Citation: *H. M. v. Minister of Employment and Social Development*, 2015 SSTAD 988

Appeal No. AD-15-391

BETWEEN:

H. M.

Applicant

and

Minister of Employment and Social Development
(Formerly Minister of Human Resources and Skills Development)

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division – Rescind or Amend Decision

SOCIAL SECURITY TRIBUNAL MEMBER: Hazelyn Ross

DATE OF DECISION: August 17, 2015

DECISION

[1] The Social Security Tribunal (the Tribunal) refuses to rescind or amend the decision to refuse the applications to extend the time for filing the application for leave to appeal; and for leave to appeal.

BACKGROUND / GROUNDS OF THE APPLICATION

[2] On March 17, 2015, the Appeal Division of the Tribunal issued a decision in which it denied the Applicant's application to extend the time for filing her application for leave to appeal as well as her application for leave to appeal, (the March 17, 2015 decision). By a letter dated May 27, 2015, which the Tribunal received on June 4, 2015, the Applicant sought to appeal the March 17, 2015 decision. The Applicant also requested that the Tribunal reopen and reconsider her application. The test of the Applicant's letter, to which she attached several documents, is reproduced below:

> I have received your decision letter dated March 18 2015 which states that my wife's CPP Disability was not approved. This letter is to again appeal this decision.
>
> As you know, my wife's health condition has not improved and is the same as before due to the car accident, and for this reason we mentioned that we would be out of the country for a few months. She cannot do much of the same movements for long periods of time and is unable to work. Without assistance it is becoming more and more difficult.
>
> Please note I have not received any letter or call from your department between the period of December 3 2013 and March 18 2015. I had called your department on 3 separate occasions to inquire about the progress of the application and I was informed that it would take some time and I would have to wait for a decision. Had I known that there was information requested from our part, it would have been sent immediately. I apologize for the delay this may have caused but as I mentioned I did not receive any letters requesting documents. I have now attached the copies of the entry/exit stamps to and from Canada of my wife and I because she was traveling with me. My daughter stays in our Mississauga home while we are away and she collects our mail until we return.
>
> I kindly request to reopen and reconsider her application, it would be greatly appreciated. Also, if there are any further documents you require from us, please let me know.

[3] The March 17, 2015 decision was, in effect, a final decision of the Appeal Division. There being no statutory provision to allow a further appeal to the Tribunal, the Tribunal was *functus officio* with regards to the decision. Accordingly, the Tribunal elected to treat the letter as an application made under subsection 66(2) of the *Department of Employment and Social Development* (DESD) *Act*, namely as an application to rescind or amend the March 17, 2015 decision. The Tribunal invited the parties to make submissions; but received submissions only from the Respondent. The Applicant's representative advised the Tribunal that the Applicant intended to rely on the information and materials submitted with her May 27, 2015 letter.

ISSUE

[4] The Tribunal must decide the following issue:

> Do the information and documents presented by the Applicant constitute new material facts that could not have been discovered at the time the Tribunal rendered its May 17, 2015 decision with the exercise of reasonable diligence?

THE LAW

[5] Section 66[1] of the DESD Act governs the case when the Tribunal may rescind or amend a decision. The provision provides,

> **66.** *Amendment of Decision* **- (1)** The Tribunal may rescind or amend a decision given by it in respect of any particular application if
>
> b) In any other case, a new material fact is presented that could not have been discovered at the time of the hearing with the exercise of reasonable diligence.

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[1] **66**(1) The Tribunal may rescind or amend a decision given by it in respect of any particular application if
(a) in the case of a decision relating to the Employment Insurance Act, new facts are presented to the Tribunal or the Tribunal is satisfied that the decision was made without knowledge of or was based on a mistake as to, some material fact; or
(b) in any other case, a new material fact is presented that could not have been discovered at the time of the hearing with the exercise of reasonable diligence.
(2) An application to rescind or amend a decision must be made within one year after the day on which a decision is communicated to the appellant.
(3) Each person who is the subject of a decision may make only one application to rescind or amend that decision.
(4) A decision is rescinded or amended by the same Division that made it.

ANALYSIS

[6] For the application to succeed, the Applicant must present new material facts to the Tribunal. The criteria for admission of these new material facts are,

a) the facts presented could not have been discovered at the time of the hearing; and

b) at the time of the hearing, the facts could not have been discovered with the exercise of reasonable diligence.

[7] On her behalf, the Applicant's representative submitted copies of the entry/exit stamps to and from Canada of the Applicant (his wife) and himself. He also stated that he had travelled with the Applicant and that, in their absence from their Mississauga home, their daughter stayed at the residence and collected their mail until they returned.

