Appellant on May 25, 2022, included an EI statement to be completed and returned.¹¹

[51] The employer said that she would receive her proof of eligibility for EI maternity and parental benefits when she applied for EI maternity/parental benefits.¹²

[52] The Appellant's evidence was she didn't do anything about the EI statement referred to by the employer at the time. She said that she thought that they would get back to her when they needed it.

[53] The Appellant was also entitled to have additional payments from the employer while on maternity and parental leave. She would have her EI benefits topped up by her employer. This was part of her collective agreement.¹³

[54] The basis of the top-up payment from the employer was the EI benefit amount that she would receive. The employer would top up the amount of the EI benefits to 93 per cent of her weekly salary. ¹⁴

[55] The Appellant didn't receive EI benefits while on her maternity and parental leave, only top up payments from her employer.

¹¹ See GD2-74

¹² See GD2-74

¹³ See GD2-15 to GD2-60

¹⁴ See GD2-40 Article 26.02 and GD2-42 Article 27.02

[56] The Appellant's evidence was that she didn't notice she wasn't receiving 93 per cent of her weekly pay as she was entitled to under her collective agreement.

[57] The Appellant says that she assumed that because she worked for the government outside of Canada, they would handle all the issues of maternity and parental leave including applying for EI benefits. It would be one process.¹⁵

[58] However, the Appellant never took any steps to inquire of her employer if this was the case. She also never made any inquiries of Service Canada as to her rights and obligations under the Act.

[59] The cases say that an Appellant has an obligation to take reasonably prompt steps to find out about her rights and obligations under the Act.¹⁶

[60] The cases also say that relying on unverified information or unfounded rumours doesn't constitute good cause.¹⁷

[61] The employer asked the Appellant to provide her EI statements on July 26, 2023.¹⁸ The Appellant didn't apply for benefits for another 2 months, on September 23, 2023.

[62] This is more consistent with lack of concern or negligence on the part of the Appellant. It doesn't show good cause for the delay in applying for benefits for the entire period of delay.

Exceptional circumstances

[63] I find that there were no exceptional circumstances that prevented the Appellant from making her claim for benefits over the 16-month period of delay.

¹⁵ See GD3-29

¹⁶ See *Canada (Attorney General) v. Somwaru*, 2010 FCA336

¹⁷ See *Canada (Attorney General) v. Trinh*, 2010 FCA 335

¹⁸ See GD3-29 at par. 5 and GD2-11 at par.9

[64] The cases say that an Appellant may have their claim antedated if there are exceptional circumstances that explain why they didn't take reasonably prompt steps to find out about their rights and obligations under the Act.¹⁹

[65] The court hasn't given a specific definition of what exceptional circumstances are but there has been guidance.

[66] An exceptional circumstance would be a circumstance that prevented them from applying for benefits or which rendered it exceptionally difficult to make the claim at the outset rather than later on.²⁰

[67] The Appellant says that she and her spouse were living and working outside of Canada. She says she had a difficult birth involving surgery. They are mature parents, and this was their first child.

[68] She says that there are particular challenges having a child outside of Canada and dealing with local requirements in a foreign language. It was particularly difficult to register the birth and get a Canadian passport for their child.

[69] She says that it was difficult dealing with her employer and their processes. She uses the example that they had to pay all medical expenses incurred and then claim them from their employer.

[70] She says that there were difficulties dealing with her own Human Resources department throughout. The Human Resources offices were in Canada, and she says they weren't responsive.

[71] The Appellant also says that the time zone differences and security measures in her place of work made dealing with Human Resources and later Service Canada very difficult.

¹⁹ See *Canada (Attorney General) v. Somwaru*, 2010 FCA 336

²⁰ See *Canada (Attorney General) v. Somwaru* 2010 FCA 336 par. 11

[72] The Appellant also says that because she was outside of Canada, she didn't have the support or contact with family, peers and colleagues who could have helped her with the EI benefits issues.

[73] The Appellant's evidence was also that she was so busy she had no time for personal administration.

[74] I understand that there are challenges with a first child and that the challenges could be even greater outside of Canada.

[75] However, there were no challenges or difficulties that prevented the Appellant from applying for benefits or that made it exceptionally difficult to make the claim for benefits at the outset rather than later on.

[76] Even though the Appellant was outside of Canada and living in a different time zone, she was still able to access the Service Canada website and contact them on a toll-free number to learn about her rights and obligations under the Act.

[77] The Appellant says that she didn't have her support group with her to help her with EI benefit issues. They might have been helpful for her.

[78] However, the Appellant has a duty to inquire about her rights and obligations and the steps that should be taken to protect her claim for benefits.²¹ She made no effort to find out about her rights and obligations under the Act.

[79] Counsel for the Appellant directed me to a case heard by the Tribunal that supported the Appellant's appeal and that should be followed.²²

[80] Cases of the Tribunal aren't binding. That means I'm not obligated to follow them, but they can be of assistance.

[81] Here I don't find this case of assistance and I won't be following it.

²¹ See *Canada (Attorney General) v. Kaler*, 2011 FCA 341

²² See *DF v. Canada Employment Insurance Commission* 2022 SST 484

[82] In the case referred to by counsel for the Appellant, a young indigenous man asked that his claim for EI benefits be backdated for a period of just over a year.

[83] The Tribunal found that the facts the Appellant was an indigenous person who was raised on a reserve, rarely interacted with government agencies and was nervous dealing with government agencies created a unique circumstance that was found to be exceptional.

[84] These exceptional circumstances were found to be good cause to explain his delay in applying for benefits.

[85] The facts of this appeal are quite different from the case that I was referred to. Here the Appellant is a more mature person working for the Government. There is no evidence that she was nervous dealing with government agencies.

[86] There was also no evidence that the Appellant's life experience was a unique circumstance that prevented her from submitting her claim for benefits on time.

Procedural fairness

[87] The Appellant says that the Commission's failed to consider her extenuating circumstances and that there was a lack of procedural fairness in refusing to antedate her claim.²³

[88] I have reviewed the circumstances of the Appellant above and have found that there were no exceptional circumstances that would be good cause for her delay in submitting her claim.

[89] The Appellant's counsel says that there wasn't procedural fairness in the Appellant's dealings with the Commission.

²³ See GD2-12 at par. 20

[90] He says that after the Appellant had submitted her claim for benefits, someone at the Commission said her claim would be allowed. However, the decision was changed and a notice denying her claim was sent to her.

[91] Counsel says that the Commission should have requested more information if there was information missing needed to support her claim. If the Appellant had the opportunity to explain the situation further, he believes that the decision would have been different.

[92] I find that the process followed by the Commission was fair and in keeping with the requirements of the law. There were clerical errors in the process as mentioned earlier but the proper process was followed by the Commission.

[93] The Appellant was given the opportunity explain her circumstances. She was able to request reconsideration and explain why she disagreed with the Commission's decision. She was contacted by the Commission and given the opportunity to clarify her position²⁴.

[94] . The Appellant had ample opportunity to explain her situation and convince the Commission.

Additional submissions

[95] . The Appellant says that the decision to deny her request to antedate her claim for benefits has caused her and her family huge financial hardship. Her employer is clawing back the top up payments that they had made for her maternity and parental leave.

[96] In addition, she says that she is now experiencing some serious health issues.

[97] I can empathize with the Appellant about the financial consequences of the decision not to antedate the claim. This can be made worse by the stress of serious health issues.

²⁴ See GD3-35

[98] However, I'm not able to re-write the legislation or interpret it in way that is contrary to its plain meaning.²⁵

[99] I don't need to consider whether the Appellant qualified for benefits on the earlier day. If the Appellant doesn't have good cause, her application can't be treated as though it was made earlier.

Conclusion

[100] The Appellant hasn't proven that she had good cause for the delay in applying for benefits throughout the entire period of the delay.

[101] The appeal is dismissed.

Edward Houlihan
Member, General Division – Employment Insurance Section

²⁵ See *Canada (Attorney General) v. Knee*, 2011 FCA 301