[8] The Respondent's Counsel took the position that the Applicant has not presented any new material facts that could not have been discovered at the time of the March 17, 2015 decision with the exercise of reasonable diligence. In his submission, Counsel argued that the new facts test found in paragraph 66(1)(b) of the DESD Act, is the same as the test contained in the now repealed subsection 84(2) of the CPP and in the Federal Court of Appeal case law interpreting subsection 84(2). In this position, Counsel relied on the Appeal Division decision in *C.T. v. Minister of Human Resources and Skills Development* (September 10, 2013), CP29153 (SST- AD) at para. 8.

[9] Counsel made the further submission that the test for admission of the proposed "new fact" is a "two-part test" requiring that both prongs of the test be met. The two aspects of the test being discoverability and materiality. Discoverability goes to the point that the proposed new fact is a fact that existed at the time of the original hearing but that was not discoverable before the original hearing by the exercise of due diligence. The other prong of the test is materiality, namely that the proposed new fact can reasonably be expected to affect the result of the prior proceeding.

[10] Counsel for the Respondent relied on the cases of *Canada (Minister of Human Resources Development) v. McDonald,* 2002 FCA 48 at para 2, and *Mazzotta v. Canada*

(Attorney General), 2007 FCA 297 (C.A.). He submitted that the case law is in accord with the statutory provision, specifically the DESD Act subsection 66.1(b) which provides that the new material fact presented be a fact that could not have been discovered at the time of the hearing with the exercise of reasonable diligence. The Tribunal concurs with this position.

[11] With the test for new facts fixed firmly in mind, the Tribunal finds that the proposed new facts presented by the Applicant do not meet the test for "new facts". First, they are nothing but responses to the questions that the Tribunal put to the Applicant in a letter dated August 14, 2014. In that letter, the Tribunal asked the Applicant to respond to the following questions:

> When did you leave for India?
> Were you accompanied, and if so, by whom?
> Was anyone living in your Mississauga home while you were away, and if so, who?
> If no-one was at your home in your absence, what arrangement did you make regarding the mail?"

The Tribunal also asked the Applicant to provide copies of the entry and exit stamps in the passports of whomever accompanied her to India and to provide her response by September 25, 2014. The Tribunal sent the letter to the address on file for the Applicant. A subsequent communication from the Applicant of September 26, 2014 asked only that the Tribunal provide an update on the Applicant's file but did not respond to the questions.

[12] In light of the Applicant's response that her daughter stayed in her home and collected her mail while she was away, the Tribunal finds it disingenuous on her part to deny receiving the Tribunal's letter asking for the information.

[13] Further, as pointed out by Counsel for the Respondent, the visa entries do not support the application for an extension of time as they indicate that, contrary to the Applicant's contention, she left the country after the time for filing the appeal had expired, not before. The Respondent's submission is reproduced below:

> [36] The RT issued its decision on January 14, 2013. This meant that the Applicant had until on or about April 13, 2013 to submit her request for Leave to Appeal the decision. The OCRT did not receive the Application until about 5 weeks later on May 23, 2013. (RA-3)

> [37] The alleged new facts confirm that the Applicant left Canada on April 20, 2013 after the 90 days period to seek an appeal of the RT decision issued on January 14, 2014. Furthermore, the Applicant's allegation that she received on May 6 or 9, 2013, the RT decision issued on January 14, 2013 is inconsistent with her passport entries demonstrating she had already left Canada by those dates. (RA-3)

[14] The Applicant's lack of straightforwardness works to her detriment. Further, none of the information presented as new facts were incapable of being discovered with the exercise of reasonable diligence, at the date the Tribunal made its decision in March 2015. All of it was in the personal knowledge of the Applicant and her representative. The proposed new facts do not meet the first prong of the new facts test of discoverability. The test is conjunctive, that is, the proposed new fact must meet both the discoverability aspect as well as the material aspect of the test before it can be accepted as a "new fact" for the purpose of rescinding or amending the decision in question. In the Applicant's case, the proposed new facts do not meet the discoverability test, therefore they cannot support the application to rescind or amend the March 17, 2015 decision. Accordingly, the Tribunal must dismiss the Application to rescind or amend the decision refusing Leave to Appeal.

CONCLUSION

[15] The Application to rescind or amend the Tribunal decision of March 17, 2015 refusing Leave to Appeal is refused.

ERRATA and CORRIGENDA

[16] The following error appears at paragraph 16 of the Appeal Division decision refusing leave to appeal: the Tribunal finds that being outside of the country, alone, is a sufficient explanation for the Applicant's delay. This statement should properly read, the Tribunal finds that being outside of the country, alone, is **not** a sufficient explanation for the Applicant's delay.

Hazelyn Ross
Member, Appeal Division